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ARTICLE

UNEQUAL JUSTICE

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UNEQUAL JUSTICE

William J. Stuntz*

Inequality is a core feature of American criminal justice, but its causes remain obscure. Official racism has declined even as the black share of the prison population has risen. The generation that saw the rise of enormous, racially skewed punishment for drug crime followed the generation that saw the rise of civil rights for black Americans and racially integrated police forces. What explains these trends? One answer — the decline of local democracy — has received too little attention in the growing literature on this subject. A century ago outside the South, high-crime city neighborhoods were largely self-governing; residents of those neighborhoods decided how much criminal punishment to impose, and on whom. Those locally democratic justice systems were both remarkably effective and surprisingly egalitarian. During the latter half of the twentieth century, local democratic control over criminal justice unraveled. Residents of high-crime cities grew less powerful; suburban voters, legislators, and appellate judges grew more so. Prison populations fell sharply, then rose massively. The effects of both the fall of criminal punishment and its subsequent rise were disproportionately felt in urban black neighborhoods. The justice system grew less equal, and less just.

Parts I and II of the Article explore these trends. Part III turns to the future, and asks what steps might be taken to reverse them. I suggest three changes: better-funded local police forces, more trials to locally selected juries, and more vaguely defined crimes (to give those juries opportunities to exercise judgment). Those changes would make urban criminal justice more democratic, more lenient — and more egalitarian.

INTRODUCTION

American criminal justice is rife with inequality. African Americans constitute 13% of the general population,¹ but nearly half of a record-high prison population.² The imprisonment rate for Latino

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¹ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007, at 14 tbl.13 (2007) (showing total population of 296,410,000 and a black population of 37,909,000). The 2007 Statistical Abstract is available online at <http://www.census.gov/compendia/statab/2007/2007edition.html> (last visited May 12, 2008); previous editions are available online at http://www.census.gov/compendia/statab/past_years.html (last visited May 12, 2008). Henceforth, annual volumes of the Abstract will be cited as [year] STATISTICAL ABSTRACT.

² See Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1255 tbl.3 (2005). On the prison population's size, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: ONLINE, tbl.6.28.2006 (showing prison population of 1.5 million in 2005, more than seven times the figure in 1970), available online at <http://www.albany.edu/sourcebook> (last visited May 12,

males is almost triple the rate for white males; black men are locked up at nearly seven times the rate of their white counterparts.³ The differentials in drug punishment are even larger: of every 100,000 black Americans, 359 are imprisoned on drug charges; the analogous figure for whites is 28.⁴ Drug offenders are far more equally distributed: 9.7% of America's black population uses illegal drugs; the analogous figure for whites is 8.1%.⁵

Those data suggest a justice system hard-wired for punitive racism. The truth is more complex. A mere thirty-five years ago, imprisonment rates across the Northeast and Midwest were comparable to or below those in Scandinavian countries today;⁶ the number of African American prisoners was one-eighth today's figure.⁷ Even now, the police "clear" more violent crimes in small cities than in large ones, more in suburbs than in small cities, and more in small towns and rural areas than in suburbs.⁸ In other words, the justice system solves (and hence punishes) violent crimes most often in places with the *fewest* poor people and black people.⁹ One-third of violent felony defendants

2008). The online version of the Sourcebook will henceforth be cited as ONLINE SOURCEBOOK; the Sourcebook's annual volumes will be cited as [year] SOURCEBOOK.

³ ONLINE SOURCEBOOK, *supra* note 2, tbl.6.33.2005.

⁴ Among Latinos, the drug imprisonment rate is 127 per 100,000. The figures on drug prisoners by race appear in ONLINE SOURCEBOOK, *supra* note 2, tbl.6.0001.2003. The general population figures used to calculate rates appear in 2004–2005 STATISTICAL ABSTRACT, *supra* note 1, at 14 tbl.13.

⁵ OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 22 (2006), available at <http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5results.pdf>.

⁶ In 2001, Denmark, Norway, and Sweden imprisoned 58, 58, and 69 inmates per 100,000 population, respectively. GORDON BARCLAY & CYNTHIA TAVARES, INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 2001, at 7 tbl.B (2003), available at <http://www.csdp.org/research/hosb1203.pdf>. In 1972, Illinois, Massachusetts, and New York imprisoned 50, 32, and 64 inmates per 100,000 population, respectively. 1975 SOURCEBOOK, *supra* note 2, at 642 tbl.6.17.

⁷ In 2005, the number of black prisoners was just over 631,000. See ONLINE SOURCEBOOK, *supra* note 2, tbl.6.33.2005; 2007 STATISTICAL ABSTRACT, *supra* note 1, at 14 tbl.13. In 1970, that number was fewer than 82,000. See MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 65 tbl.3-31 (1986); 1972 STATISTICAL ABSTRACT, *supra* note 1, at 16 tbl.15.

⁸ The data appear in FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 2005, tbl.25 (2005). From 1995 forward, annual volumes of *Crime in the United States* are available online at <http://www.fbi.gov/ucr/ucr.htm#cius>. Earlier volumes in the series, which dates to the 1930s, are titled UNIFORM CRIME REPORTS. Henceforth, volumes in this series will be cited as CRIME IN THE UNITED STATES: [year] or UNIFORM CRIME REPORTS: [year], depending on which title is used for the relevant volume.

⁹ As of 2002, 51.5% of America's black population lived in central cities, while 36% lived in metropolitan areas outside central cities, and a mere 12.5% lived outside metropolitan areas. Among non-Hispanic whites, the comparable figures were 21%, 57%, and 22%. JESSE MCKINNON, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002, at 2 fig.2 (2003). On the link between race and concentrated poverty, see ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE,

in the seventy-five most populous counties — nearly half of whom are black and the large majority of whom are poor¹⁰ — have the charges against them dismissed.¹¹ A mere 8% of federal fraud defendants, a group that is much wealthier and whiter,¹² achieve the same result.¹³ In all categories of criminal cases, indigent defendants are more likely to win dismissals than defendants who hire their own lawyers.¹⁴ These are not the hallmarks of an adjudicative system bent on locking up young men in poor black neighborhoods.

What accounts for this strange set of patterns? Official racism¹⁵ is an unlikely explanation for a massive rise in black punishment that took hold in the generation *after* the civil rights movement. The rise of populist politics¹⁶ appears not to fit the relevant trends: populism and the politics of crime were as potent a mix in George Wallace's day as in our own — but the prison populations in Wallace's Alabama and in Ronald Reagan's California were low and falling, not high and rising.¹⁷ “The culture of control” and “governing through crime,” David

AREAS WITH CONCENTRATED POVERTY: 1999, at 8 fig.4 (2005). For evidence that race, but not poverty, is a strong negative predictor of clearance rates, see Janice L. Puckett & Richard J. Lundman, *Factors Affecting Homicide Clearances: Multivariate Analysis of a More Complete Conceptual Framework*, 40 J. RES. CRIME & DELINQ. 171 (2003).

¹⁰ Among defendants charged with violent felonies in large metropolitan counties, 44% are black, and only 28% are white. ONLINE SOURCEBOOK, *supra* note 2, tbl.5.52.2002. 83% of those defendants are poor enough to qualify for court-appointed counsel. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 5 tbl.7 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

¹¹ ONLINE SOURCEBOOK, *supra* note 2, tbl.5.57.2002.

¹² Not only in the collar: 65% of federal fraud defendants are white; fewer than 30% are black. *Id.* tbl.5.18.2003. 43% of such defendants pay for their own lawyers, well over twice the rate for defendants charged with violent felonies. HARLOW, *supra* note 10, at 3 tbl.3.

¹³ ONLINE SOURCEBOOK, *supra* note 2, tbl.5.17.2004.

¹⁴ HARLOW, *supra* note 10, at 6 tbl.10. In nearly all categories of cases, defendants with court-appointed counsel receive shorter prison sentences. *Id.* at 9 tbl.18.

¹⁵ For the classic account of racism as the cause of America's punitive turn, see MARC MAUER, RACE TO INCARCERATE (1999). Cf. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–118 (2003) (noting that jurisdictions with a history of lynching carry out executions at much higher rates than other jurisdictions).

¹⁶ On the connection between massive, discriminatory punishment and the rise of the populist politics of crime, see SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE (2d ed. 1998); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) [hereinafter ZIMRING ET AL., THREE STRIKES].

¹⁷ In 1962, the year Wallace was first elected Governor of Alabama, that state's imprisonment rate was 166 per 100,000. See 1964 STATISTICAL ABSTRACT, *supra* note 1, at 11 tbl.8, 159 tbl.216. Fourteen years later, the state's imprisonment rate had fallen to 83; Wallace and his wife Lurleen governed the state for eleven of those fourteen years. 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72. California's imprisonment rate stood at 146 in 1966, the year before Reagan's governorship began. See 1968 STATISTICAL ABSTRACT, *supra* note 1, at 12 tbl.11, 159 tbl.237. That figure fell to 84 in 1972. 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72. By comparison, in 2005, Alabama's and California's imprisonment rates and the rate for the nation as a whole stood at 591, 466, and 491, respectively. ONLINE SOURCEBOOK, *supra* note 2, tbl.6.29.2006.

Garland's and Jonathan Simon's apt labels for the growing use of criminal punishment to manage the nation's poor,¹⁸ capture the character of contemporary drug enforcement — but not the enforcement of laws against criminal violence or white-collar crime:¹⁹ in those areas, rich suspects do badly and poor ones do surprisingly well.

Another explanation does better: inequality of all these varying sorts arose, in large measure, because of the decline of local democratic control over criminal justice outcomes. In the late nineteenth and early twentieth centuries, when local politics governed the amount and distribution of criminal punishment, the justice system was stable, reasonably lenient, and surprisingly egalitarian. Prison populations were much smaller than today's, and varied little across place and time. Outside the South, the groups most likely to be the targets of discriminatory punishment — blacks, women, and poor immigrants — achieved results as favorable as native-born white men, or nearly so. No legal rules commanded those results; rather, political equilibrium produced them. In the twentieth century's second half, that equilibrium unraveled. Suburban populations mushroomed, diluting poor city neighborhoods' electoral power; big-city police forces grew more professionalized, hence more detached from the streets they patrol. Crime became a live issue in state and national elections, shifting political power from high-crime cities to the safer suburbs and countryside. The constitutional law of criminal procedure expanded dramatically, shifting legal authority from locally elected trial judges to state and federal appellate courts.

As local control faded, variation of all kinds — across place, time, and demographic category — exploded. In the 1950s, 1960s, and early 1970s, Northern prison populations fell sharply, in the midst of an unprecedented crime wave. The balance of the twentieth century saw an unprecedented *punishment* wave, while urban crime remained stubbornly high.²⁰ Both the lenient turn of the century's third quarter and the punitive turn of its last quarter struck high-crime cities, and black neighborhoods within those cities, especially hard. So did the rise of massive, racially disparate drug enforcement. And so did the under-

¹⁸ See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

¹⁹ Jim Whitman's theory explains not only the punitive turn in general, but the harsh character of the law of white-collar crime as well. According to Whitman, American-style "harsh justice" flows from a decision to level down rather than level up — to treat high-status criminals like low-status ones, instead of the other way around as in Europe. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) [hereinafter WHITMAN, *HARSH JUSTICE*].

²⁰ See *infra* p. 2011 (Table 5).

punishment of urban violence, as police and prosecutors substituted cheap drug cases for more expensive violent crime cases.²¹ These varied trends are linked: all flow, in large measure, from the decline of locally self-governing justice systems in high-crime cities.

Adolf Berle and Gardiner Means would have understood the connection. Seventy-five years ago, Berle and Means made famous the separation of ownership from control in the world of business corporations.²² Thanks in part to their book, reducing the agency cost that inheres in control by non-owner managers and ownership by non-controlling shareholders is corporate law's primary goal. Contemporary American criminal justice faces the same governance problem, but in worse form. After all, managers have good reason to see that the corporations they run remain profitable: their jobs depend on it. The detached managers of urban criminal justice systems are in a different position. To the suburban voters, state legislators, and state and federal appellate judges whose decisions shape policing and punishment on city streets, criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life. Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones. Those sad propositions explain much of the inequality in American criminal justice.

How are the relevant trends to be reversed? The core principle is the same as in the law of corporations: reduce agency cost; place more power in the hands of residents of high-crime city neighborhoods — for they feel the effects of rising and falling rates of crime and punishment, just as shareholders feel the effects of rising and falling corporate profits. Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian. Three moves are key, and all can be accomplished without radical change in the structure of the system or the legal doctrines that govern it: put more police officers on city streets, try more criminal cases to locally selected juries, and define criminal prohibitions more vaguely — so jurors can exercise judgment instead of rubber-stamping prosecutors' charging decisions. The federal government can and should advance those goals by changing the character of the federal contribution to state and local law enforcement: less federal law, more federal budget dollars.

The balance of the Article is organized as follows. Part I explains the link between criminal justice equality and local politics, both in the abstract and historically. Part II traces the late-twentieth-century col-

²¹ See *infra* section II.C, pp. 2019–25.

²² ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

lapse of the egalitarian justice system that once governed Northern cities. Part III turns to the future, exploring some means by which a measure of equality in this crucial sphere of governance might be recovered. Part IV concludes.

I. EQUALITY AND LOCAL POLITICS

Localism and democratic politics seem antithetical to egalitarian criminal justice. Localism means difference and variation: tough enforcement here and lax enforcement there, moralist legal doctrine in one place and libertarian rules in another. A criminal justice system under the thumb of voters and politicians is a system prone to act on majoritarian prejudices. Taken together, local control of criminal justice institutions and political control of those institutions would appear to maximize discrimination, not equality.

History suggests the opposite conclusion: when America's criminal justice system was more localized than it is today, the variation in imprisonment rates was much smaller than it is today. So was the degree of change over time, and so were racial disparities in criminal punishment (based on the limited data available). Outside the South, the Gilded Age — the era of *Lochner*²³ and laissez-faire — saw the rise of the most egalitarian criminal justice in American history. That more egalitarian justice system was both more localized and more democratic than our own. Local power over criminal punishment was exercised by local jurors, by locally elected government officials, and by voters from the neighborhoods where crime and punishment alike were concentrated. In our time, centralized democratic power seems associated with discrimination and severity.²⁴ In the past, local democratic control of criminal justice appears to have produced equality and lenity.

This Part seeks to explain those surprising truths. I begin with a brief discussion of the limits of the two alternatives to politics as a means of guaranteeing criminal justice equality: legal doctrine and bureaucracy. Next comes a discussion of *Lochner*-era criminal justice: an age of brutal discrimination in the South, but one that produced a surprisingly large measure of egalitarianism in Northern cities.

A. *Law's Limits, Bureaucracy's Bias*

In order to identify and combat inequality, one must first know what the term means. My definition is conventional: an egalitarian

²³ The reference, of course, is to *Lochner v. New York*, 198 U.S. 45 (1905).

²⁴ The leading scholarship on America's "punitive turn" has emphasized the role of democratic politics in producing it. See sources cited *supra* notes 16, 18–19. Centralization has not played a large role in that story: an important gap in the literature.

justice system treats morally like cases alike.²⁵ Because race does not alter offenders' moral desert, black drug dealers should be as likely as white ones to be arrested and prosecuted, and should receive the same punishments when convicted. Because wealth creates no moral entitlement to the law's protection, crimes that victimize the poor should trigger arrest and punishment at the same rate as crimes that victimize the rich. The Fourteenth Amendment, with its promise of "the equal protection of the laws,"²⁶ seems to guarantee as much — yet the justice system does not fulfill the Constitution's promise. Why not? Why have courts and legal doctrine proved unable to provide even a modest measure of criminal justice equality? There are two answers. First, judges lack the information needed to identify race- and class-based inequalities when they happen. Second, judges lack the remedial tools to rectify those inequalities.

The key missing information concerns missing cases: the many crimes that do not yield arrests, prosecutions, and convictions. In order to redress the massive discrimination that appears to afflict drug enforcement, judges need to know about the black and (especially) white drug dealers who have escaped arrest. That information does not exist. The data noted in this Article's first paragraph illustrate the point: we know, at least roughly, the number of black and white drug users, but no one knows the numbers and locations of black and white drug *dealers* — and it is dealers, not users, who swell the nation's prison population. The problem extends beyond drug cases: demographic information about criminals who commit uncharged crimes of all kinds is sparse, and it is hard to see how any legal system could make it otherwise.

Hard as inequality is to identify and prove, remedying it through litigation seems harder still. If a large corporation hires too many white job applicants and too few blacks, a court can order the hiring of more applicants from the victimized group. At worst, a few people who deserve to keep their jobs will lose them (and likely find equivalent work elsewhere), while a few qualified-but-not-stellar applicants will get jobs that others might have done slightly better. Error costs are low. Remedying unequal criminal punishment is far more disruptive. Imagine a judicial holding that a given state's drug punishment

²⁵ There are nearly as many moral theories of equality as there are moral theories. *See, e.g.*, DOUGLAS RAE, *EQUALITIES* 133 (1981) (finding more than one hundred definitions). As Peter Westen has explained, however, these different theories "are merely substantive variations on the common, formal principle that 'likes should be treated alike.'" Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539 n.8 (1982); *see also* Jeremy Waldron, *The Substance of Equality*, 89 MICH. L. REV. 1350, 1358-64 (1991) (reviewing PETER WESTEN, *SPEAKING OF EQUALITY* (1990)) (explaining the relationship between that principle and substantive equality).

²⁶ U.S. CONST. amend. XIV, § 1.

practices violate the Equal Protection Clause. What happens next? Courts might order police to arrest and prosecutors to charge more white drug suspects — but which ones? What should officials say to the crime victims whose crimes are never investigated because the police were busy rounding up drug suspects whom residents of the relevant communities do not want to punish? Prosecutors might not try hard to win convictions in cases they preferred not to bring in the first place. What happens if the additional white defendants win their cases? Such questions have no good answers.

The logical alternative is to spare members of the victimized group. But how many, and which ones, and what is to be the mechanism by which they are selected? Those questions likewise have no good answers. The criminal justice system is not designed to identify marginal convictions that can be overturned at little cost if the need arises. Even were it otherwise, judges might reasonably fear the consequences of freeing large numbers of drug prisoners from neighborhoods where street-level drug trafficking causes the most damage.²⁷ And discriminatory drug enforcement is an easy matter compared to discriminatory enforcement of violent felonies and felony thefts: imagine the political consequences of a judicial order freeing a large bloc of burglars or arsonists, car thieves or rapists.

Perhaps because defining and enforcing criminal justice equality seems so difficult, courts have been quick to embrace legal substitutes. Vagueness doctrine requires reasonably specific crime definition,²⁸ which is supposed to reduce inequality by reducing the range of enforcement discretion.²⁹ The Fourth, Fifth, and Sixth Amendments, plus the Fourteenth Amendment's Due Process Clause, oblige police officers, prosecutors, and trial judges to follow procedures designed to protect criminal suspects and defendants against abuse and exploitation. Those procedures apply to all, regardless of skin color and social class. But their *raison d'être* is the prevention of class and race discrimination — the protection of suspects and defendants who lack the

²⁷ A comprehensive remedy for discriminatory drug enforcement would probably require the widespread dismissal of drug charges in poor black neighborhoods, given the high concentrations of poor blacks among drug defendants. See ONLINE SOURCEBOOK, *supra* note 2, tbl.5.52.2002 (showing a three-to-two ratio of black to white drug defendants in metropolitan counties); *id.* tbl.6.0001.2003 (showing a two-to-one ratio of black to white drug prisoners in state penitentiaries); HARLOW, *supra* note 10, at 5 tbl.7 (84% of drug defendants in metropolitan counties are poor enough to receive state-paid counsel).

²⁸ Sufficiently specific to “provide the kind of notice that will enable ordinary people to understand what conduct [the law] prohibits.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion).

²⁹ For the best explanation of the link between specificity and discrimination, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 214–18 (1985).

political and financial power to protect themselves.³⁰ Both vagueness doctrine and the law of constitutional criminal procedure amount to equal protection doctrine in disguise.

Unfortunately, these ersatz equality rules work no better than direct legal mandates. Legislators can define broad crimes as specifically as narrow ones,³¹ and thereby create as much enforcement discretion as they wish without violating the void-for-vagueness doctrine. Protective procedures make criminal trials more expensive; more expensive trials make guilty pleas more valuable to prosecutors — and also to poor defendants, whose lawyers cannot afford to take many cases to trial.³² The consequence is more plea bargaining, and hence (again) more discretionary power for prosecutors. That does not advance the cause of equal justice. Law's fundamental problems in this area — the absence of good data on crimes never prosecuted, the judiciary's limited array of remedial tools — are not susceptible to doctrinal fixes.

If the law cannot command criminal justice equality, perhaps a centralized bureaucracy can do so. Well-run government agencies, one might suppose, are good at handling large numbers of cases without generating disparities like those America's dysfunctional justice system creates. Most Western justice systems are run by apolitical national or provincial bureaucracies,³³ and those countries do not have massive, racially skewed prison populations.³⁴ Perhaps institutional design and criminal justice outcomes are linked. It might be so: but it is worth noting that those justice systems did not face the combination of American-style crime rates and serious racial or ethnic divisions before

³⁰ On the link between Warren-era criminal procedure doctrine and class discrimination, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379–86, 445–46 (2000); and Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62–66 (1996). On the relationship between that doctrine's origins and race discrimination, see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) [hereinafter Klarman, *Racial Origins*].

³¹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 559–61 (2001) [hereinafter Stuntz, *Pathological Politics*].

³² On the docket pressure faced by court-appointed counsel, see STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 10–11, 16, 17–18 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034–36, 1053–59 (2006); and Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734–35 (2005).

³³ See Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 35–36 (2007); see also WHITMAN, *HARSH JUSTICE*, *supra* note 19, at 13–15, 199–202 (linking strength of state bureaucracies with lenity of criminal justice outcomes).

³⁴ Some European prison populations may be racially skewed, but they cannot fairly be called massive. Across the E.U., the average imprisonment rate in 2001 stood at 87 per 100,000. BARCLAY & TAVARES, *supra* note 6, at 7 tbl.B. In the same year, the imprisonment rate in the United States stood at 470. ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006.

the last generation's wave of North African and Middle Eastern immigration.³⁵ A generation hence, Europe's centralized criminal justice bureaucracies might appear as discriminatory as the political agencies that run America's system.

To see why that depressing conclusion is plausible, it helps to compare two kinds of centralized power: political and bureaucratic. National politicians controlling criminal law enforcement face two obvious discriminatory temptations. They might use their power to overpunish minorities, because doing so is popular with the majority of voters. Or, they might devote too much time and energy to a small number of politically salient criminals like O.J. Simpson or Kenneth Lay, and pay too little attention to low-salience crimes against poor or minority victims. These two tendencies, toward racism and populism, are precisely the ones that the literature on the politics of crime identifies as the sources of discriminatory criminal justice.³⁶

Centralized, apolitical bureaucrats probably are less prone to those two forms of discrimination. But the bureaucrats face another temptation: to skew enforcement in favor of the rich — say, by ignoring rich criminals' offenses, or by policing wealthy neighborhoods more carefully than poor ones. As generations of political scientists have taught, regulatory capture is common in the realm of bureaucratic governance: when well-funded groups have important interests at stake, they often find it easy to convince allegedly impartial bureaucracies to serve the groups' selfish ends.³⁷ That insight is rarely applied to crime and criminal justice, but it applies as readily to those fields as, say, to environmental regulation. Despite criminal laws banning the employment of illegal immigrants, a host of businesses continue to rely on off-the-books immigrant labor; prosecution for such behavior is rare.³⁸ De-

³⁵ Several of the essays in *ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* (Michael Tonry ed., 1997) [hereinafter *ETHNICITY, CRIME, AND IMMIGRATION*], play this theme. See Hans-Jörg Albrecht, *Ethnic Minorities, Crime, and Criminal Justice in Germany*, in *ETHNICITY, CRIME, AND IMMIGRATION*, *supra*, at 31; Josine Junger-Tas, *Ethnic Minorities and Criminal Justice in the Netherlands*, in *ETHNICITY, CRIME, AND IMMIGRATION*, *supra*, at 257; Martin Killias, *Immigrants, Crime, and Criminal Justice in Switzerland*, in *ETHNICITY, CRIME, AND IMMIGRATION*, *supra*, at 375; Peter L. Martens, *Immigrants, Crime, and Criminal Justice in Sweden*, in *ETHNICITY, CRIME, AND IMMIGRATION*, *supra*, at 183; see also *SENTENCING AND SANCTIONS IN WESTERN COUNTRIES* (Michael Tonry & Richard S. Frase eds., 2001).

³⁶ See sources cited *supra* notes 15–16, 18.

³⁷ See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167 (1990); Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 335 (1974).

³⁸ See Spencer S. Hsu & Kari Lydersen, *Illegal Hiring is Rarely Penalized*, *WASH. POST*, June 19, 2006, at A1. For a summary of the available enforcement data, see Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 *U. CHI. LEGAL F.* 193, 209–11.

spite draconian money laundering statutes, the bureaucratized federal justice system almost never prosecutes bankers or those who operate other apparently legitimate businesses.³⁹ These enforcement patterns are classic examples of capture: the industries that benefit the most from cheap immigrant labor have more clout than the mass of ordinary citizens who wish to see immigration laws enforced, just as banks have more influence than voters who want to see drug financing networks destroyed. Were the justice system centrally controlled by apolitical agencies like the FBI,⁴⁰ such examples would likely multiply.

Likewise, bureaucrats tend to minimize effort, and maximize leisure. Drug cases in poor city neighborhoods are cheap for police and prosecutors; investigating and prosecuting drug crime in well-off suburbs is a good deal more expensive.⁴¹ Were America's justice system more bureaucratized, the disparities in drug enforcement might grow, not shrink.

Of course, America's justice system already is bureaucratized, but the most important bureaucracies — police forces and district attorneys' offices — are governed by local politics and politicians. That sounds like bad news if one's goal is a more egalitarian justice system. After all, for much of American history, the exaltation of local electorates was the creed of racists. Federal law — *Brown v. Board of Education*,⁴² the Civil Rights Act of 1964,⁴³ the Voting Rights Act of 1965⁴⁴ — drove the legal movement for civil rights. State and local power were key sources of resistance to that movement. Surely local politics is the last place to look for egalitarian law enforcement.

Yet local politics and politicians have two crucial advantages in this area. First, poor blacks are a larger fraction of urban electorates than of state or national voting populations.⁴⁵ Residents of poor, high-

³⁹ That is the central claim of Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311 (2003). As Cuéllar notes, the money laundering statutes are often used to prosecute drug dealers, *see, e.g.*, *United States v. Rivera-Rodríguez*, 318 F.3d 268 (1st Cir. 2003), and sometimes used to ratchet up the punishment of ordinary frauds, *see, e.g.*, *United States v. Trost*, 152 F.3d 715 (7th Cir. 1998); *United States v. Reynolds*, 64 F.3d 292 (7th Cir. 1995). Recently, those statutes have been used to attack terrorism, with little success. *See* David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1409–18 (2007). Rarely are money laundering statutes used for their intended purpose.

⁴⁰ On the FBI's insulation from political oversight, *see* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 793–96 (1999).

⁴¹ *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1281–87 (1999) [hereinafter Stuntz, *Fourth Amendment Privacy*].

⁴² 347 U.S. 483 (1954).

⁴³ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

⁴⁴ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

⁴⁵ *See* sources cited *supra* note 9.

crime neighborhoods should find it easy to join the governing coalitions of their cities; wielding influence in state legislative hallways or on Capitol Hill is bound to be harder.⁴⁶ This point is especially important given the demographics of poverty in the United States. Generally speaking, the white poor are dispersed, not concentrated. Outside the South, the black poor are concentrated, not dispersed, and the largest concentrations are in cities.⁴⁷ Giving cities less power over criminal justice, and giving state and national governments more, means shifting power from urban blacks to suburban whites: hardly a recipe for egalitarian criminal justice.

The second advantage does not depend on the demographics of poverty or race; it applies as much to rich white suburbs as to poor black neighborhoods in large cities. With respect to crime and criminal punishment, residents of *all* neighborhoods have two warring incentives. On the one hand, they want safe streets on which to walk and drive and go about their business; they want to travel to parks and sporting events and grocery stores without fearing for their lives and property. On the other hand, they are loath to incarcerate their sons and brothers, neighbors and friends. The desire for order and the longing for freedom, anger at crime and empathy for the young men whom police officers arrest and prosecutors charge — both forces are powerful, and they push in opposite directions. Anyone who has been the victim of a serious crime knows the desire to see perpetrators punished that seems to be part of our nature.⁴⁸ At the same time, all those who have seen neighbors' sons, or their own, behind bars know the

⁴⁶ A decade ago, Dan Kahan and Tracey Meares noted this fact and its implications for the portions of constitutional criminal procedure that regulate policing. See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998). Kahan and Meares were right — but their point extends farther. Not just Fourth and Fifth Amendment law, but constitutional law generally regulates local law enforcement agencies more stringently than state and federal ones. Yet the groups whose interests constitutional law allegedly protects — minorities and the poor — have more political power over local governments than over state and national ones.

⁴⁷ For news stories noting this pattern in three metropolitan areas, see Kiljoong Kim, *Where Do Chicago's Poor White People Live?*, BEACHWOOD REP. (Chicago), Sept. 11, 2006, http://www.beachwoodreporter.com/politics/where_chicagos_poor_white_peop.php; Christopher Tidmore, *Public Housing Redevelopment Sparks Multi-City Protest and Lawsuit*, LA. WKLY. (New Orleans), July 3, 2006, at 1, available at <http://www.louisianaweekly.com/weekly/news/articlegate.pl?20060703b>; Margery Austin Turner, *Segregation by the Numbers*, WASH. POST, May 18, 1997, at C3. For a brief discussion of the more general pattern, see, for example, David R. Williams, *Poverty, Racism, and Migration: The Health of the African American Population*, in RACE, POVERTY, AND DOMESTIC POLICY 311, 320–22 (C. Michael Henry ed., 2004). For evidence of the much higher levels of concentrated poverty in the African American population, see BISHAW, *supra* note 9, at 8 fig.4.

⁴⁸ See, e.g., WENDY KAMINER, *IT'S ALL THE RAGE: CRIME AND CULTURE* (1995) (discussing the link between capital punishment and popular rage at crime and criminals).

agony incarceration imposes on local communities.⁴⁹ Local political control over criminal justice harnesses both forces, without giving precedence to either.

The balance between those warring incentives looks quite different when power over criminal punishment is given to voters and officials outside the communities where crimes happen and punishment is imposed. Anger and empathy alike are weaker forces when they come from voters who see crime on the evening news than when they flow from voters' lived experience. When both forces are weak, small changes in either can produce large systemic consequences: no countervailing force checks the trend toward more or less punishment. Extreme variation becomes the norm, stable equilibrium the exception. The system oscillates not between moderate levels of mercy and retribution, but between wholesale indifference and unmitigated rage. When that happens, we see what Americans have seen over the past fifty years — unfathomable lenity, followed by unimaginable severity.

B. Criminal Justice in the Gilded Age

If the preceding discussion is right, criminal justice systems governed by local politics should achieve more egalitarian results than justice systems that are more centralized, legalized, and bureaucratized. That hypothesis sounds backward: after all, American criminal justice *is* governed by local politics — unlike the rest of the world, we elect prosecutors and trial judges, and urban police forces are answerable to the elected mayors and council members who govern their cities. The results can hardly be called egalitarian. Yet the hypothesis is probably correct. Notwithstanding the role local politics plays in it, American criminal justice is more centralized, more legalized, and less locally democratic than first appears. The true test of the effect of local democracy on criminal justice equality is not to be found in today's justice system, but in the justice system of the Gilded Age: the half-century between the end of Reconstruction and the beginning of the Great Depression.

Those fifty years are not known for their egalitarianism. The Gilded Age was the era of robber barons and sweatshops, a time when the power of “the trusts” dwarfed the clout of labor unions or government regulators.⁵⁰ In the world of legal doctrine, it was the age of constitutionalized *laissez-faire*, when any interference with business or

⁴⁹ See BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 85–198 (2006).

⁵⁰ For the classic view, see JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900* (2007); MATTHEW JOSEPHSON, *THE ROBBER BARONS* (1934). For more nuanced views of the era, see SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE* (3d ed. 1993); REBECCA EDWARDS, *NEW SPIRITS: AMERICANS IN THE GILDED AGE, 1865–1905* (2006).

any government effort to improve the lot of the poor risked judicial invalidation.⁵¹ Last but certainly not least, it was an age when Jim Crow's strange career began, when black voting in the South all but ceased and the grip of a second slavery grew steadily tighter.⁵² Yet criminal justice *was* egalitarian — far more so than in our own time, and probably more so than at any time in American history. These propositions did not hold true in the South, and probably did not hold true everywhere in the North. But in most Northern cities, policing, criminal litigation, and criminal punishment appear to have been both a good deal less discriminatory and a great deal more lenient toward poor and working-class offenders than today. The key to this surprisingly egalitarian justice system was local democracy.

1. *The South.* — The justice system of the post-Reconstruction South was neither democratic nor egalitarian. Private terrorism played roles that well-funded law enforcement agencies played in the North;⁵³ the consequence was a strange mix of anarchy and authoritarianism. Black crimes against whites were punished brutally, often without the niceties of due process.⁵⁴ White offenders who victimized blacks regularly went unpunished⁵⁵ — and, frequently, so did black criminals who harmed other blacks.

As the following table indicates, this anarchic social order was far from orderly. The table lists the policing and homicide rates — police officers and murders per 100,000 population — in three Northern and three Southern cities in the mid-1930s:

⁵¹ The sentence in the text describes the reality a bit too starkly. For a more nuanced discussion of *Lochner*-era doctrine, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

⁵² The classic treatment is the one from which the phrase in the text is borrowed. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed. 1974).

⁵³ On the rise of that system of privatized terrorism and its victory over the federal government's efforts to protect newly freed slaves, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988); LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872* (1996). On the character of Jim Crow law enforcement, see JOHN DITTMER, *BLACK GEORGIA IN THE PROGRESSIVE ERA, 1900-1920* (1977); NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* (1990); HORTENSE POWDERMAKER, *AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH* app. D (1939).

⁵⁴ The white South's approach to legal process when prosecuting black defendants was complicated. The late nineteenth and early twentieth centuries saw lynching — the ultimate rejection of legal procedure — reach its peak. Later, the decades following World War I saw a marked trend toward adherence to legal forms, as Michael Klarman has noted. See Klarman, *Racial Origins*, *supra* note 30, at 55-58. Nevertheless, when black defendants were in the dock, white Southerners' commitment to following the appropriate formal procedures was, in a word, formal: black defendants were routinely denied the practical benefits of the procedural rights that the Southern justice system pretended to honor. See *id.*

⁵⁵ On the different treatment afforded the two different classes of interracial crime, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 117-35, 152-58, 225-32, 267-86 (2004).

TABLE 1. POLICING AND MURDER RATES IN 1937,
SELECTED CITIES⁵⁶

<i>City</i>	<i>Policing Rate</i>	<i>Murder Rate</i>
Boston	292	1.6
Detroit	238	4.6
New York	251	4.5
Atlanta	125	39.3
Houston	98	21.3
Memphis	93	12.8

These figures capture a key reality of law enforcement in the pre-air conditioning, pre-civil rights South: the region's poverty. All government services were underfunded by comparison to the wealthier Northeast and Midwest.⁵⁷ That fact left Southern cities with fewer police officers to contain crime than in the North, and with more crime to contain.⁵⁸

Underfunded Southern law enforcement agencies mostly ignored black neighborhoods, which led to racially skewed crime data like those reported in Hortense Powdermaker's study of Mississippi homicides in the 1930s.⁵⁹ Three-fourths of the state's murder victims were black, as were two-thirds of the killers. White killers' victims were racially mixed: 63% white, 37% black. By comparison, nineteen of every twenty black killers killed black victims. Punishment rates were low by our standards, but aside from black-victim cases, they were very high by comparison with Northern cities in the same period.⁶⁰ One-

⁵⁶ All rates in the Tables are per 100,000 population. The numbers of homicides and urban police officers are taken from UNIFORM CRIME REPORTS: 1937, *supra* note 8, at 197-99 tbl.108; and UNIFORM CRIME REPORTS: 1938, *supra* note 8, at 71 tbl.51, respectively. For the cities' populations, see 1941 STATISTICAL ABSTRACT, *supra* note 1, at 27-28 tbl.30.

⁵⁷ As long ago as 1855, Boston's policing rate stood at 153 per 100,000. See ROGER LANE, POLICING THE CITY: BOSTON 1822-1885, at app. III (1967) [hereinafter LANE, POLICING THE CITY]. A century later, Houston's policing rate was less than two-thirds of that figure — 96 per 100,000. See 1961 STATISTICAL ABSTRACT, *supra* note 1, at 16 tbl.10; UNIFORM CRIME REPORTS: 1956, *supra* note 8, at 29 tbl.13. Rates are calculated using city populations extrapolated from those of the nearest decades.

⁵⁸ Today, the wealth gap between North and South has narrowed considerably — and so have the gaps in murder and policing rates. In 2005, Atlanta had a higher policing rate than either Boston or Detroit, and a significantly lower homicide rate than Detroit. See CRIME IN THE UNITED STATES: 2005, *supra* note 8, tbls.8, 78.

⁵⁹ The data cited in the text appear in POWDERMAKER, *supra* note 53, at app. D.

⁶⁰ In late-nineteenth- and early-twentieth-century Chicago, a mere 22% of homicide cases ended in conviction. JEFFREY S. ADLER, FIRST IN VIOLENCE, DEEPEST IN DIRT: HOMICIDE IN CHICAGO, 1875-1920, at 115-16 (2006). Given the large number of black-victim cases and the low levels of law enforcement in black neighborhoods, it seems likely that well over half of Mississippi's white-victim cases led to conviction and punishment.

third of the murders Powdermaker studied led to criminal convictions, and that figure undoubtedly differed depending on the races of killers and, especially, victims. Killers of whites could expect a serious effort at arrest, prosecution, and punishment. Killers of blacks — white ones to be sure, but many black killers as well — were more likely to escape detection. That is why prison populations in the Jim Crow South were almost certainly whiter than the offender population, and sometimes whiter than the general population.⁶¹

Poverty fed inequality. Egalitarian law enforcement requires the money needed to pay for it, and Southern governments found it harder to raise revenue than their Northern counterparts. Crime rates were much higher in the South than in the North partly because Southern criminals faced lower odds of detection than Northern ones — which in turn was partly due to small budgets for Southern law enforcement agencies. The undemocratic character of Southern government reinforced these tendencies. Not only were blacks barred from voting throughout the Jim Crow South; in many places, so were poor whites.⁶² Thus, the portions of the population that suffered the most from both crime and criminal punishment were frozen out of political power.⁶³ Naturally, equal justice was in short supply. The Gilded Age South more nearly resembled a weak authoritarian state, able to do little save for oppressing blacks, than any form of democracy we know today. Jim Crow's history does not support the proposition that local democracy promotes egalitarian criminal justice, but neither does it negate that proposition.

⁶¹ In 1950, South Carolina's population was nearly 40% black, 1953 STATISTICAL ABSTRACT, *supra* note 1, at 36 tbl.25, yet more than two-thirds of the state's imprisoned felons were white. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS: 1950, at 55 tbl.21. According to the same sources, in the eleven states of the old Confederacy except Georgia (for which data are missing), 44% of imprisoned felons were black, compared to 24% of the general population. By comparison, in the Northeast, 29% of prisoners were black, compared to only 5% of the general population. The conclusion is inescapable: Jim Crow held the black imprisonment rate *down*.

⁶² The poll tax, common in most of the South during the first half of the twentieth century, was the most obvious means of biracial disenfranchisement but not the only one. For the classic discussion, see V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 578-618 (1949). The effect of those restrictions on white turnout rates was dramatic. See J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880-1910, at 224-31 (1974).

⁶³ Since the 1930s, the Southern state with the highest ratio of police officers to population has been Louisiana — which, thanks to Huey Long, is also the state with the strongest political tradition of government officials competing for the votes of the poor. In 1937, New Orleans had 175 police employees per 100,000 population, see UNIFORM CRIME REPORTS: 1938, *supra* note 8, at 71 tbl.51; 1942 STATISTICAL ABSTRACT, *supra* note 1, at 27 tbl.25 — far higher than the rate in other Southern cities, see *supra* p. 1984 (Table 1). Today, Louisiana has the highest policing rate in the nation. Its neighbors Mississippi, Arkansas, and Texas are all in the bottom half of state policing rates. See CRIME IN THE UNITED STATES: 2006, *supra* note 8, tbls.77, 78.

2. *Northern Cities.* — Northern cities were far less discriminatory, as three pieces of evidence suggest. First, criminal defendants in the demographic groups most likely to suffer discrimination — women, blacks, and poor immigrants — seem to have achieved litigation outcomes nearly as good as the outcomes native-born white men achieved. Second, imprisonment rates were stable: in an age of great social and political change, prison populations neither exploded nor collapsed. Third, those populations varied remarkably little across jurisdictional boundaries; differences in population-adjusted imprisonment rates were much smaller than in the late twentieth and early twenty-first centuries.

Begin with the treatment of what would now be called “suspect classes.” In the early 1900s, no one had heard of battered woman’s syndrome; east of the Mississippi River, women could not yet vote.⁶⁴ Even so, more than 80% of Chicago women who killed their husbands escaped punishment — among white women, the figure topped 90% — thanks to “the new unwritten law” permitting women to defend themselves on the same terms as men.⁶⁵ This “law” consisted mostly of jury preferences, but the preferences were clear enough to lead the local State’s Attorney to opine that “a wife may murder her husband in Cook County with impunity.”⁶⁶ A half-century before the women’s movement transformed the law of self-defense, female defendants were achieving the results the movement sought without the help of the legal and medical arguments on which their late-twentieth-century sisters relied.⁶⁷

As historian Jeffrey Adler notes, black women who killed their husbands fared worse, probably due to a combination of race and sex biases.⁶⁸ The existence of such biases is no surprise. What *is* surprising is the weakness of the racial bias in Northern cities in the Gilded Age. After an exhaustive study of early-twentieth-century Philadelphia homicides, Roger Lane concluded that black murder defendants did about as well as white ones:

⁶⁴ See ANNE F. SCOTT & ANDREW M. SCOTT, *ONE HALF THE PEOPLE: THE FIGHT FOR WOMAN SUFFRAGE* 166–68 (1975). Illinois granted women a limited right to vote in 1913. See SHERNA BERGER GLUCK, *FROM PARLOR TO PRISON: FIVE AMERICAN SUFFRAGISTS TALK ABOUT THEIR LIVES* 297 (1985); SCOTT & SCOTT, *supra*, at 166.

⁶⁵ ADLER, *supra* note 60, at 112. Even if one counts only white women who were arrested for homicide, a mere 11% were convicted. *Id.* at 329 n.141. On the character and power of the “unwritten law,” see *id.* at 108–17.

⁶⁶ *Id.* at 112 (internal quotation mark omitted).

⁶⁷ Favorable results were not limited to self-defense claims. Women who murdered their children, a surprisingly common scenario in turn-of-the-century Chicago, were almost never prosecuted. See *id.* at 92–99.

⁶⁸ See *id.* at 153–55. Black child-killers either did not exist or were ignored by the authorities. *Id.* at 152–53.

While Philadelphia was . . . the northernmost of southern cities, . . . [the city's justice system] seems to have been largely free of systematic prejudice in determining guilt or innocence. Elderly black men and women, survivors of "The Great Migration" north in the era of World War I and after, recall the justice system as essentially fair. . . . [I]n most identifiable measures of discrimination, such as degree of charge and conviction rate, neither blacks nor those with Italian [surnames] seem to have differed significantly from others brought to the dock.⁶⁹

The early twentieth century saw the beginnings of the mass migration of Southern blacks to Northern cities, prompting bloody race riots and a resurgent Ku Klux Klan — as strong in parts of the North as in the South. Even so, Northern cities' treatment of black defendants appears to have been "essentially fair."

The famous story of Ossian Sweet captures the phenomenon. Sweet was a black doctor who had the audacity to buy a house in a white Detroit neighborhood in 1925. A white mob surrounded his house and shots were fired from inside, where several of Sweet's relatives and friends were armed. One of the shots killed a white neighbor. All eleven people in the house, including Sweet and his wife, were charged with murder.⁷⁰ Clarence Darrow took the case and argued self-defense, invoking the long history of violence against blacks by white mobs. The case was tried twice, both times to all-white juries;⁷¹ in his closing arguments, Darrow questioned whether white jurors could fairly judge black defendants charged with doing violence to a white man. The first jury hung; the second acquitted.⁷² The judge in both trials was Frank Murphy, who went on to become Mayor of Detroit and Governor of Michigan before Franklin D. Roosevelt appointed him to head the Justice Department, and later to the Supreme Court.⁷³ Notice: a black man was acquitted of killing a white man by an all-white jury, in a case in which the victim was unarmed and the defense all but admitted the killing. The judge who

⁶⁹ Roger Lane, *On the Social Meaning of Homicide Trends in America*, in 1 VIOLENCE IN AMERICA 55, 70–71 (Ted Robert Gurr ed., 1989) [hereinafter Lane, *Homicide Trends*]; see also ROGER LANE, *ROOTS OF VIOLENCE IN BLACK PHILADELPHIA, 1860–1900* (1986) [hereinafter LANE, *BLACK PHILADELPHIA*].

⁷⁰ See KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE* 20–43, 193–94 (2004) (discussing Sweet's background and the events surrounding the house purchase, the shooting, and the filing of criminal charges).

⁷¹ *Id.* at 266, 316.

⁷² In the first trial, all eleven defendants were tried; in the second trial, Ossian Sweet's brother Henry — believed to be the shooter — was tried alone. *Id.* at 292–99, 331–36.

⁷³ One of Murphy's biographers reports that the trial was "the most intense emotional experience of his life." RICHARD D. LUNT, *THE HIGH MINISTRY OF GOVERNMENT: THE POLITICAL CAREER OF FRANK MURPHY* 26 (1965).

presided over the case was rewarded for that outcome, not punished.⁷⁴ To anyone familiar with American criminal litigation in the last thirty years, the story sounds wildly implausible.

Black defendants like Sweet did not avoid conviction because they lived in racially enlightened times: a Klan rally in nearby Dearborn, Michigan in 1924 drew “upwards of fifty thousand.”⁷⁵ Rather, black defendants benefited from the fact that *all* defendants fared better than their counterparts today. Adler notes that a mere 22% of turn-of-the-century Chicago homicides led to criminal convictions.⁷⁶ In Alameda County, California in the same era, fewer than 60% of felony trials ended in conviction; in cases in which defendants made bail, the conviction rate fell below 30%.⁷⁷ Comparable figures today are much higher.⁷⁸ Turn-of-the-century defendants’ success rates were even better than appears from the figures just cited, because many fewer criminal defendants pled guilty a century ago than today. In metropolitan counties today, 65% of felony cases end with a guilty plea, and those pleas represent 95% of felony convictions.⁷⁹ In turn-of-the-century Alameda County, the analogous figures were 41% and 63%, respectively⁸⁰ — and the figures in the Northeast and Midwest were probably a good deal lower.⁸¹ In today’s justice system, felony trials are rare events, acquittals rarer still. In Northern cities a century ago, both trials and acquittals were common. Women and blacks fared

⁷⁴ Murphy later lost an election due to his stance on crime, but it was not black crime that prompted his defeat. In 1938, Murphy was running for reelection as Michigan’s Governor; his lenient treatment of sit-down strikers in automobile factories was a major issue, and Murphy lost in a close race. *See id.* at 151–60. In late 1930s America, being seen as soft on industrial labor unions carried a higher political price tag than acquitting black criminals.

⁷⁵ BOYLE, *supra* note 70, at 142. For a discussion of the Klan’s role in Detroit politics at the time, see *id.* at 24, 140–43.

⁷⁶ ADLER, *supra* note 60, at 115–16.

⁷⁷ *See* LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910*, at 166 tbl.5.8 (1981).

⁷⁸ More than 80% of murder arrests in metropolitan counties lead to conviction. ONLINE SOURCEBOOK, *supra* note 2, tbl.5.57.2002. In felony cases that go to trial, the conviction rate is 75%. *Id.*

⁷⁹ *Id.*

⁸⁰ *See* FRIEDMAN & PERCIVAL, *supra* note 77, at 166 tbl.5.8.

⁸¹ Guilty pleas play no part in Adler’s account of Chicago homicide cases — partly because pleas make less interesting stories, but probably also because pleas were less common in the Northeast and Midwest than on the West Coast. Throughout this period, California’s imprisonment rate was double that of most states in the Northeast and Midwest. *See* CAHALAN, *supra* note 7, at 30 tbl.3-3. Criminal convictions must have been more numerous in California than in the nation’s Northeastern quadrant, and guilty pleas are an efficient litigation tool for prosecutors who must convict large numbers of criminal defendants.

well in that older justice system because defendants as a whole fared well.⁸²

A large fraction of the many acquittals in this period were won by defendants from poor or working-class immigrant communities. Adler's book about violence in turn-of-the-century Chicago is a compendium of stories of homicides by that city's immigrant poor, who needed no Clarence Darrow to win their cases: "vague, generic self-defense arguments . . . nearly always persuaded jurors."⁸³ Bar fights, disputes over card games, and drunken brawls regularly produced defense victories. Those victories rarely flowed from doubts about the killer's identity.⁸⁴ Rather, Adler's Chicago juries were exercising powers of moral evaluation⁸⁵ — powers the substantive law of the late nineteenth and early twentieth centuries vested in fact finders, not just in legislatures and appellate courts.

Acquittals of working-class white immigrants may seem less surprising than victories by husband-killing white women and homicidal black men. But white immigrants of the late nineteenth and early twentieth centuries held a lower political status than twenty-first-century Americans might suppose. The bulk of the immigration in this period came from Southern and Eastern Europe; Catholics and Jews were a larger fraction of immigrants than in the past.⁸⁶ Both groups were subject to substantial religious prejudice, a major factor in the Klan's rise during the 1920s.⁸⁷ In context, the success of the poor immigrants Adler discusses is almost as remarkable as the successes enjoyed by women and blacks.

⁸² Adler explicitly makes the link with respect to women. ADLER, *supra* note 60, at 115–16. Taken together, his evidence and Roger Lane's analysis suggest the same conclusion with respect to black defendants as well. *See supra* note 69 and accompanying text.

⁸³ ADLER, *supra* note 60, at 116.

⁸⁴ *See, e.g., id.* at 6–37 (discussing the many Chicago homicides that arose from drunken brawls in public places in front of dozens of witnesses).

⁸⁵ Much like the seventeenth- and eighteenth-century English juries that are the subject of JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008) [hereinafter WHITMAN, *REASONABLE DOUBT*]. Like turn-of-the-century Chicago juries, English juries of centuries past tended to resolve doubts in favor of acquittal; as in old Chicago, those doubts often had more to do with moral desert than with the facts of the case at hand. *See id.* at 159–200; *see also* ROGER LANE, *VIOLENT DEATH IN THE CITY: SUICIDE, ACCIDENT, AND MURDER IN NINETEENTH-CENTURY PHILADELPHIA* 66 (2d ed. 1999) [hereinafter LANE, *VIOLENT DEATH IN THE CITY*] (Philadelphia juries "were usually quite tolerant of assaultive behavior and were always greatly influenced by moral or social rather than purely legal considerations.")

⁸⁶ JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 64–67 (rev. ed. 2002).

⁸⁷ *Id.* at 285–86, 290–94. Politicians and some scholars argued that Southern and Eastern Europeans belonged to a different race than immigrants of the past; fears of inundation by immigrants of inferior racial "stock" were common. *Id.* at 131–57.

Nationwide data on litigation outcomes do not exist for this period. Still, what little evidence we have tends to confirm the proposition that, outside the South, Adler's Chicago and Lane's Philadelphia represent the rule, not the exception. The key evidence comes from the combination of imprisonment rates and homicide rates, which suggest that criminal punishment was both stable and moderately lenient throughout the relevant period. Table 2 presents the murder rate, the imprisonment rate, and the number of prisoner-years per murder in 1904, 1910, and at ten-year intervals beginning in 1923. Under each heading, the first figure is the rate for New York, using New York City's murder rate and New York state's imprisonment rate, while the second figure is the rate for the nation as a whole.⁸⁸

TABLE 2. CRIME AND PUNISHMENT IN NEW YORK
AND IN THE UNITED STATES⁸⁹

Year	Murder Rate		Imprisonment Rate		Prisoner-Years per Murder	
	N.Y.	U.S.	N.Y.	U.S.	N.Y.	U.S.
1904	4.2	8.3	71	69	16.9	8.3
1910	5.4	7.9	78	75	14.4	9.5
1923	4.8	8.8	58	74	12.1	8.4
1933	7.2	9.8	74	109	10.3	11.1
1943	2.7	5.1	112	103	41.5	20.2
1953	4.0	4.8	107	108	26.8	22.5
1963	7.0	4.6	101	114	14.4	24.8
1973	22.0	9.8	71	96	3.2	9.8
1983	22.7	8.6	172	179	7.6	20.8
1993	26.6	9.5	354	359	13.3	37.8
2003	7.4	5.7	339	482	45.8	84.6

⁸⁸ For New York, the figure on prisoner-years per murder is only a rough approximation, because the murder rate is the city's and the imprisonment rate is the state's. States, not cities, run America's penitentiary system, so city-level imprisonment data are, for the most part, nonexistent.

⁸⁹ Through 1973, both New York's homicide rate and the nation's are taken from data and estimates collected by the late Eric Monkkonen and used in ERIC H. MONKKONEN, MURDER IN NEW YORK CITY (2001). The data are available through the National Archive of Criminal Justice Data, at <http://www.icpsr.umich.edu/cocoon/NACJD/STUDY/03226.xml>. After 1973, homicide rates are taken from the relevant volumes of the UNIFORM CRIME REPORTS, *supra* note 8. Imprisonment rates up to 1923 come from CAHALAN, *supra* note 7, at 30 tbl.3-3. Subsequent imprisonment rates for the United States as a whole come from ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006. New York's imprisonment rates from 1933 to 1963 are taken from the relevant volumes of the STATISTICAL ABSTRACT, *supra* note 1; later rates appear in 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72; and ONLINE SOURCEBOOK, *supra* note 2, tbl.6.29.2006. To calculate prisoner-years per murder, I divided the imprisonment rate by the murder rate.

New York's murder rate was lower in the early twentieth century than today,⁹⁰ while its prison population was a small fraction of today's. Moderate punishment coexisted with modest levels of criminal violence. And the punishment *was* moderate: substantially more severe than in the 1970s, far more lenient than today. Neither imprisonment rates nor punishment per unit crime changed dramatically in the early 1900s; levels of criminal punishment were relatively stable.⁹¹ Not so in the century's last forty years, when murders nearly quadrupled before falling sharply, imprisonment quintupled, and prisoner-years per murder fell by more than 90%, then multiplied fourteen times. Instability suggests inconsistency — the same crimes received very different treatment at different times. Early-twentieth-century criminal punishment appears to have been more consistent.

New York was typical. In the last half of the twentieth century, imprisonment rates varied massively throughout the Northeast and Midwest, both over time and between jurisdictions.⁹² States in those regions incarcerated similar (and similarly low) percentages of their populations in the late nineteenth and early twentieth centuries, suggesting that the patterns Adler and Lane discovered in Chicago and Philadelphia were typical of their regions. Other regions differed: Southern prison populations varied more widely, both over time and across jurisdictional boundaries — as Table 3 shows. The table records the imprisonment rates per 100,000 population for two sets of five neighboring states, North and South:

⁹⁰ *Much* lower: a large fraction of the homicides of generations past would not be so classified today, because high-quality emergency medical care would save the victims' lives. JAMES Q. WILSON, *THINKING ABOUT CRIME* 16 (rev. ed., Vintage Books 1985) (1975).

⁹¹ The era of stable imprisonment rates ended in the 1930s, with the first of America's two twentieth-century punitive turns. Imprisonment peaked at 137 per 100,000 in 1939, followed by a sharp drop as millions of young men were drafted into the army. See ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006.

⁹² See *id.* tbl.6.29.2006.

TABLE 3. IMPRISONMENT RATES, SELECTED STATES, 1880-1910⁹³

<i>State</i>	<i>1880</i>	<i>1890</i>	<i>1904</i>	<i>1910</i>
Pennsylvania	43	45	39	46
Ohio	40	45	53	54
Indiana	63	65	69	88
Illinois	60	54	47	46
Michigan	72	53	54	57
Virginia	50	70	80	104
North Carolina	58	88	33	32
South Carolina	26	70	47	56
Georgia	—	94	80	101
Alabama	31	72	97	158

Notice that the lowest *and* highest imprisonment rates come from the South — along with the largest ranges of variation. Alabama's rate quintupled and North Carolina's fell by almost two-thirds; none of the Northern states' imprisonment rates varied by as much as 40% in either direction. Southern criminal justice, which was designed for inequality, produced highly variable prison populations. Inmate populations in the North were far more stable, and what little evidence we have suggests surprisingly low levels of discrimination against vulnerable groups.⁹⁴ Variation and discrimination seem to travel together. So do stability and equality, perhaps joined by moderately lenient treatment for criminal defendants. Southern criminal justice systems had the former set of characteristics, Northern systems the latter.

Why was Northern criminal justice both stable and relatively lenient? There are four related answers. First, Northern cities were well-policed, at least by the standards of the time. The reasons for the link between relatively high levels of policing and relatively low and stable punishment levels are unclear. But it seems increasingly plain that such a link exists. Today, jurisdictions with the most police officers

⁹³ The figures in Table 3 are taken from CAHALAN, *supra* note 7, at 30 tbl.3-3. Georgia's imprisonment rate in 1880 is unavailable.

⁹⁴ The evidence goes beyond Adler's and Lane's studies. Data on sentences broken down by demographic group are nearly nonexistent for the early twentieth century, but data from mid-century support the picture painted in the text. Across the Northeast and Midwest, whites were punished more severely than blacks for murder and drug crime; blacks were punished more severely than whites for manslaughter, fraud, and rape. Overall, blacks served longer sentences, but not by a large margin. In the South, the median time served by white offenders was 18 months; for blacks, the median was 21 months. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS: PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS: 1952 AND 1953, at 32 tbl.7A. The chief difference between the regions was one that those data do not capture: the selection of cases for prosecution. Many more black-on-black crimes were prosecuted and punished in the North than in the South.

tend to have the lowest imprisonment rates and the smallest rates of increase in imprisonment.⁹⁵ The same was true a century ago: cities in the Gilded Age South had much smaller police forces than their Northern counterparts; the South also saw both higher and more variable punishment levels than the North.⁹⁶ Those propositions are likely connected.

Second, then-prevailing procedural rules made criminal trials cheap and therefore common. Because jury trials were more common than today, defense victories were bound to be more common as well.⁹⁷ Acquittals were less newsworthy, so prosecutors paid a smaller political price for them and were less eager to avoid them than today. Note the logic: less elaborate trial procedures helped defendants — not the government — by making both trials and acquittals more ordinary events.

Third, substantive criminal law was both less clearly defined and more favorable to defendants than today's legal doctrine. Defendants rarely have occasion to challenge the application of today's bright-line criminal liability rules, in large part because those rules seem designed to foreclose defense arguments. That was not the case a century ago. Statutory conduct terms, mens rea standards, and affirmative defenses all invited such arguments rather than foreclosing them. When the terms of criminal statutes were insufficiently hospitable to such arguments, courts filled the gap through common lawmaking. An example makes the point. Like many of its neighbors, Michigan passed a local-option law banning liquor in counties that approved the ban; to discourage evasion, the legislature forbade not only selling alcoholic beverages but also giving them away. The Michigan Supreme Court soon established a defense for those who served liquor in their homes as an exercise of "a decent hospitality" to their guests.⁹⁸ Analogous doctrines in today's law of controlled substances (the analogue to early-twentieth-century liquor laws) are unimaginable.

Such doctrines were everywhere in the criminal law of the Gilded Age. Another Michigan doctrine held that mutual fights in which both sides were willing participants were not crimes.⁹⁹ According to the

⁹⁵ William J. Stuntz, *Accountable Policing* 45–46 & tbl.3 (2007) (unpublished manuscript, on file with the Harvard Law School Library). The data used are taken from *CRIME IN THE UNITED STATES: 2004*, *supra* note 8, tbls.8, 78; and *ONLINE SOURCEBOOK*, *supra* note 2, tbl.6.29.2004.

⁹⁶ See *supra* p. 1984 (Table 1), p. 1992 (Table 3).

⁹⁷ See *supra* notes 76–81 and accompanying text.

⁹⁸ The quoted phrase is from *People v. Bedell*, 127 N.W. 33, 36 (Mich. 1910) (Ostrander, J., concurring); the leading case for the doctrine in question was *People v. Peterson*, 120 N.W. 570 (Mich. 1909).

⁹⁹ See *People v. Yund*, 128 N.W. 742, 744 (Mich. 1910). For a decision rejecting the doctrine, see *People v. Sherman*, 166 N.W.2d 22 (Mich. Ct. App. 1968).

common law definition used in most states, burglary defendants could prevail if the targeted place was not a dwelling, if the break-in did not happen at night, or if the defendant formed the intent to commit a felony only after going inside.¹⁰⁰ Rape defendants won if their victims failed to resist with all their might.¹⁰¹ Proof of mens rea meant proof of moral fault, not just the intent to carry out one's physical actions.¹⁰² In the late twentieth century, self-defense doctrine seemed to bar defenses for battered women who killed their batterers.¹⁰³ The less doctrinally developed version of the defense that applied in early-twentieth-century Chicago awarded victory not only to abused women, but to virtually any homicide defendant who could offer a better reason for his — or her — crime than greed or hatred.¹⁰⁴ With open-ended doctrines like these, criminal trials were genuine morality plays, with jurors serving as both judge and Greek chorus. Jurors went well beyond determining witnesses' credibility:¹⁰⁵ they were moral arbiters, assessing both the propriety of defendants' conduct and the propriety of punishing it.

As Jim Whitman has shown, in English legal history, that open-ended power to pass judgment and to assign blame was long associated with lenity.¹⁰⁶ Likewise in Gilded Age America: local juries hesitated to send their neighbors to prison when the law offered multiple ways to avoid doing so. Surprisingly, lenity and predictability seem to have coincided. The "unwritten law" excusing wives who killed abusive husbands, the pattern of acquittals for bar fights that escalated to homicide, the unofficial defense granted automobile drivers in cases of vehicular homicide¹⁰⁷ — because of their consistency, these patterns

¹⁰⁰ See, e.g., *People v. Sparks*, 47 P.3d 289, 293 (Cal. 2002) (describing traditional common law definition).

¹⁰¹ See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105–21 (1986) (discussing cases).

¹⁰² Chief Justice Taft's opinion in *United States v. Balint*, 258 U.S. 250 (1922) — a case in which proof of moral fault was *not* required — makes the point. Balint was charged with violating the Harrison Act; his only possible defense was that he did not know the conditions the Act placed on drug sales. Taft reasoned that Congress "weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 254. His opinion makes sense only on the assumption that moral blameworthiness was a prerequisite for criminal liability: that, save for a few unusual cases, the government must prove the defendant knew enough about the relevant facts and law to render his behavior culpable.

¹⁰³ See, e.g., Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988).

¹⁰⁴ See ADLER, *supra* note 60, *passim*.

¹⁰⁵ Cf. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997).

¹⁰⁶ So much so that the beyond-a-reasonable-doubt standard of proof was needed to reassure reluctant eighteenth-century English jurors that they could convict plainly guilty defendants without jeopardizing their souls. See WHITMAN, REASONABLE DOUBT, *supra* note 85, at 125–200.

¹⁰⁷ See ADLER, *supra* note 60, at 211–12.

amounted to the functional equivalent of legal doctrine.¹⁰⁸ Perhaps consistency flowed from transparency: these unwritten legal standards emerged from public trials, not behind-closed-doors plea bargains.

The fourth answer follows naturally from the first three: political control over policing and prosecution was in the hands of the same groups who were most often victimized by and charged with serious crime. Big-city police forces were governed by big-city political machines that in turn relied on the votes of the working-class immigrants whose streets most needed patrolling.¹⁰⁹ Officers were not so much professional law enforcers as holders of patronage jobs, rewards for the machines' supporters.¹¹⁰ They lived in the same communities as the young men they arrested, attended the same churches, depended on the same networks for help when hardship struck. Urban machines likewise selected the district attorneys who prosecuted criminal cases and the judges who tried those cases. Last but not least, working-class voters exercised power in the jury box as well as the ballot box. The common law vicinage requirement held that the jury was to be selected from the community in which the crime happened.¹¹¹ The norm today is county-wide selection¹¹² — and because most metropolitan counties include vast suburbs, high-crime city neighborhoods have little control over the juries that try crimes committed on their streets. Before the rise of the automobile, more localized selection practices

¹⁰⁸ That is one reason why government officials objected to these patterns so strenuously. *See id.* at 112, 212–15.

¹⁰⁹ *See, e.g.,* M. Craig Brown & Barbara D. Warner, *Immigrants, Urban Politics, and Policing in 1900*, 57 AM. SOC. REV. 293 (1992) (showing strong negative correlation between machine control of city politics and the level of arrests for alcohol-related offenses). The one major city with both a high level of machine control and a high level of alcohol arrests was Philadelphia, in which the political machine was Republican and relied on native-born voters for its support. *Id.* at 301 & tbl.2. Elsewhere, the reigning machines — Republican and Democratic alike — depended on immigrant votes, and generally avoided strict enforcement of alcohol regulations.

¹¹⁰ *See* ROBERT M. FOGELSON, *BIG-CITY POLICE 17–22* (1977); Mark Haller, *Historical Roots of Police Behavior: Chicago, 1890–1925*, in 5 CRIME AND JUSTICE IN AMERICAN HISTORY: POLICING AND CRIME CONTROL 244 (Eric H. Monkkonen ed., 1992); Eugene J. Watts, *The Police in Atlanta, 1890–1905*, in 5 CRIME AND JUSTICE IN AMERICAN HISTORY: POLICING AND CRIME CONTROL, *supra*, at 908. *Cf.* LANE, *POLICING THE CITY*, *supra* note 57, at 213 (noting the difficulty upper-class Republicans in Boston had in controlling the local police force even when they won local elections).

¹¹¹ For the standard historical discussion, see William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944). Custom, not law, determined the size of the community. In England, locally selected juries were “a functional necessity,” since local knowledge informed jury decisionmaking. Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000). Local knowledge was still an important part of jury decisions in the late nineteenth and early twentieth centuries. The limits of urban transportation and the necessities of urban machine politics pushed in the same direction. But these forces shaped the practice of jury selection, not its legal form. Consequently, evidence of particular selection practices is hard to come by.

¹¹² *See* Engel, *supra* note 111, at 1705 n.242.

were probably the norm:¹¹³ would-be jurors could not easily transport themselves across large metropolitan counties.

Nowhere was the power of local democracy more evident than in battles over vice. Between 1870 and 1930, Americans fought a series of vice wars: against pornography,¹¹⁴ gambling,¹¹⁵ prostitution,¹¹⁶ narcotics¹¹⁷ and, above all, alcohol.¹¹⁸ As in the late twentieth century's drug war, these vice crusades invariably led to state and federal legislation seeking to stamp out the relevant markets. The similarity ends there. In today's drug war, offenders face sentences far more severe than anything bootleggers or pimps faced eighty or a hundred years ago. State and federal drug laws have been enforced most aggressively in poor city neighborhoods.¹¹⁹ Enforcement of late-nineteenth- and early-twentieth-century vice laws in Northern cities was usually lax and often nonexistent.¹²⁰ (In the South, such laws were often enforced disproportionately against blacks.¹²¹) In the one field in which federal law battled for control over criminal justice, local officials fought back, usually taking the side of the working-class populations that indulged

¹¹³ This proposition is surprisingly hard to support, because records of jury selection practices in the past are thin. For a rare discussion of the scope of the community from which urban juries were actually drawn in generations past, see *People v. Jones*, 510 P.2d 705 (Cal. 1973), which addressed jury selection under the Los Angeles system of judicial districts.

¹¹⁴ See DONNA I. DENNIS, *THE RISE OF AMERICAN EROTICA: PRODUCING AND POLICING PORNOGRAPHY IN NINETEENTH-CENTURY NEW YORK* (forthcoming 2009) (manuscript at ch. 7, on file with the Harvard Law School Library).

¹¹⁵ See David Skeel & William J. Stuntz, *The Puzzling History of the Criminal Law of Gambling* (2007) (unpublished manuscript, on file with the Harvard Law School Library).

¹¹⁶ There were two different battles against prostitution. The first was fought locally, where occasional crusades prompted backlash from the "silent army" of customers, LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 331 (1993), leading to a return to quiet tolerance. See Haller, *supra* note 110, at 257 (describing lax enforcement in turn-of-the-century Chicago). The second battle was the federal drive to stamp out the so-called "white slave traffic." See, e.g., Mara L. Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917*, 35 J. SOC. HIST. 5 (2001).

¹¹⁷ For the best discussion of the crusade against opium that took hold in the late nineteenth and early twentieth centuries, see GEORGE FISHER, *MARRIED TO ALCOHOL: THE DRUG WAR'S MORAL ROOTS* (forthcoming 2008) (manuscript at chs. 7-8, on file with the Harvard Law School Library) [hereinafter FISHER, *MARRIED TO ALCOHOL*].

¹¹⁸ See, e.g., EDWARD BEHR, *PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA* (1996); FISHER, *MARRIED TO ALCOHOL*, *supra* note 117; DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* (2d ed., Kent State Univ. Press 2000) (1979).

¹¹⁹ Proving that the laws have been more aggressively enforced in the poorer sections of cities is difficult, perhaps impossible — though the demographics of the drug defendant population suggest as much. For evidence that drug defendants are disproportionately poor, see HARLOW, *supra* note 10, at 5 tbl.7. For evidence that drug defendants are disproportionately black, see *supra* notes 4-5 and accompanying text. Finally, for evidence that the black population is both poorer and more urbanized than the white population, see *supra* note 9.

¹²⁰ See BEHR, *supra* note 118, at 175-93 (discussing lack of enforcement in Chicago); MICHAEL A. LERNER, *DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 160-70* (2007) (discussing local opposition to enforcement in New York).

¹²¹ See MARTHA BENSLEY BRUERE, *DOES PROHIBITION WORK?* 112-13 (1927).

in the relevant vices. The lenient locals won most of those battles against their more severe federal and state adversaries. In the larger and more important realms of violent felonies and felony thefts, local control was unchallenged.

II. THE RISE OF INEQUALITY

The power of high-crime city neighborhoods over criminal justice in those neighborhoods fell sharply during the course of the twentieth century's second half. Rising suburban populations exercised more power over local elections than in the past; city voters exercised less. Entrepreneurial national politicians discovered that they could use urban crime to win votes not in cities, but in suburbs and small towns. The constitutionalization of criminal procedure and the combined expansion and growing specificity of substantive criminal law have, taken together, made prosecutors more powerful and local juries less so. Today's professionalized urban police forces have left officers detached from the neighborhoods they serve.

The trends just described arose precisely when black neighborhoods became the focus of criminal justice in Northern cities. That combination was bound to produce more racial inequality and injustice. Other crime and policing trends reinforced that sad result. As urban violence escalated, police clearance rates for violent felonies plummeted and large illegal drug markets arose, in poor city neighborhoods as elsewhere. Beginning in the 1970s, lawmakers, police officers, and prosecutors alike began to use drug prosecutions as an indirect means of attacking urban violence. That misguided substitution fed rising inequality. The federal government should have mitigated that trend but instead aggravated it, by enacting draconian federal sentencing rules that local prosecutors could use to induce favorable (from prosecutors' point of view) plea bargains. Had the federal government made less law and spent more money on local policing, the trend might have been very different. But federal police spending has been light, while substantive lawmaking has been heavy. The predictable consequence has been more criminal punishment, more unequally distributed.

A. *Local Democracy's Decline*

Three pairs of trends led to the demise of the locally democratic criminal justice systems of the Gilded Age. The first pair began in the 1930s and 1940s: the rise of the symbolic politics of crime and the consequent expansion of state and federal criminal liability. The second pair of trends took hold after World War II: the growing geographic concentration of violent crime in poor black neighborhoods in Northern cities, and the coincident growth of white suburbs surrounding those cities. The third pair of trends — a legal change and the politi-

cal response to it — arose in the 1960s, and picked up steam in the decades that followed. The legal change was the constitutionalization of criminal procedure. The political response was the bidding war that broke out beginning in the late 1960s between politicians on the right and those on the left, as the two sides sought the votes of blue-collar whites by vying to see who could punish black crime most severely. Each of these trends reduced the power of urban voters over crime and punishment close to home.

Begin with symbolic politics. Today, politicians seeking state and national office routinely use salient crimes as political symbols.¹²² That tactic was all but unknown before the 1930s. When lawmakers debated criminal prohibitions, both sides in the relevant debates assumed that the point of the prohibitions was to stamp out the banned conduct — not to take a public stand against it while ignoring the conduct in practice. That state of affairs began to change in the wake of Prohibition: a criminal justice disaster for which national politicians and federal officials bore political responsibility. New Deal-era politicians did not wish to repeat the disaster, but they did want to find ways to capitalize on public concern about crime. How can one claim credit for fighting crime without bearing responsibility if the fight fails? A pair of young men on the rise — FBI Director J. Edgar Hoover and Manhattan District Attorney Thomas E. Dewey — answered that question in the same manner at about the same time. Thus was born the modern politics of crime.

The solution was to go after not *crimes* but *criminals*: pick a few high-profile bad guys who can be taken down, then take them down as publicly as possible. Call it the John Dillinger strategy.¹²³ In the 1950s, Hoover's FBI institutionalized that strategy with its Ten Most Wanted list, which soon became a fixture in American post offices.¹²⁴ (Hoover could have made a fortune in advertising.) Dewey was more successful still. An ambitious young lawyer on the make, he became America's first celebrity prosecutor — the Rudy Giuliani of his day,

¹²² See, e.g., ZIMRING ET AL., *THREE STRIKES*, *supra* note 16, at 194–223; Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997). For an argument that American-style symbolic politics has spread beyond our borders, see Tim Newburn & Trevor Jones, *Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton*, 1 CRIME, MEDIA, CULTURE 72 (2005).

¹²³ Dillinger's capture and death in 1934, at the hands of FBI agents, helped to make the Bureau's reputation — and Hoover's. See BRYAN BURROUGH, *PUBLIC ENEMIES: AMERICA'S GREATEST CRIME WAVE AND THE BIRTH OF THE FBI, 1933–34*, at 402–16 (2004). On Hoover's use of battles against high-profile criminals to raise his own political profile, see RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 189–93, 196–209* (1987).

¹²⁴ On the Ten Most Wanted list, see *The FBI's Ten Most Wanted Fugitives: Frequently Asked Questions*, <http://www.fbi.gov/wanted/topten/tenfaq.htm> (last visited May 12, 2008).

only bigger — by charging and convicting Richard Whitney, the disgraced head of the New York Stock Exchange, and Lucky Luciano, then New York's leading Mafia don.¹²⁵ Dewey became a national hero: *Time* magazine put him on its cover in early 1937;¹²⁶ by the summer of 1939 (Dewey was then a 37-year-old local prosecutor who had never won an election outside Manhattan), he was the leading candidate to succeed Franklin D. Roosevelt in the White House, more popular than FDR himself.¹²⁷ But for Adolf Hitler, Whitney's and Luciano's convictions might have made Dewey President — eight years before his upset loss to Harry Truman.

Other politicians noticed. SEC Chair William O. Douglas's crusade against Wall Street in the late 1930s,¹²⁸ Estes Kefauver's nationally televised Senate hearings on links between the Mafia and big-city Democratic machines in the early 1950s,¹²⁹ Robert Kennedy and the 1959 Senate Rackets Committee hearings that exposed Jimmy Hoffa,¹³⁰ even Joe McCarthy and his efforts to expose subversion in the State and Defense Departments¹³¹ — these exercises in the symbolic politics of crime were Dewey's descendants, Hoover's heirs. Douglas and McCarthy, Kefauver and Kennedy won fame and power not by fighting crime but by talking about it. The tactic worked: Douglas became the youngest Supreme Court Justice since Joseph

¹²⁵ See RICHARD NORTON SMITH, THOMAS E. DEWEY AND HIS TIMES 176–206, 249–50 (1982). Dewey convicted Luciano of multiple counts of conspiracy to commit prostitution. *Id.* at 205–06. The prostitution charges seem an obvious law enforcement tactic now, but the tactic was at least somewhat novel then: most prosecutors probably assumed that voters would attach no value to such convictions. Dewey saw that the political payoff from criminal prosecution depended more on the identity of the defendant than on the law that formed the basis of the conviction.

¹²⁶ See *Fight Against Fear*, TIME, Feb. 1, 1937, at 14.

¹²⁷ SMITH, *supra* note 125, at 285 (reporting Gallup Poll results showing Dewey as the choice of 50% of Republicans for his party's presidential nomination, and giving Dewey 58% in a head-to-head matchup with FDR). Dewey won most of the primaries in 1940 and led on the first three ballots of the Republican convention, before losing to Wendell Willkie on the sixth ballot. CHARLES PETERS, FIVE DAYS IN PHILADELPHIA 57–108 (2005); SMITH, *supra* note 125, at 294–314.

¹²⁸ See BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 124–54 (2003).

¹²⁹ JOSEPH BRUCE GORMAN, KEFAUVER: A POLITICAL BIOGRAPHY 74–102 (1971); WILLIAM HOWARD MOORE, THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME: 1950–1952 (1974).

¹³⁰ For a critical view of Kennedy's work on the Rackets Committee, see Paul Jacobs, *Extracurricular Activities of the McClellan Committee*, 51 CAL. L. REV. 296 (1963).

¹³¹ The literature on McCarthyism is massive. For a good general discussion of the Wisconsin Senator's work and legacy, see JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 196–205, 264–70 (1996) [hereinafter PATTERSON, GRAND EXPECTATIONS].

Story, and was nearly chosen as FDR's running mate in 1944.¹³² Kefauver eliminated a sitting President from the presidential race in 1952 and was a leading contender for his party's presidential nomination that year and in 1956.¹³³ Kennedy became Attorney General on the strength of a reputation for doggedness earned in the Hoffa hearings.¹³⁴ McCarthy, a dissolute drunk, was for a time one of the most powerful men in the United States.

These creative politicians changed the governance of America's justice system. Before Hoover and Dewey, the politics of crime mostly resembled the politics of fixing potholes: local voters governed local officials who administered the relevant government services locally. State legislators and members of Congress were small players; aside from the occasional vice war, substantive criminal law was not the subject of high-profile legislation. Beginning in the 1930s, that ceased to be true. The Lindbergh kidnapping prompted a federal criminal statute,¹³⁵ just as the rise of celebrity gangsters led to the National Firearms Act¹³⁶ and the Anti-Racketeering Act.¹³⁷ These bills were not designed to stamp out kidnapping or to regulate the firearms trade; rather, they were tools used to exploit the publicity surrounding famous crimes like Bruno Hauptmann's¹³⁸ and famous criminals like John Dillinger and "Pretty Boy" Floyd.¹³⁹ Over time, state legislators came to embrace the same practice, as shown by the wave of anti-carjacking laws that followed a famous Maryland crime in 1992.¹⁴⁰

¹³² On Douglas's Supreme Court appointment, see MURPHY, *supra* note 128, at 165-75. On the 1944 vice-presidential nomination, see *id.* at 211-30. The man who *was* chosen to run with FDR, Harry Truman, became President upon Roosevelt's death in April 1945. PATTERSON, *GRAND EXPECTATIONS*, *supra* note 131, at 137. It could easily have been Douglas.

¹³³ GORMAN, *supra* note 129, at 103-59, 211-65. In 1952, crime not only made Kefauver's name, but also served as his key campaign issue. See *id.* at 142.

¹³⁴ Of course, the fact that his brother was the President whose campaign he had managed had something to do with the appointment. Still, but for the Rackets Committee hearings, the selection would have been politically impossible. For a good discussion of Kennedy's appointment and the reasons for it, see VICTOR S. NAVASKY, *KENNEDY JUSTICE* xii-xx (1971).

¹³⁵ Pub. L. No. 72-189, 47 Stat. 326 (1932); see also HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 478-79 (1937).

¹³⁶ Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 18 U.S.C. § 922 (2000) and 26 U.S.C. § 5861 (2000)).

¹³⁷ Pub. L. No. 73-376, 48 Stat. 979 (1934) (replaced by the Hobbs Act, which is codified at 18 U.S.C. § 1951 (2000)).

¹³⁸ Hauptmann was convicted of first-degree murder for the kidnapping and killing of the Lindberghs' infant son. Russell B. Porter, *Hauptmann Guilty, Sentenced to Death for Murder of the Lindbergh Baby*, N.Y. TIMES, Feb. 14, 1935, at A1.

¹³⁹ See SIMON, *supra* note 18, at 46-49; see also *Staples v. United States*, 511 U.S. 600, 626 (1994) (Stevens, J., dissenting) (describing the National Firearms Act as targeting "weapons characteristically used only by professional gangsters like Al Capone, Pretty Boy Floyd, and their henchmen").

¹⁴⁰ See Stuntz, *Pathological Politics*, *supra* note 31, at 531-32 & nn.107-10.

Laws like these give prosecutors more cards to play in plea bargaining sessions, and thereby give jurors fewer opportunities to exercise the discretion that characterized criminal justice in early-twentieth-century Northern cities. Such laws also make the justice system more centralized, less locally governed.

Which leads to the second pair of trends: the rise of black crime in Northern cities and the coincident rise of middle-class white suburbs surrounding those cities. The first half of the twentieth century saw black crime rates in the North rise sharply, becoming a large multiple of white crime rates.¹⁴¹ As Roger Lane has explained, industrialization provided economic opportunity for young white men who controlled their antisocial impulses, and taught those same young men the discipline essential to orderly urban life. Blacks were largely excluded from the markets that offered the best opportunities for upward mobility — save for the years immediately before and during World War II, when the gap between black and white crime rates narrowed substantially. After the war, economic discrimination took hold again, and black crime returned to its earlier path.¹⁴²

Initially, rising black crime did not have dramatic effects on crime rates in Northern cities because those cities' black populations were small.¹⁴³ After the war, that story changed — as Table 4 shows. The Table records the murder rate and the black percentage of city population for selected Northern cities and for the nation as a whole, at ten-year intervals:

¹⁴¹ See ADLER, *supra* note 60, at 127 fig.6; Lane, *Homicide Trends*, *supra* note 69, at 70–72 & tbl.2.2. The size of the racial disparity in Northern prison populations in 1950, see *supra* note 61, suggests a large disparity in crime rates. Marvin Wolfgang's famous study of juvenile crime in Philadelphia likewise found such a disparity. See MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972).

¹⁴² For a good, brief exposition of this argument, see Lane, *Homicide Trends*, *supra* note 69, at 56–64, 70–74. William Julius Wilson used a similar argument to explain the high levels of violence and drug crime in urban black neighborhoods of the 1980s and 1990s. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 22–33 (1987); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 21–23, 55–61 (1996).

¹⁴³ See ADLER, *supra* note 60, at 134, 239 (blacks accounted for less than 5% of Chicago's population in 1920); Lane, *Homicide Trends*, *supra* note 69, at 72 tbl.2.2 (black Philadelphians were 5% of that city's population in 1900, rising to 10% by 1928).

TABLE 4. MURDER RATE AND BLACK SHARE
OF GENERAL POPULATION¹⁴⁴

City	1950		1960		1970		1980	
Boston	1.4	5%	3.9	9%	17.8	16%	16.4	22%
Chicago	7.1	14%	10.3	23%	24.1	33%	28.9	40%
Cleveland	6.8	16%	9.6	29%	36.1	38%	46.2	44%
Detroit	6.1	16%	9.0	29%	32.7	44%	45.7	63%
New York	3.7	9%	5.0	14%	14.1	21%	25.7	38%
Philadelphia	5.9	18%	7.5	26%	18.1	34%	25.8	38%
United States	5.3	10%	4.7	11%	8.3	11%	10.7	12%

As the black share of the urban North's population grew, so did the murderousness of Northern city streets. Violent crime became increasingly localized in cities with large black communities.

Meanwhile, the white suburbs surrounding those cities exploded. Both local district attorneys and trial judges are elected county-wide in the United States; metropolitan counties typically include both cities and close-in suburbs. The suburban share of those counties' populations rose in the generation after the war — and cities' share declined. In 1940, Chicagoans were 70% of the population of the Chicago metropolitan area; by 1980, their share had fallen to 42%.¹⁴⁵ Atlanta's percentage of its metropolitan population fell from 58 to 21 during those same forty years; Cleveland's fell from 69 to 30, Detroit's from 68 to 28.¹⁴⁶ Wherever counties included both urban and suburban voters, the mix of those two categories changed: suburban voters grew more numerous, and city voters less so. White suburbanites' power over local prosecutors and trial judges grew, even as those officials focused a larger share of their attention on crime in urban black neighborhoods.

¹⁴⁴ I use Eric Monkkonen's data for the figures on the United States, and for New York's murder rate in 1950. See MONKKONEN, *supra* note 89. Homicide data for the other cities are taken from UNIFORM CRIME REPORTS: 1950, *supra* note 8, at 95–99 tbl.35; UNIFORM CRIME REPORTS: 1960, *supra* note 8, at 129 tbl.38; UNIFORM CRIME REPORTS: 1970, *supra* note 8, at 185 tbl.60; and UNIFORM CRIME REPORTS: 1980, *supra* note 8, at 97–127 tbl.6. City population data, including the black percentage of various cities' populations, come from CAMPBELL GIBSON & KAY JUNG, U.S. CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1790 TO 1990, FOR LARGE CITIES AND OTHER URBAN PLACES IN THE UNITED STATES, tbls.5, 14, 22, 23, 33, 36 & 39 (2005), available at <http://www.census.gov/population/www/documentation/twps0076.html>. The black percentages of the United States population for the relevant years are taken from 1962 STATISTICAL ABSTRACT, *supra* note 1, at 24 tbl.15; and 1982 STATISTICAL ABSTRACT, *supra* note 1, at 21 tbl.24.

¹⁴⁵ See 1951 STATISTICAL ABSTRACT, *supra* note 1, tbls.55 & 56; 1981 STATISTICAL ABSTRACT, *supra* note 1, tbls.23 & 24.

¹⁴⁶ See sources cited *supra* note 145.

Of course, white residents of metropolitan areas had always governed their black neighbors, even in the North: recall that Ossian Sweet was freed by a white lawyer, white jurors, and a white judge. Before the mid-twentieth century, though, that fact had smaller effects on Northern criminal justice than one might suppose. Black neighborhoods accounted for a small fraction of Northern cities' populations. The neighborhoods that dominated urban crime — working-class white neighborhoods, mostly European immigrants and their offspring — also governed urban policing and, to a large degree, urban criminal justice generally. The lenient doctrines and practices used in blue-collar white neighborhoods spilled over to urban blacks.¹⁴⁷ The growth of large, high-crime black neighborhoods in Northern cities, along with the coincident explosion of white suburbs surrounding those cities, made that egalitarian equilibrium hard to maintain.

The third pair of trends — the rise of constitutional criminal procedure and the consequent rise of bidding-war politics — made it harder still. Before 1950, procedural litigation was a small share of criminal litigation. Criminal procedure doctrines were, by contemporary standards, simple and spare. The growth of state constitutional law in the 1950s¹⁴⁸ began to change that state of affairs. The criminal procedure revolution of the 1960s obliterated it, and thereby changed the politics of crime. As the risk of pro-defendant constitutional rulings grew, so did politicians' incentives to find ways to evade those rulings. Broader and more specific criminal prohibitions made guilty pleas easier to extract; tougher sentencing rules did the same. Coincidentally or not, criminal liability grew both broader and more rule-like after the Warren Court decisions of the 1960s, and severe sentencing rules multiplied.¹⁴⁹ Those changes added to the power of the state and

¹⁴⁷ See *supra* pp. 1987–89, 1995–96.

¹⁴⁸ See, e.g., Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1379–82, 1394, 1411 (2004). Curiously, commentary in the 1950s paid little attention to state-law developments, focusing instead on the more modest changes in federal constitutional law. See, e.g., Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

¹⁴⁹ On the rise of rule-based sentencing in the states, see ZIMRING ET AL., *THREE STRIKES*, *supra* note 16; and Symposium, *Sentencing: What's at Stake for the States?*, 105 COLUM. L. REV. 933 (2005). On the rise and (apparent) fall of detailed and severe sentencing rules for federal cases, see Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005). On the breadth of substantive criminal law, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–54 (2008). On the link between breadth and specificity, see Stuntz, *Pathological Politics*, *supra* note 31, at 515–19, 559–61, 578–79. For an argument linking substantive law's breadth to the post-1960 expansion of constitutional criminal procedure, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 802–07 (2006) [hereinafter Stuntz, *Political Constitution*].

national electorates who choose legislators, and reduced the power of the local communities from which criminal juries are drawn.

Had these trends taken hold in the Gilded Age, big-city police forces would have reduced their impact. That didn't happen. Instead, urban police forces grew more professionalized, hence more distant from the city neighborhoods officers patrolled. Police unions grew more powerful, overturning the patronage hiring practices of the past. Meritocratic hiring and seniority-based protections took hold just when the older style of police hiring would have helped black job applicants.¹⁵⁰

Pro-defendant criminal procedure doctrines were not responsible for white power over urban policing. But those doctrines were at least partly responsible for the rise of the punitive politics of crime at the national level. This point requires a brief detour. Before the 1960s, conservative politicians were either indifferent toward crime or mildly libertarian in their attitudes toward criminal defendants. Conservative Republican President William Howard Taft opposed Prohibition,¹⁵¹ his son Robert criticized the Nuremberg prosecutions.¹⁵² Save for the father's fondness for trust-busting and the son's late-career flirtation with McCarthyism,¹⁵³ neither Taft ever sought to make political hay from crime. For political conservatives, that stance was natural. Criminal punishment is an especially intrusive form of government regulation. Spending on criminal justice — including prison spending — is redistributive: money spent to warehouse poor criminals comes disproportionately from rich taxpayers' pockets. Conservative politicians dislike government regulation and redistributive spending.

Two conservative governors in the liberal 1960s — George Wallace and Ronald Reagan — upended that tradition.¹⁵⁴ Before Wallace, Southern politicians' chief goal with respect to crime was to keep the

¹⁵⁰ On the professionalizing trends in mid-twentieth-century policing, see FOGELSON, *supra* note 110, at 167–92; DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 34–38 (2008) [hereinafter SKLANSKY, *DEMOCRACY*].

¹⁵¹ See Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1540 n.109 (2002).

¹⁵² On then-Senator Taft's criticism of the Nuremberg trials on rule-of-law grounds, see JAMES T. PATTERSON, *MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT* 326–29 (1972). Taft's libertarianism ran deep: while serving in the Ohio legislature, he opposed Klan-sponsored legislation banning dancing on Sundays and mandating Bible readings in public schools. *See id.* at 96–97, 100–02.

¹⁵³ *See id.* at 445–49 (discussing the relationship between Senators Taft and McCarthy).

¹⁵⁴ Interestingly, neither Wallace nor Reagan had deep roots in American conservatism. Wallace grew to political maturity as a liberal populist and ally of "Big Jim" Folsom, one of the South's most liberal mid-century politicians. *See* STEPHAN LESHNER, *GEORGE WALLACE: AMERICAN POPULIST* 81–83, 99–101 (1994). Before his ideological conversion, Reagan was a pro-New Deal Democrat. MATTHEW DALLEK, *THE RIGHT MOMENT* 1, 29–32 (2000).

federal government away from it.¹⁵⁵ Wallace sought to keep the federal government away from civil rights — but when the subject was crime, he focused not on states' rights but on black criminals, and (even more) on the liberal white judges who allegedly protected them. His 1968 stump speech included these lines: "If you walk out of this [hall] tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday morning they'll try the policeman instead of the criminal."¹⁵⁶ As race riots struck many American cities, Wallace bragged about Alabama's version of social peace: "They start a riot down here, first one of 'em to pick up a brick gets a bullet in the brain."¹⁵⁷ Such racially charged rhetoric won votes: Wallace ran strong races in three Democratic presidential primaries in 1964; four years later, he carried five states and won 13% of the popular vote on a third-party ticket.¹⁵⁸

Reagan was more subtle — instead of rhetorical bullets to the head, Reagan noted sadly that "[o]ur city streets are jungle paths after dark"¹⁵⁹ — and also more effective. In his 1966 campaign for California's governorship, Reagan took Wallace's tough-on-crime rhetoric, made it more respectable,¹⁶⁰ and used it to draw blue-collar Democrats across the partisan aisle in huge numbers: enough to win by a million-vote margin against a seemingly unbeatable opponent.¹⁶¹ In doing so, Reagan married two political constituencies that his contemporaries

¹⁵⁵ Two generations of Southern members of Congress fought to prevent federal anti-lynching legislation. *See, e.g.*, ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 187–202*, 212–18 (2002). During his Dixiecrat campaign for the White House, Strom Thurmond told New Yorkers that federal civil rights legislation would be as much an affront to his state as a federal ban on gangland murders would be to theirs. ZACHARY KARBELL, *THE LAST CAMPAIGN: HOW HARRY TRUMAN WON THE 1948 ELECTION* 224 (2000).

¹⁵⁶ POWE, *supra* note 30, at 410 (quoting Wallace) (internal quotation marks omitted).

¹⁵⁷ Dan T. Carter, *Legacy of Rage: George Wallace and the Transformation of American Politics*, 62 *J. S. HIST.* 3, 11 (1996) (quoting Wallace) (internal quotation mark omitted).

¹⁵⁸ *See* MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 434–36, 449–51 (1990); LESHNER, *supra* note 154, at 284–85, 295, 303–04.

¹⁵⁹ DALLEK, *supra* note 154, at 195 (quoting Ronald Reagan, Speech Announcing Candidacy for Governor of California (Jan. 4, 1966)) (internal quotation mark omitted). The "jungle" reference was a clear piece of racial code. Reagan wasn't *that* subtle.

¹⁶⁰ One of Reagan's key tactics was to link urban rioting with disorder on college campuses — a largely white crime problem. *See id.* at 185–89, 195–96. That move helped him appeal to white racists without identifying himself as one of them. Reagan's gifts at that enterprise were considerable. *See, e.g.*, LOU CANNON, *GOVERNOR REAGAN: HIS RISE TO POWER* 122, 132–33, 139–40 (2003) (discussing Reagan's opposition to the Civil Rights Act of 1964); *id.* at 263–68 (detailing Reagan's efforts to appeal to Wallace supporters during his 1968 campaign for the Republican presidential nomination).

¹⁶¹ Reagan's opponent — Pat Brown, the two-term Democratic governor and father of Reagan's successor, Jerry Brown — was known as "the giant killer" because of his two previous gubernatorial victories. DALLEK, *supra* note 154, at 13–16, 20–23. Brown won the office in 1958 by beating then-Senator William Knowland, a leading presidential contender before his defeat. Four years later, Brown won reelection by beating former Vice President Richard Nixon.

thought were incompatible: economic conservatives who had opposed the New Deal and unionized workers who had formed its core base of support.

Partisan politics was transformed. To Northern and Western politicians of the 1950s and early 1960s, blacks and pro-civil rights whites were the swing voters for whose allegiance the two parties competed. Dwight Eisenhower won 40% of the black vote in 1956; Richard Nixon won nearly a third in 1960.¹⁶² While blacks were the object of partisan competition, blue-collar whites were generally seen as a core part of the Democratic base.¹⁶³ Reagan intuited that, thanks to the Kennedy and Johnson Administrations' support for civil rights, blacks and white liberals were now solidly Democratic; yesterday's swing voters didn't swing anymore. Rising crime, falling punishment, and liberal Supreme Court decisions protecting criminal defendants' procedural rights had created a new set of swing voters: blue-collar whites. That changed electoral configuration gave conservative Republicans the opportunity to build a national majority, just when that opportunity seemed most distant.

The Warren Court's criminal procedure decisions were crucial to that process, in three respects. First, those decisions allowed politicians to attack black crime indirectly by condemning the white judges who protected black criminals, not the criminals themselves. That gave conservative politicians a chance to appeal to more than racist whites. Second, the Court made street crime — violent felonies and felony thefts: classic state-law crimes — a national political issue for the first time in American history. One reason crime played a larger role in national politics in the last decades of the twentieth century than ever before¹⁶⁴ is that national politicians could talk about the kinds of crime that voters most feared: not Mafia corruption or labor racketeering¹⁶⁵ but robbery and burglary, murder and rape. Earlier generations had assumed that only local officials concerned themselves with such crimes. Earl Warren changed that political equation. Third, because the Court was the Court, crime talk was cheap talk: politicians couldn't change the constitutional rulings that prompted so

¹⁶² On Eisenhower's vote, see DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at 158 (1982); on Nixon's, see BARONE, *supra* note 158, at 557.

¹⁶³ Democrats won the large congressional majority they held throughout the 1960s in the off-year election of 1958, in which Republican candidates throughout the country campaigned for anti-union right-to-work laws. See BARONE, *supra* note 158, at 301-04.

¹⁶⁴ For the best discussion to date, see SIMON, *supra* note 18.

¹⁶⁵ The focus of Estes Kefauver's Senate hearings in 1950-1951 was Mafia influence over big-city Democratic machines. Robert Kennedy first won fame as chief counsel to the Senate committee holding hearings on labor racketeering in the late 1950s — the same hearings that made Jimmy Hoffa a household name. See *supra* pp. 1999-2000.

much controversy, so their criticisms were unburdened by the need to exercise governing responsibility.

Reagan and Wallace exemplified that last point. California's imprisonment rate fell by nearly half during Reagan's two terms in Sacramento.¹⁶⁶ Alabama's imprisonment rate did likewise under Wallace.¹⁶⁷ Neither of these tough-on-crime governors did anything to reverse those trends. Their tough rhetoric was just that: rhetoric, with no discernible policy implications. Like Kefauver's hearings and Hoover's Ten Most Wanted list, the conservative politics of crime was an exercise in political symbolism that seemed to have no substantive consequences.

But symbols do not remain purely symbolic for long; substantive consequences have a way of catching up to them. When conservatives like Reagan, Wallace, and Nixon¹⁶⁸ won blue-collar white votes by attacking soft judges and (indirectly) black criminals, liberal politicians were forced to respond. Liberal Democratic President Lyndon Johnson supported and signed legislation that funneled money to local police and purported to overrule *Miranda v. Arizona*:¹⁶⁹ the Omnibus Crime Control and Safe Streets Act of 1968,¹⁷⁰ the first of what became a long series of federal crime bills targeting urban street crime.¹⁷¹ Liberal Democratic presidential candidate Robert Kennedy made tough measures against urban disorder a centerpiece of his campaign for his party's nomination.¹⁷² Jimmy Carter — embodiment of the Southern left in the early 1970s — presided over a 40% increase in Georgia's imprisonment rate as governor, while neighboring Alabama's prison population stagnated.¹⁷³ Liberal Republican Governor Nelson Rockefeller proposed ramped-up penalties for heroin offenders; the so-called Rockefeller laws became the model for the next wave of

¹⁶⁶ California's imprisonment rate fell from 146 in 1966 to 84 in 1972. See *supra* note 17.

¹⁶⁷ Between 1962 and 1976, Alabama's imprisonment rate fell from 166 to 83. See *supra* note 17. George and Lurleen Wallace won all four of the gubernatorial elections during those fourteen years.

¹⁶⁸ Like Wallace and Reagan before him, Nixon was no life-long conservative. In 1960, he sought the White House by running to the left, seeking and winning Nelson Rockefeller's support and angering Barry Goldwater and the Republican right in the process. See BARONE, *supra* note 158, at 330. In 1968, Nixon switched sides, winning longtime segregationist Strom Thurmond's support at the cost of alienating the pro-civil rights Rockefeller wing of the party. See *id.* at 442. The "law and order" issue played a key role in that right turn, and in Nixon's subsequent victory. See MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 162–78 (2005).

¹⁶⁹ 384 U.S. 436 (1966).

¹⁷⁰ Pub. L. No. 90-351, 82 Stat. 197. For the story of Johnson's involvement with this legislation, see FLAMM, *supra* note 168, at 132–41.

¹⁷¹ See NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960–1993 (1994).

¹⁷² See FLAMM, *supra* note 168, at 148–50.

¹⁷³ See 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72.

tough state drug statutes.¹⁷⁴ The same year Rockefeller signed the laws that bore his name, New York's imprisonment rate turned up after fifteen years of decline.¹⁷⁵

For the balance of the 1970s — as liberal Democrats controlled Congress, two-thirds of state legislatures, the large majority of governorships, and nearly all big-city mayoralities — prison populations rose steadily, after falling throughout the country in the preceding dozen years.¹⁷⁶ America's punitive turn did not come from the political right, at least not initially. Rather, the rise in punishment came from the left's response to the right's rhetoric.¹⁷⁷ That response soon bred its own response. Once liberal politicians like Johnson and Kennedy embraced punitive politics, the right's bluff had been called. Conservative politicians had two choices: they could back down, cede the crime issue to their liberal opponents and admit that their tough rhetoric was cheap talk. Or they could follow suit, and ramp up punishment still more.

They followed suit. Reagan was once again a key player, the model for his party and for his ideological camp. As Governor, he had specialized in combining tough talk with soft policy, or no policy at all. As President, his walk matched his talk: he signed into law the most draconian piece of drug legislation to date;¹⁷⁸ partly as a consequence, the federal imprisonment rate doubled in the 1980s.¹⁷⁹ In an increasingly conservative age, state prison populations saw similar trends.¹⁸⁰ The conservative politics of crime remained symbolic at its core — but the symbolism worked only if conservatives were seen as tougher than liberals. What began as a political bluff had become a bidding war.

¹⁷⁴ See Alan Chartock, *Narcotics Addiction: The Politics of Frustration*, PROC. ACAD. POL. SCI., May 1974, at 239, 242–48.

¹⁷⁵ The Rockefeller laws were signed in 1973. New York's imprisonment rate fell in at least ten of the preceding fifteen years (data concerning two of the remaining five years are missing). For the data, see the annual volumes of STATISTICAL ABSTRACT, *supra* note 1. 1973 saw the first of twenty-seven consecutive increases in that rate. 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72; 2003 SOURCEBOOK, *supra* note 2, at 501 tbl.6.29.

¹⁷⁶ Between 1972 and 1980, the nation's imprisonment rate rose by half, after falling by 22% in the preceding eleven years. See ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006.

¹⁷⁷ Cf. SIMON, *supra* note 18, at 49–52 (discussing Robert Kennedy's posture toward crime); *id.* at 90–101 (same, regarding Lyndon Johnson).

¹⁷⁸ For the best account, by far, of the passage of the federal legislation that mandated the hundred-to-one crack/powder sentencing ratio — meaning, possession of one gram of crack cocaine is punished as severely as possession of one hundred grams of cocaine powder — see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) [hereinafter Sklansky, *Cocaine and Race*].

¹⁷⁹ In 1980, the year before Reagan took office, the federal imprisonment rate was 9 per 100,000. By 1989 — the year Reagan left the White House — the federal imprisonment rate had risen to 19. ONLINE SOURCEBOOK, *supra* note 2, tbl.6.29.2006.

¹⁸⁰ From 1980 to 1989, the state imprisonment rate rose from 130 to 253. *Id.*

The bidding war continued through the 1990s, when liberal Democrats faced the same problem that conservative Republicans faced in the 1980s, and embraced the same solution. Ann Richards served as the Democratic Governor of Texas from 1991 to 1995; she followed Republican Bill Clements and was replaced by Republican George W. Bush. Under Clements and Bush, Texas's imprisonment rate rose 29% and 5%, respectively; under Richards, it rose 128%.¹⁸¹ Democrat Mel Carnahan replaced Republican John Ashcroft as Missouri's Governor in 1993. In Ashcroft's two terms in office, Missouri's prison population grew more slowly than the nation's; in Carnahan's two terms, the number of Missouri prison inmates grew almost twice as fast as the national average.¹⁸² Democrat Douglas Wilder's four years in the Virginia statehouse saw that state's imprisonment rate increase 46%. Under Wilder's Republican replacement — George Allen, who campaigned on a promise of ending parole¹⁸³ — imprisonment fell 2%.¹⁸⁴

The moment that best captured both liberals' dilemma and their response to it came shortly before the New Hampshire primary in 1992. Then-Governor Bill Clinton, falling in the polls, returned to Arkansas to supervise the execution of a mentally retarded black inmate named Ricky Ray Rector.¹⁸⁵ It worked: Clinton finished a close second in New Hampshire, and went on to win the White House. The Rector execution was Clinton's gruesome answer to the elder George Bush's use of Willie Horton to defeat Michael Dukakis four years earlier. The character of the answer captures the relevant political dynamic. This was no philosophical argument between opposing sides; rather, it was a war of images in which, strangely, both sides sought to send the same message. As the Horton and Rector incidents illus-

¹⁸¹ See *id.* The figures in this paragraph were calculated using the imprisonment rates reported in the Online Sourcebook as of December 31 of the relevant years. Since governors usually begin their terms in early January, there is a nearly year-long time lag between the beginning of each new governor's term and the imprisonment rate which, in the text, I attribute to that governor's administration. The time lag is consciously chosen; it ordinarily takes at least a year for state-level policy decisions to have significant effects on the relevant state's imprisonment rate.

¹⁸² From 1985 to 1993 — Ashcroft's term as Missouri's governor — the state's imprisonment rate rose from 194 to 308, an increase of 59%, while the nation's imprisonment rate rose from 200 to 350: a 75% increase. *Id.* In Ashcroft's second term, imprisonment rose a mere 15%; in his last two years in office, the rise was less than 1% — compared to a 13% increase in the nation as a whole. *Id.* From 1993 to 2001 — Carnahan died in October 2000; a Democratic successor served the balance of his second term — Missouri's imprisonment rate rose from 308 to 509, an increase of 65%; the nation's imprisonment rate rose 34% during those eight years. See *id.*

¹⁸³ Donald P. Baker, *Winner Talks Tough, Cites Mandate for Change*, WASH. POST, Nov. 4, 1993, at A1.

¹⁸⁴ ONLINE SOURCEBOOK, *supra* note 2, tbl.6.29.2006.

¹⁸⁵ See Christopher Lydon, *Sex, War, and Death: Covering Clinton Became a Test of Character — For the Press*, COLUM. JOURNALISM REV., May–June 1992, at 57, 60.

trated, the politics of crime had devolved into a game of can-you-top-this.

Bush probably found Lee Atwater's Horton ad distasteful,¹⁸⁶ and Clinton may have felt similarly about Rector's execution. If so, the two presidents' distaste highlights an important feature of late-twentieth-century politics: right and left alike supported criminal justice policies that, in principle, they found repugnant. The Reaganite right disbelieved in big government, yet helped create a prison system of unprecedented scope and size. The Clintonian left opposed racially discriminatory punishment, yet reinforced and expanded the most racially skewed prison population in American history. The source of this conflict between politics and principle was the same on both sides. Crime policy was not a means of addressing crime — and the policy's consequences for the poor blacks who were both victimized by crime and punished for it were, politically speaking, irrelevant. Each side supported punitive policies because the other side had done so, and because changing course seemed politically risky.

Such political stances worked because the votes that mattered most — the votes for which the two parties competed, the ones most likely to switch sides if the other side's crime posture seemed more attractive — were not the votes of crime victims and their friends and neighbors, much less of criminal defendants and *their* friends and neighbors. They were the votes of those for whom crime was at once frightening and distant, those who read about open-air drug markets and the latest gang shootings in the morning paper. Neighborhood democracy faded, and was replaced by a democracy of angry neighbors. The consequence was much more criminal punishment, distributed much less equally.

B. Lenity and Severity

The last half of the twentieth century saw two dramatic "turns" in criminal justice. The second is famous: the generation-long punitive turn that drove American prison populations into the stratosphere. The first is less well known: a generation-long lenient turn that saw criminal punishment collapse in Northern cities, in the midst of an unprecedented crime wave. Table 5 captures the magnitude of these two opposite trends. The Table lists the city homicide rate and state imprisonment rate for seven cities: two each from the South, Northeast, and Midwest, and one from the West Coast. Notice the difference between the two Southern cities and the rest:

¹⁸⁶ Even Atwater appears to have found it distasteful, after the fact. See John Brady, "I'm Still Lee Atwater," WASH. POST MAG., Dec. 1, 1996, at 16, 45 (discussing Atwater's deathbed apology for his treatment of the Horton issue).

TABLE 5. CITY HOMICIDE RATE AND STATE IMPRISONMENT RATE, SELECTED CITIES, 1950–2005¹⁸⁷

<i>City</i>	<i>1950</i>		<i>1972</i>		<i>1991</i>		<i>2005</i>	
Atlanta	30.5	155	52.8	174	50.9	342	20.9	533
Houston	15.3	77	22.5	136	36.5	297	16.3	691
Boston	1.4	55	16.6	32	19.7	143	12.9	239
New York	3.7	103	21.9	64	29.5	320	6.6	326
Chicago	7.1	91	21.6	50	32.9	247	15.6	351
Detroit	6.1	135	41.5	94	59.3	388	39.3	489
Los Angeles	3.2	98	17.6	84	28.9	318	12.6	466

In Atlanta and Houston, the lenient turn never happened; punishment and crime rose in tandem through the 1950s and 1960s.¹⁸⁸ In the following three decades, Southern prison populations kept rising while crime rates plateaued, then fell to something like mid-century levels. In the rest of the country, imprisonment rates fell by one-third or more during the 1950s and 1960s, while criminal violence rose through the roof. In some places, punishment per unit crime appears to have fallen by more than 80%: a stunningly large decline.¹⁸⁹ Then, beginning in the mid-1970s, *punishment* rose through the roof — yet crime kept rising. Just when no one thought it could happen crime fell substantially

¹⁸⁷ The left column under each year notes the relevant city's homicide rate; the right column notes the relevant state's imprisonment rate. For New York's homicide rate in 1950, I use Eric Monkkonen's data. See MONKKONEN, *supra* note 89. For the other listed homicide rates, see UNIFORM CRIME REPORTS: 1950, *supra* note 8, at 94–98 tbl.35; UNIFORM CRIME REPORTS: 1972, *supra* note 8, at 218 tbl.76; UNIFORM CRIME REPORTS: 1991, *supra* note 8, at 112–50 tbl.8; and CRIME IN THE UNITED STATES: 2005, *supra* note 8, tbl.8. City populations for 1972 (used in computing city homicide rates) are extrapolated from the populations for 1970 and 1980, which can be found in GIBSON & JUNG, *supra* note 144, tbls.5, 11, 14, 22, 23, 33 & 44, as can city populations for 1950. Georgia's imprisonment rate in 1950 is taken from CAHALAN, *supra* note 7, at 30 tbl.3-3. For other states' 1950 imprisonment rates, see 1952 STATISTICAL ABSTRACT, *supra* note 1, at 14 tbl.11, 146 tbl.175. For later imprisonment rates, see 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72; and ONLINE SOURCEBOOK, *supra* note 2, tbl.6.29.2006.

¹⁸⁸ Georgia did experience a brief period of declining prison populations — but it lasted a mere six years and was quickly reversed. In 1964, the state's imprisonment rate stood at 168 per 100,000. 1966 STATISTICAL ABSTRACT, *supra* note 1, at 11 tbl.9, 162 tbl.232. By 1970, that rate had fallen to 111. 1972 STATISTICAL ABSTRACT, *supra* note 1, at 11 tbl.10, 161 tbl.264. Two years later, the imprisonment rate had risen to 174. 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72.

¹⁸⁹ In Boston, Detroit, and New York, prisoner-years per murder fell by 90% or more. The actual drop in punishment per unit crime was no doubt smaller, since imprisonment rates are state-wide while the homicide rates in Table 5 are city-wide. If the drop in imprisonment was felt most where crime rates were lowest, then falling punishment in high-crime cities was less extreme than the figures suggest. Still, it was extreme enough.

beginning in 1992.¹⁹⁰ Even after what Frank Zimring calls “the great American crime decline”¹⁹¹ of the 1990s, violent crime in Northern cities remains much higher than the pre-1960 historical norm.

If a common theme runs through these cross-cutting trends, the theme is instability. The last half of the twentieth century was an age of disequilibrium: rising and falling crime plus steeply rising punishment in the South, unprecedented crime increases coupled with equally unprecedented punishment decreases *and* increases in the North. It was also an age of inequality — but this time, the geographic focus of the inequality was the pro-civil rights North, not the Jim Crow South.

In the South, the paradigmatic victim of discriminatory criminal justice in mid-century America was Emmett Till, the black teenager from Chicago who was murdered for whistling at a white woman in the inaptly named town of Money, Mississippi in 1955.¹⁹² Surprisingly, Till’s white killers were charged with the crime and brought to trial; less surprisingly, they were swiftly acquitted.¹⁹³ The basic story of the Till case — the justice system failed to protect a black victim from his white victimizers — had long been common in the South. That form of discrimination was declining by mid-century, as the prosecution of Till’s killers illustrated. South Carolina’s imprisonment rate almost tripled during the 1940s and 1950s; North Carolina’s rate doubled, and Virginia’s nearly did so.¹⁹⁴ The largely privatized system of law enforcement that had long ignored crimes against black victims — the system Hortense Powdermaker described in her study of Depression-era Mississippi¹⁹⁵ — was dying, and increasingly populous Southern prisons were a sign of its demise. Less discriminatory law enforcement meant more punishment for crimes victimizing blacks, which in turn meant rising levels of black incarceration:¹⁹⁶ in the mid-twentieth-

¹⁹⁰ See generally THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2000).

¹⁹¹ FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007).

¹⁹² STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL 15–23 (1988).

¹⁹³ *Id.* at 22–24, 33–48. Shortly after their acquittal, the killers confessed to the author of an article published in *Look* magazine; the consequent story detailed how they committed the crime. *Id.* at 51–55.

¹⁹⁴ CAHALAN, *supra* note 7, at 30 tbl.3-3.

¹⁹⁵ See *supra* notes 59–61 and accompanying text.

¹⁹⁶ Race-specific imprisonment data from the Jim Crow South are hard to come by, but the available evidence supports the claim in the text. Between 1937 and 1964, the annual number of blacks admitted to state prison rose 79% in North Carolina, 43% in South Carolina, 94% in Florida, and 58% in Texas. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PRISONERS IN STATE AND FEDERAL PRISONS AND REFORMATORIES: 1937, at 28 tbl.22; FED. BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS: STATE PRISONERS: ADMISSIONS AND RELEASES, 1964, at 23 tbl.A8. Between the 1940 and 1960 censuses, the black population rose 14% in North Carolina, 2% in South Carolina, 71% in Florida, and 28% in Texas. See 1965 STATISTICAL ABSTRACT, *supra* note 1, at 26 tbl.23.

century South as in the twenty-first-century Northeast, most crime was intraracial.¹⁹⁷

While inequality was falling in the South, it was rising in the North — in two distinct ways, serially. First, punishment in high-crime cities all but collapsed, in the midst of the worst crime wave in American history. As Table 5 suggests, prison populations fell most in the places where that crime wave crested highest: throughout the urbanized Northeast and Midwest.¹⁹⁸ Taken together, those trends were revolutionary. After the early 1970s, Americans saw a revolution of a different sort, as imprisonment rates soared. The number of white inmates shattered records. The number of black inmates shattered communities.¹⁹⁹

The consequences of these two “turns” were disproportionately felt in black neighborhoods. During the 1960s, imprisonment fell more among whites (26%) than among blacks (19%)²⁰⁰ — but that fact may be due chiefly to Southern trends,²⁰¹ and the massive crime wave that coincided with falling punishment was focused on mostly black inner cities, not on the white suburbs. In the five non-Southern cities listed in Table 5, the murder rate rose an average of 562% between 1950 and 1972. In the nation as a whole, murders rose 77% during those years.²⁰² The combination of skyrocketing crime and falling punishment hit Northern cities, and black neighborhoods within them, hardest.

The second trend is more familiar: after abandoning black neighborhoods in the 1950s and 1960s, Northern law enforcement agencies punished young men in those neighborhoods in numbers never before seen — reinforcing a trend that was already underway in the South. Strangely, the same political and legal changes that helped cause the lenient turn of the twentieth century’s third quarter also reinforced the punitive turn of its last quarter.

With respect to politics, the preceding section tells the story. Suburban voters cared less about urban crime than did the residents of city neighborhoods; falling punishment in an era of rising crime was

¹⁹⁷ See, e.g., POWDERMAKER, *supra* note 53, at 395–96.

¹⁹⁸ See CAHALAN, *supra* note 7, at 30 tbl.3-3, 38 tbl.3-10. Cahalan’s figures show that the biggest imprisonment drops came in the Midwest and West, as well as in New York — the largest state in the Northeast.

¹⁹⁹ For the best discussion to date, see WESTERN, *supra* note 49.

²⁰⁰ See CAHALAN, *supra* note 7, at 65 tbl.3-31.

²⁰¹ Black imprisonment was rising in the South during Jim Crow’s last days. See sources cited *supra* note 196. State-level demographic data on prison populations during these years are sparse, but it could well be that, in the Northeast and Midwest, the decline in black imprisonment outstripped the decline in white imprisonment.

²⁰² In 1950, the murder rate for the United States as a whole stood at 5.3 per 100,000; by 1972, that rate had risen to 9.4. See sources cited *supra* note 89.

the natural consequence of suburban indifference. Both the number of urban police officers per unit population and the urban arrest rate rose during the 1960s,²⁰³ even as prison populations fell. Those facts suggest that prosecutors and judges, not police officers, were the chief reasons for declining punishment. Then as now, urban police forces worked for city governments; prosecutors and trial judges were usually elected county-wide. The officials who cared most about suburban voters' preferences drove punishment levels down.²⁰⁴

After the early 1970s, indifference gave way to anger; voters sought something more tangible than tough rhetoric about urban crime. Local district attorneys responded.²⁰⁵ Voters in poor city neighborhoods might have limited the turn toward more punishment, but they were outvoted by the suburbs. Local juries might have made the punitive turn less punitive by acquitting large numbers of defendants, as Chicago juries had done two generations before. But changes in substantive law made acquittals harder to win, and the rising number of guilty pleas left few trials in which to win them. Fiscal cost might have signaled that the punishment wave had gone too far, but thanks to nineteenth-century institutional arrangements, state taxpayers paid for prison beds while local voters chose the prosecutors who filled them.²⁰⁶ To the suburban voters who chose big-city district attorneys, criminal punishment was nearly a free good. Naturally, they "bought" too much of it.

While states paid the tab for growing prison populations, no comparable subsidy swelled the ranks of urban police forces. Local governments pay 90% of the cost of policing in their jurisdictions, and

²⁰³ According to FBI data, the number of police employees per 100,000 urban population stood at 189 in 1960; the city arrest rate stood at 4762 per 100,000. UNIFORM CRIME REPORTS: 1960, *supra* note 8, at 95 tbl.20, 105 tbl.31. By 1969, the former number had risen to 216, and the latter to 4876. UNIFORM CRIME REPORTS: 1969, *supra* note 8, at 127 tbl.37, 148 tbl.49.

²⁰⁴ To some degree, falling criminal punishment was due to liberal prosecutors' and judges' ideological aversion to incarcerating criminals. For a good account of this skeptical ideology, see GARLAND, *supra* note 18, at 46–51. But suburban voters' indifference was crucial: without it, those liberal prosecutors and judges would have lacked the freedom to indulge their lenient preferences.

²⁰⁵ Between 1974 and 1990, the number of local prosecutors in the United States rose from 17,000 to 20,000 — an increase of 18%. Between 1978 and 1991, the number of felony charges filed in state court more than doubled. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 9 n.19, 25 (1997) [hereinafter Stuntz, *Uneasy Relationship*], and sources cited therein.

²⁰⁶ This crucial fact was ignored in the legal literature until Robert Misner's brilliant article highlighted it. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996). For an interesting discussion of the interjurisdictional competition that these institutional arrangements foster, see Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831 (2005).

that percentage has been stable over time.²⁰⁷ Predictably, police budgets have grown much more slowly than prison budgets. The number of prison inmates per unit population more than tripled in the 1970s and 1980s; the number of urban police officers per capita held steady.²⁰⁸ Police officers and prison cells are substitutes: alternative means by which governments spend money to battle crime. In the last thirty-five years, the mix of those two alternatives has changed radically: in 1970, there were more than twice as many local cops as inmates; today, there are more than twice as many inmates as local cops.²⁰⁹ Local governments largely determine the character of the mix — cities and counties hire and pay for the police officers who patrol their streets, and local district attorneys decide whom to prosecute and for what charges. But those same local governments pay for only one of the two alternatives.

Notice: The decline of local democracy did not inevitably produce more punishment, nor did it inevitably produce less. As in the early-twentieth-century South, it produced both: first much less punishment, then vastly more. The crucial regulating mechanisms that governed Northern cities' justice systems in the Gilded Age — juries selected from the local population, prosecutors elected by city voters (because suburban populations were small), police forces ruled by urban machines that depended on working-class immigrant votes for their survival — faded or disappeared. Bureaucratic detachment, legal procedure, and symbolic politics took their place. The consequences were poor crime control, rapidly changing punishment practices, and massive inequality.

Far from checking political excess, constitutional law encouraged it — in both directions. The key mechanism was price. Protective procedures adopted in the 1960s raised the price law enforcers paid for arrests and convictions when urban violence was already rising, and when punishment for it was falling. Urban arrests fell sharply in the

²⁰⁷ For the current figures, see ONLINE SOURCEBOOK, *supra* note 2, tbl.1.4.2003. For budget data from the early 1970s, see 1974 SOURCEBOOK, *supra* note 2, at 33 tbl.1.2.

²⁰⁸ On the imprisonment data, see 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72. According to FBI data, the number of urban police officers per 100,000 population rose from 204 in 1970 to 211 in 1974; in 1989 it stood at 210. See UNIFORM CRIME REPORTS: 1970, *supra* note 8, at 163 tbl.51; UNIFORM CRIME REPORTS: 1974, *supra* note 8, at 236 tbl.57; UNIFORM CRIME REPORTS: 1989, *supra* note 8, at 238 tbl.66.

²⁰⁹ The numbers of prison inmates and police officers per 100,000 population in 1970 were 96 and 204, respectively. ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006; UNIFORM CRIME REPORTS: 1970, *supra* note 8, at 163 tbl.51. In 2005, the analogous numbers were 491 and 230. ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006; CRIME IN THE UNITED STATES: 2005, *supra* note 8, tbl.71.

decade's first half,²¹⁰ after *Mapp v. Ohio*²¹¹ imposed the Fourth Amendment's exclusionary rule on state courts. The drop in imprisonment accelerated in the decade's second half,²¹² when most of the key Court decisions regulating criminal trials took hold. After 1970, when political pressures began pushing punishment levels up, procedural doctrine changed again: this time, making both arrests and convictions cheaper for the government. The law made punishment more costly when there was too little of it, and cheaper when there was far too much.

The first step in that progression is straightforward. The level of procedural regulation, both of policing and prosecution, was already on the rise when the 1960s began: state appellate courts were rapidly adopting protective procedures like the exclusionary rule and state-appointed lawyers before the Supreme Court required them to do so.²¹³ The Court accelerated that process, beginning in 1961 with *Mapp*. Later in the decade, the Justices constitutionalized the right to counsel (on appeal as well as at trial),²¹⁴ the right to discovery,²¹⁵ the law of self-incrimination,²¹⁶ the right of compulsory process,²¹⁷ the right to a jury trial,²¹⁸ and the right to be free from double jeopardy.²¹⁹ These decisions did not transform state-court criminal processes: all the procedural elements just mentioned already existed; indeed, most had existed for centuries, which explains their inclusion in the Bill of Rights. The chief effect of Warren-era criminal procedure decisions was to raise the level of legal uncertainty. The boundaries of rights that had been long settled became hotly contested. Contested doctrine attracts litigation. Procedural claims mushroomed.²²⁰

²¹⁰ In 1961, the FBI's "city arrests" data showed 4776 arrests per 100,000 urban population; by 1964, that figure had fallen to 4325. See UNIFORM CRIME REPORTS: 1961, *supra* note 8, at 97 tbl.23; UNIFORM CRIME REPORTS: 1964, *supra* note 8, at 123 tbl.30.

²¹¹ 367 U.S. 643 (1961).

²¹² Illinois's imprisonment rate stood at 90 per 100,000 in 1960, falling to 78 in 1965, then dropping to 57 in 1970. New York's imprisonment rate fell from 109 in 1957 to 97 in 1965, then fell to 66 in 1970. Georgia's rate was 178 in 1959 — Southern prison populations were larger than Northern ones — declined to 170 in 1964, then fell sharply to 111 in 1970. California's imprisonment rate rose in the early 1960s, from 137 in 1960 to 146 in 1966, before dropping to 87 in 1971. These data are taken from the relevant volumes of the STATISTICAL ABSTRACT, *supra* note 1, and from 1992 SOURCEBOOK, *supra* note 2, at 609 tbl.6.59.

²¹³ See Lain, *supra* note 148, at 1379–82, 1389–99.

²¹⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trials); *Douglas v. California*, 372 U.S. 353 (1963) (appeals).

²¹⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

²¹⁶ *Malloy v. Hogan*, 378 U.S. 1 (1964).

²¹⁷ *Washington v. Texas*, 388 U.S. 14 (1967).

²¹⁸ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²¹⁹ *Benton v. Maryland*, 395 U.S. 784 (1969).

²²⁰ I have explained this dynamic elsewhere. See Stuntz, *Uneasy Relationship*, *supra* note 205, at 35–52.

These destabilizing court decisions arose from egalitarian motives: the Justices saw the Bill of Rights as a procedural Equal Protection Clause, a means of assisting poor black suspects and defendants as they battled a criminal justice system run by and for wealthier whites.²²¹ To a surprising degree, the Justices' egalitarian goals were fulfilled. Not only did arrests fall in the 1960s — arrests of black suspects fell more, and in a time of rising black crime.²²² Imprisonment rates fell too, at a time when rich criminal defendants were a rare breed. And the trial process grew friendlier to poor defendants, at least as a relative matter. A large number of studies across a wide range of jurisdictions over a period of several decades show that indigent criminal defendants — defendants poor enough to receive state-paid lawyers — achieve as good or better outcomes as defendants who hire their own lawyers.²²³ The criminal procedure decisions of the 1960s explain that surprising result.

But pendulums that swing in one direction tend to swing back. The very doctrines that raised the cost of policing and prosecution created political pressure to *reduce* those costs. The consequence was a more streamlined process than the one that existed before Earl Warren and his fellow Justices crafted their constitutional revolution.

The character of the relevant procedural rules offered a ready means of reducing the legal “tax” Warren and his colleagues had imposed on law enforcers. That tax consisted almost entirely of procedural rights exercised by individual suspects and defendants. In American law, individuals who hold legal rights may use them as they wish: rights are like alienable property interests, waivable at will by rightholders. Cutting Warren's procedural taxes was easy: one need only establish generous waiver rules, and help police and prosecutors to induce as many waivers as possible. After 1970, the Supreme Court took the first step, while legislators took the second. Police officers

²²¹ Race is the familiar subtext of Warren-era criminal procedure doctrine. See sources cited *supra* note 30. David Sklansky persuasively argues that a less familiar subtext — police oppression of gay Americans — likewise influenced the criminal procedure decisions of the 1960s. See David Alan Sklansky, “One Train May Hide Another”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875 (2008). Notice that both subtexts concern inequality: the central theme of the law of criminal procedure.

²²² According to the FBI's city arrest data, the arrest rate fell 9% from 1961 to 1964; the rate of black arrests fell 12%. See UNIFORM CRIME REPORTS: 1961, *supra* note 8, at 97 tbl.23; UNIFORM CRIME REPORTS: 1964, *supra* note 8, at 123 tbl.30. As a percentage of the urban black population, black arrests fell 18%. See 1976 STATISTICAL ABSTRACT, *supra* note 1, at 18 tbl.19. By 1969, the overall arrest rate was slightly higher than in 1961 — but the black arrest rate was 6% lower. UNIFORM CRIME REPORTS: 1969, *supra* note 8, at 127 tbl.37.

²²³ For a recent example, see HARLOW, *supra* note 10. Older studies to the same effect are discussed in Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 365–78 (1991).

and prosecutors reaped the benefit: dramatic rises in rates of arrest, prosecution, conviction, and imprisonment.

Fourth Amendment law bars intrusive searches without probable cause and, sometimes, a warrant. If the target of the search consents to it, however, the warrant and probable cause requirement go by the boards. Post-1970 Supreme Court decisions make obtaining consent easy: police need only ask; if the circumstances suggest that police requests are the functional equivalent of commands,²²⁴ so much the better.²²⁵ Fifth Amendment law bars the interrogation of arrested suspects without a voluntary, knowing, and intelligent waiver of the suspects' rights to remain silent and to the assistance of counsel.²²⁶ Such waivers are easily induced, given the generous *Miranda* waiver doctrines the post-*Miranda* Court has crafted.²²⁷ The various trial rights the Constitution guarantees apply only to defendants who take their cases to trial. Guilty pleas waive those rights, and the state is free to use even extortionate threats to induce pleas.²²⁸

In all these areas, constitutional law establishes procedural hurdles the state must clear — but also creates cheap alternatives if clearing those hurdles seems too costly. The net result is to make searches, interrogations, and criminal prosecutions cheaper, not more expensive. Mike Seidman captured the dynamic in a brilliant article about *Miranda* doctrine in the early 1990s.²²⁹ Before *Miranda*, courts reviewed police interrogation under a voluntariness standard. Since that decision, judges have relied on *Miranda*'s warnings and invocation rules to ensure that confessions are the product of suspects' free choice. Consequently, Seidman notes, confessions that might have been suppressed before *Miranda* are routinely admitted today.²³⁰ Before *Mapp v. Ohio*, the probable cause requirement applied to local police searches but was not rigorously enforced, because of the absence of a binding exclusionary rule. In the age of consent searches, probable

²²⁴ For a study showing that most people do think that — even people who are unusually well-informed about their legal rights — see David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 98 J. CRIM. L. & CRIMINOLOGY (forthcoming Jan. 2009).

²²⁵ See *Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153.

²²⁶ E.g., *Moran v. Burbine*, 475 U.S. 412, 420–28 (1986) (explaining the meaning of these terms).

²²⁷ See William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 982–86 (2001) (summarizing *Miranda* waiver doctrines).

²²⁸ See, e.g., *Miles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995) (prosecutors threatened to imprison defendant's parents if defendant refused to plead guilty; plea was held voluntary); *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992) (prosecutors threatened to imprison defendant's wife if defendant refused to plead guilty; plea was held voluntary).

²²⁹ Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992).

²³⁰ *Id.* at 742–47.

cause rarely applies — police need *no* cause once they have consent: and today, they nearly always have consent.²³¹ Before the 1960s, criminal trials were more casual than today, but still common. Today's more elaborate trials are rare events.²³² Fourth Amendment searches, police station confessions, and criminal convictions alike are probably cheaper now than before Warren and his colleagues crafted their procedural code. The law of criminal procedure raised the cost of policing and prosecution when that cost was already too high, and lowered it when the cost was already too low. The consequence was to make *both* the punishment drop of the 1960s *and* the punishment rise of the following three decades larger and more destructive.

C. Violence and Drugs

Consider a recent story about a Boston gang bust:

Authorities said yesterday they are keeping a promise to prosecute 25 members of a violent street gang they hold responsible for 57 shootings and six slayings in Dorchester and Mattapan in two years.

The Lucerne Street Doggz, who authorities said have about 40 members ranging in age from 18 to 28, now face federal and state gun and drug trafficking charges that could keep some jailed for up to 40 years.

“We told them we wanted them to put their guns down,” Police Commissioner Edward F. Davis said at a press conference

“The ones that continued are being prosecuted today,” Davis said. “We are following through on the warning that was issued.”

. . . .

Seeking to break the gang's grip and improve the quality of life for residents, authorities said, they held two meetings last year involving gang members, police, job training groups, members of the 10 Point Coalition, and law enforcement.

During the meetings, dubbed Operation Ceasefire, authorities detailed the prison sentences that courts can impose for crimes involving guns and drugs, according to an affidavit by Boston police Sergeant John J. Ford.²³³

²³¹ See Nadler, *supra* note 225, at 208–10.

²³² In a 1962 study of criminal litigation in twenty-eight counties, the author found a plea rate of 74% for defendants with court-appointed lawyers and 48% for defendants with retained counsel. See 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 22–23 tbls.3, 4 (1965). (The latter category was a good deal larger than it is now. See *infra* note 266.) Forty years later, a study of criminal litigation in seventy-five metropolitan counties found that 95% of felony convictions were obtained by guilty plea. ONLINE SOURCEBOOK, *supra* note 2, tbl.5.57.2002.

²³³ John R. Ellement, *Officials Say Vow Kept with Arrests*, BOSTON GLOBE, May 25, 2007, at B4.

The reason for the bust was the spate of shootings for which the Lucerne gang is responsible. But the crimes charged are selling drugs, and buying and selling unregistered guns.

That story is not unusual, and not limited to Boston. For the past generation, drug and gun crime (by “gun crime,” I mean offenses involving gun registration and licensing, not the use of guns to commit violent felonies) have been used as means of battling violent crime. As Tracey Meares, Neal Katyal, and Dan Kahan have noted, prosecutors regularly justify drug prosecutions as surrogates for violent crime charges even when the drug in question is marijuana.²³⁴ The pattern is especially clear in the federal system. Bill Clinton instructed the FBI to treat gangs like the Lucerne Street Doggz as it had treated the Mafia,²³⁵ and charging proxy crimes was a key means of taking down Mafia families, dating back to Robert Kennedy’s tenure in the Justice Department.²³⁶ The Lucerne story illustrates the degree to which the pattern has taken hold in local prosecutors’ offices as well.

The historical norm was very different. During Prohibition, unrelated charges like the tax charge that sent Al Capone to prison were sometimes used to target bootleggers,²³⁷ but alcohol charges were not used to target more traditional crimes. The other vices that federal and state law have forbidden over the years were used strategically against high-profile mobsters, like Lucky Luciano or the various Mafia defendants who faced federal gambling charges — but Mob cases were rare, and nearly all of them were federal. With few exceptions, violent felonies were enforced straight-up, as is proved by the high acquittal rates in homicide cases that were common a century ago. Charges like those in the Lucerne case were unknown. Why did that state of affairs change?

There are three answers: coincidence, a changed political structure, and law enforcement necessity. Mass markets for illegal drugs arose just after the wave of violence that swamped Northern cities, and just when political pressure was forcing big-city prosecutors to ramp up criminal punishment. For urban police looking to increase their arrest numbers and urban prosecutors seeking higher conviction rates, drug

²³⁴ Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1178 & n.22 (2004).

²³⁵ Nancy E. Marion, *Symbolic Policies in Clinton’s Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 97 (1997).

²³⁶ See Daniel C. Richman & William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 598–99 (2005) (quoting Attorney General John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001) (noting and endorsing this policy)). This approach has made the federal law of gun registration and possession a de facto federal law of violent crime. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 277 (2006).

²³⁷ Including Capone’s brother Ralph. See Richman & Stuntz, *supra* note 236, at 584 n.2.

cases were a godsend. As for political structure: local electorates seem to like transparent charging practices — meaning, the crimes charged are the reasons for criminal punishment. That is probably why drug sentences are so much more severe in urban black neighborhoods than in wealthier and whiter suburbs.²³⁸ Suburban drug cases are prosecuted directly, not as a substitute for other crimes. In the suburbs, criminal justice remains a locally democratic enterprise. Not so in high-crime cities.

The third reason — law enforcement necessity — requires explanation. Police clearance rates in violent crime cases were high in the past²³⁹ because the cases were easy. Killings tended to follow a few simple fact patterns; identifying the killer was not hard. As Roger Lane has noted, that state of affairs changed beginning in the mid-twentieth century: both stranger killings and robbery-murders rose, and the friends-and-family killings that had dominated homicide statistics in the past declined sharply.²⁴⁰ Clearance rates fell.²⁴¹

As evidence-gathering in violent crime cases grew more difficult, the law of criminal procedure placed more restrictions on it. Confessions and eyewitness testimony are crucial to the prosecution of many violent felonies. Thanks to changes in the relevant bodies of constitutional law, confessions became a good deal harder for the police to obtain in the 1960s.²⁴² As for eyewitness testimony, criminal violence is frightening, not only to its victims but to those who see and hear it as well; witnesses fear becoming victims themselves if they testify. The rise of violent urban gangs in the last generation is partly attributable to gangs' skill at silencing would-be witnesses.²⁴³ Both the rise of po-

²³⁸ More whites than blacks are convicted of drug felonies in state courts. See ONLINE SOURCEBOOK, *supra* note 2, tbl.5.45.2004. Yet the ratio of black to white drug prisoners in state penitentiaries is more than three to two. See *id.* tbl.6.0001.2004.

²³⁹ See, e.g., LANE, VIOLENT DEATH IN THE CITY, *supra* note 85, at 81 (noting that 91% of homicides were cleared in mid-twentieth-century Philadelphia, a figure “very close to that reported for other cities in the same period”).

²⁴⁰ See Roger Lane, *Murder in America: A Historian's Perspective*, 25 CRIME & JUST. 191, 208–10 (1999).

²⁴¹ See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1066–70 & figs.1–2 (1998).

²⁴² See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964). At the same time, silence became a more viable litigation strategy. See *Griffin v. California*, 380 U.S. 609 (1965).

²⁴³ For a telling example, see SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 302–18 (2006). In these pages, Venkatesh tells the story of a gang murder; the victim's brother witnessed the killing and was left alive. Nevertheless, no one was ever prosecuted for the homicide. Not long afterward, Venkatesh asked a local minister whether “Big Cat,” leader of the local gang, was responsible. The minister's answer was telling: “If I say yes, you'll ask me how do I know. . . . I know, we know, the community knows.” *Id.* at 318 (internal quotation marks omitted).

lice interrogation doctrine and the rise of urban gangs made violent crime cases harder to build, and harder to win — especially in high-crime city neighborhoods.

In earlier generations, these problems might have produced procedural reforms designed to make policing and prosecution of violent offenses easier. But constitutional law bars the most obvious reforms. *Miranda* grants savvy suspects the right to be free from all police questioning, not merely the coercive kind — and that right cannot be undone by mere politicians.²⁴⁴ The same is true of the right to confront the state's witnesses,²⁴⁵ which forces American prosecutors to build cases on live testimony rather than the written case files European prosecutors use.²⁴⁶ Drug law seemed to offer a ready solution to these problems. Physical evidence — the drugs themselves, the paraphernalia used to consume them, the cash used to buy them — is omnipresent in drug cases, making eyewitness testimony unnecessary. Police investigation is cheap: a single street stop or buy-and-bust might produce multiple arrests, with many fewer man-hours than in a robbery or homicide investigation. And drug markets in poor city neighborhoods were and are associated with the high rates of violence in those neighborhoods.²⁴⁷ For all these reasons, the substitution of drug prosecutions for violent felony cases was natural.

Drug laws passed in the 1970s, 1980s, and 1990s facilitated that substitution. Draconian sentences far beyond anything attached to vice crimes in the past were attached to possession of even small quantities of selected drugs — and the drugs selected for such severe treatment were those used and sold in poor black neighborhoods.²⁴⁸ The definitions of the relevant crimes were mechanical; no open-ended defenses or mens rea arguments were made available to the unlucky defendants charged with drug offenses.²⁴⁹ For the first time in American history, state criminal statutes carrying severe criminal punishments

²⁴⁴ See *Dickerson v. United States*, 530 U.S. 428 (2000).

²⁴⁵ See *Davis v. Washington*, 126 S. Ct. 2266 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁴⁶ The confrontation right exacerbates class-based inequality by raising the cost of prosecuting violent offenders in poor neighborhoods. See William J. Stuntz, Comment, *Inequality and Adversarial Criminal Procedure*, 164 J. INSTITUTIONAL & THEORETICAL ECON. 47, 50 (2008).

²⁴⁷ See, for example, William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1813–15 (1998) [hereinafter Stuntz, *Race and Drugs*], and sources cited therein. See also Richard H. Blum, *Drugs, Behavior, and Crime*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1967, at 135, 145 (concluding that drug use by “big-city slum-dwelling males” was associated with violence and other forms of criminality, but that drug use in the population at large was not associated with non-drug crime).

²⁴⁸ For the legal side of this equation, see Sklansky, *Cocaine and Race*, *supra* note 178. On the character of the relevant drug markets, see Stuntz, *Race and Drugs*, *supra* note 247, at 1804–15.

²⁴⁹ See *infra* section III.C, pp. 2036–39.

were designed not to define the prohibited conduct, but to make punishment for other conduct easier.

That proposition makes sense of several otherwise puzzling features of drug enforcement and drug politics. Both the timing and demographics of drug punishment track violent crime, not drug crime. The thirty years after 1960 saw an unprecedented explosion in criminal violence. The thirty years after 1970 saw an unprecedented explosion in drug punishment.²⁵⁰ As for demographics, blacks are imprisoned for drug crime at thirteen times the rate of whites.²⁵¹ Rates of illegal drug use vary little across the races.²⁵² Rates of criminal violence vary much more: in 2006, the murder rate among whites stood at 3.1 per 100,000; among blacks, the analogous figure was 23.7.²⁵³ Clearance rates by race of the offender are unavailable, but clearance rates for violent crimes vary by population density: rates are lowest in large cities and highest in small towns, with suburbs in between.²⁵⁴ That tracks, inversely, the distribution of the black population: in the places where the most blacks live, clearance rates for violent crimes are lowest; in the whitest areas, clearance rates are highest.²⁵⁵

The link between drug enforcement and violent crime also explains the absence of large-scale political opposition to contemporary drug laws, despite the draconian punishments those laws impose on drug offenders. Much milder punishments for other vices prompted much more political opposition in the late nineteenth and early twentieth centuries. That earlier age was more moralist than ours: early-twentieth-century Americans criminalized all forms of extramarital sex;²⁵⁶ twenty-first-century Americans make adult consensual sex a constitutional right.²⁵⁷ Yet Prohibition proved politically unsustainable, while the drug war is politically untouchable. During Prohibition, leading politicians like New York's Al Smith and Maryland's Albert Ritchie (each of whom won his state's governorship four times)

²⁵⁰ In 1970, there were roughly ten prisoners incarcerated for drug crimes per 100,000 population. See CAHALAN, *supra* note 7, at 30 tbl.3-3, 45 tbl.3-17. In 2002, that figure stood at 102. See ONLINE SOURCEBOOK, *supra* note 2, tbls.6.0001.2002, 6.29.2006.

²⁵¹ See *supra* note 4 and accompanying text.

²⁵² See *supra* note 5 and accompanying text.

²⁵³ The number of murders, by race of offender, appears in CRIME IN THE UNITED STATES: 2006, *supra* note 8, Expanded Homicide Data tbl.3. The general population for 2006, by race, appears in 2008 STATISTICAL ABSTRACT, *supra* note 1, at tbl.6. The rates stated in the text assume that murders by offenders of unknown race were committed by whites and blacks in the same proportion as murders by offenders whose race is known.

²⁵⁴ See CRIME IN THE UNITED STATES: 2006, *supra* note 8, tbl.25.

²⁵⁵ See MCKINNON, *supra* note 9, at 2 fig.2.

²⁵⁶ See *Caminetti v. United States*, 242 U.S. 470, 483 (1917) (upholding Mann Act conviction for transporting a young woman across state lines "for the purpose of debauchery . . . to wit, that the aforesaid woman should be and become his mistress and concubine").

²⁵⁷ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

publicly criticized the nationwide ban on alcohol sales;²⁵⁸ aside from former Baltimore Mayor Kurt Schmoke,²⁵⁹ no major American politician has made opposition to drug criminalization an important part of his or her political profile. Local resistance to the vice wars of a century ago was common. Not so with respect to the drug war. If drug enforcement *isn't* a response to criminal violence, these political facts seem inexplicable.

There is more. Politicians and judges alike worried obsessively about the chronically inconsistent enforcement of the Eighteenth Amendment, and about what those enforcement patterns said about the rule of law in America.²⁶⁰ Voters worried too: Prohibition fell not because of the opposition of the wet Northeast, but with the connivance of the dry farm belt.²⁶¹ A critical mass of Prohibition's supporters evidently concluded that repeal was preferable to uneven enforcement. Drug enforcement has been plagued by inconsistency and discrimination far worse than anything Prohibition produced. Yet the drug war's supporters still refuse to abandon their cause. Everything about the war on drugs and the politics associated with it makes sense only on the assumption that drugs were not the war's primary target. Violence was.

So, in the many cases in which direct punishment for violence was impossible, drug laws made indirect punishment easy. That increased both the size and the racially disproportionate character of state prison populations in two mutually reinforcing ways. First, the use of drug charges as a substitute for violent felony charges increased sentences for *non-violent* drug crimes. Drugs were not solely proxy crimes; a large fraction of incarcerated drug offenders were suspected of drug crimes and nothing else. But the laws authorizing their punishment were designed with violent offenders in mind. So nonviolent drug offenders were, in effect, punished both for the crimes they committed and for the violence of the drug markets in which they participated.

²⁵⁸ Concerning Smith, see LERNER, *supra* note 120, at 227–54. Concerning Ritchie, see, for example, *Effects of a Groundswell*, TIME, Sept. 29, 1930, at 16, 17; *From Anne Arundel Town*, TIME, May 24, 1926, at 8.

²⁵⁹ See *Baltimore Mayor Supports Legalization of Illicit Drugs*, N.Y. TIMES, Sept. 30, 1988, at B4.

²⁶⁰ See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 83–137 (2006).

²⁶¹ Franklin D. Roosevelt, the wet candidate in the 1932 presidential election, was both nominated and elected by the dry parts of the country. For an account of Roosevelt's nomination and the role Prohibition played in it, see STEVE NEAL, *HAPPY DAYS ARE HERE AGAIN* 236–49 (2004). In the general election, Herbert Hoover, a dry Republican, ran nearly even with Roosevelt in the wet Northeast. Roosevelt, a (newly) wet Democrat, carried the dry West by a two-to-one margin. See OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, *STATISTICS OF THE CONGRESSIONAL AND PRESIDENTIAL ELECTION OF NOVEMBER 8, 1932* (1933), available at http://clerk.house.gov/member_info/electionInfo/1932election.pdf.

Since poor city neighborhoods had the most violent drug markets,²⁶² residents of those neighborhoods received the most severe drug sentences. The use of drug crime as a (partial) proxy for violence amounted to a sentencing enhancement for black drug crime.

Second, because drug punishment was and is a poor tool for deterring violence, violence levels remained high even as drug punishment escalated — which reinforced political support for tough drug punishment: a vicious circle. Recall the Lucerne Street bust. The gun and drug charges filed in that case may track gang members' history of criminal violence, but only in the aggregate. The gang was targeted because of the many acts of violence its members committed, and (at least in part) because of the many acts of violence members of other Boston gangs committed. But no gang member knows which particular acts of violence prompt such targeting. From the point of view of any individual offender, the odds that any particular shooting will lead to a later drug trafficking prosecution must be very low. Meanwhile, the gains from the shooting, or at least a large share of them — vengeance, status within the gang, a reputation for toughness — are captured by the perpetrator. One reason why violence by drug-dealing gangs remains high is that, from the point of view of the perpetrators, it pays.

The upshot is massive drug punishment that deters neither violence nor drug crime. Its dominant incentive effect has more to do with politics than with crime. From its inception, the drug war has been fueled by violence in urban black neighborhoods. Continued violence means a continuing supply of the symbols on which the symbolic politics of crime feeds. Politically speaking, the drug war is self-sustaining as long as it continues to create casualties. Tragically, those are never in short supply.

D. Federalism

For most of American history, the federal government played a minor role in American criminal justice. It plays a large role now, and the wrong one. In today's justice system, the federal government is a key source of law — both procedural and substantive — in state criminal cases. It should be a key source of money, especially for cash-strapped urban police forces.

Begin with the law of constitutional criminal procedure. That law makes it easier for criminal defendants to threaten expensive, drawn-out litigation. Defendants with the money to pay for high-priced lawyers can make that threat credibly.²⁶³ Poor defendants cannot: their

²⁶² See Stuntz, *Race and Drugs*, *supra* note 247, at 1813–15.

²⁶³ Stuntz, *Uneasy Relationship*, *supra* note 205, at 27–31.

lawyers face unimaginably severe docket pressure, and so must plead out the vast majority of cases.²⁶⁴ Thanks to the crime wave of the 1960s and after, local district attorneys likewise face heightened docket pressure.²⁶⁵ That fact raises the value of rich defendants' ability to draw out criminal litigation. These propositions guarantee rising inequality. The generation after the constitutional revolution in criminal procedure saw a sharp rise in the percentage of criminal defendants poor enough to qualify for state-paid lawyers.²⁶⁶ As criminal trials grew both more expensive and rarer, the pool of criminal defendants grew poorer, and guilty pleas grew more common: a recipe for the massive, class-biased prison populations Americans know today.

The Fourth and Fifth Amendment doctrines that the Supreme Court imposed on local police after 1960 have similar distributive effects. Under the governing Fourth Amendment law, inhabitants of detached houses receive more protection than apartment dwellers, drivers of cars more than passengers on city buses or subways, office workers more than factory workers.²⁶⁷ *Miranda* doctrine gives defendants the right to opt out of police questioning — but only if they know enough to say the right words at the right time. Poor and poorly educated suspects do badly under that regime. Those who do best are recidivists and rich suspects: the former disproportionately invoke their *Miranda* rights,²⁶⁸ the police do not bother to question the latter.

Those are strange results for bodies of law designed to promote equality — as criminal procedure doctrine is, according to the conventional understanding.²⁶⁹ The strangeness has more to do with the designers than with the design. Supreme Court Justices have no particular expertise at the enterprise of crafting rules for policing and criminal litigation. Few have extensive criminal litigation experience, fewer still in state cases. The Justices have no means of gathering evidence about the effects of the procedural rules they craft. And constitutional law is easy to make but hard to change, which means that legal errors tend to be uncorrectable. That would be no bad thing if the relevant doc-

²⁶⁴ See sources cited *supra* note 32.

²⁶⁵ See *supra* note 205.

²⁶⁶ Entering the 1980s, fewer than half of felony defendants were poor enough to qualify for state-appointed counsel; by 1992, the indigency rate had risen to 80%. See STEVEN K. SMITH & CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDI-
GENT DEFENSE 1, 4 (1996); ROBERT L. SPANGENBERG ET AL., BUREAU OF JUSTICE STA-
TISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 33
(1986).

²⁶⁷ For an explanation, see Stuntz, *Fourth Amendment Privacy*, *supra* note 41, at 1267–74.

²⁶⁸ According to Richard Leo, a suspect with a felony record is nearly four times more likely to invoke his *Miranda* rights than a suspect with no criminal record, and nearly three times more likely than a suspect with only misdemeanor convictions. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286–87 (1996).

²⁶⁹ See *supra* note 30 and accompanying text.

trines rested on timeless truths. But criminal procedure is filled with rules that rest on changeable and contested empirical assumptions. The rise of new surveillance technologies alters the balance between law enforcement need and individual privacy. Because of the rise of violent urban gangs, the Confrontation Clause's emphasis on live witness testimony has become a barrier to prosecuting ordinary homicides. Technological and social change is a constant — which means that legal flexibility is essential. Constitutional law is anything but flexible.

Federal substantive law should not suffer from these failings. Members of Congress are much better positioned than Supreme Court Justices to gather useful information, to experiment and innovate, and to correct the inevitable mistakes. And their mistakes appear to have smaller consequences, since the statutes that define federal crimes and sentences do not apply in state courts, where most crimes are prosecuted. Yet federal substantive law may have worse consequences than the law of criminal procedure. The federal share of the prison population is about 11%; the federal government prosecutes roughly 7% of all felony cases and a fraction of 1% of misdemeanors.²⁷⁰ The punitive character of federal substantive law accounts for the difference. That is why white-collar defendants achieve worse outcomes than defendants charged with thefts and violent felonies.²⁷¹ The white-collar defendants are charged federally; theft and violent crime defendants are overwhelmingly charged in state court.

More important, the federal criminal code increases *state* prison populations: broad federal liability rules and severe federal sentences allow local prosecutors to induce guilty pleas more easily, with harsher sentences than defendants would otherwise accept. These effects are strongest where the gap between federal and state sentences is most substantial: gun and drug cases.²⁷² That gap should surprise. Federal criminal law is far more severe than that of most states, as the percentages cited in the preceding paragraph show — but it should be about average in terms of sentencing severity. That is the natural consequence of blending electorates with different preferences: the national electorate is more moderate than the most extreme state elec-

²⁷⁰ See ONLINE SOURCEBOOK, *supra* note 2, tbls. 6.29.2006, 5.44.2004, 5.17.2004; Stuntz, *Political Constitution*, *supra* note 149, at 782 n.5, and sources cited therein.

²⁷¹ See *supra* notes 10–13 and accompanying text.

²⁷² In 2000, the average federal sentence for drug trafficking was seventy-five months; the average state sentence was thirty-five months. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURT, 2000, at 3 (2003). Severe federal sentences for gun crimes are the cause of programs like Project Exile that use federal gun charges as a tool for combating urban violence. See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369 (2001).

torates. Instead of moderation, federal criminal law produces immoderate severity. Why?

The answer stems from two facts. First, federal criminal law is mostly optional: it criminalizes conduct that state law already covers — fraud, extortion, robbery, racketeering, drug crime.²⁷³ Second, the law enforcement bureaucracy that enforces federal crimes is small: the number of local prosecutors is five times the number of Assistant U.S. Attorneys.²⁷⁴ The ratio of state to federal *cases* is even larger: the number of state-court felony convictions is fifteen times the number of federal felony convictions.²⁷⁵ The bureaucracy's small size means that federal criminal prohibitions have small fiscal consequences. The optional nature of federal criminal prohibitions makes them useful vehicles for sending symbolic messages. Both facts push toward greater severity.

Ironically, so does federal law enforcers' restraint. Because federal agents and prosecutors tend to reserve tough federal statutes for serious misconduct — recall the Lucerne Street bust, which led to federal gun and drug charges as well as state drug charges — Congress faces little pressure to make those statutes less tough. That reinforces the congressional tendency to err on the side of severity when drafting criminal prohibitions and sentencing rules. One more characteristic of federal criminal lawmaking contributes to that tendency. Over the past forty years, as budget pressure on local law enforcement agencies has increased, federal criminal law has become increasingly focused on crimes committed by groups: conspiracy, enterprise crime and racketeering, terrorism, and so on. Such crimes are more costly to investigate and prosecute than one-on-one criminal transactions; it seems natural that the part of the justice system that enjoys the most generous funding has taken over responsibility for the most expensive cases.²⁷⁶

Criminal organizations, even small ones, are usually good at hiding information. In order to penetrate them, prosecutors need the cooperation of some of their members: especially the marginal members, the ones who are least culpable (since prosecutors want to punish the *most* culpable). To win that cooperation, prosecutors must be able to threaten those marginal members of the organization with serious

²⁷³ See 18 U.S.C. §§ 1341, 1343 (2000) (mail and wire fraud); *id.* § 1951 (extortion and robbery); *id.* § 1962 (racketeering); 21 U.S.C. § 841 (2000) (drug possession).

²⁷⁴ The number of U.S. Attorneys and AUSAs stands at roughly 5700. ONLINE SOURCEBOOK, *supra* note 2, tbl.1.79.2006. The number of district attorneys and assistants is approximately 27,000. *Id.* tbl.1.86.2006.

²⁷⁵ There are roughly 73,000 federal felony convictions each year, *id.* tbl.5.17.2004, compared to 1.1 million state-court felony convictions each year, *id.* tbl.5.44.2004.

²⁷⁶ Cf. Stuntz, *Uneasy Relationship*, *supra* note 205, at 29–31 (explaining the federalization of white-collar criminal litigation on this ground).

criminal punishment. Which explains the otherwise puzzling character of the federal law of organized crime — even by the standards that apply elsewhere in federal criminal law, the offenses used to prosecute criminal organizations are stunningly broad.²⁷⁷ Federal statutes targeting group crimes are designed to overpunish the defendants who fall within their terms, because threats of excessive punishment are the chief means by which federal law enforcers extract information about their targets. The laws are written for their threat value. Severe laws make for more effective threats.

Another kind of federal law influenced state criminal punishment in the opposite direction: toward lenity and equality, not severity and discrimination. In 1968, Congress created the Law Enforcement Assistance Administration (LEAA), a federal agency designed to funnel money to urban police forces. LEAA money soon dried up; local governments were left to fend for themselves.²⁷⁸ A quarter-century later, Congress tried again, passing the Violent Crime Control and Law Enforcement Act of 1994,²⁷⁹ one portion of which was prompted by then-President Clinton's pledge to put another 100,000 police officers on city streets.²⁸⁰ Both times, the infusion of federal money was short-lived.²⁸¹ Both times, it was modest: the vast majority of police spending remained with local governments.²⁸² Both times, more federal aid led to a short-term increase in the number of police officers per unit population in the nation's cities. And both times, higher policing rates appear to have pushed punishment rates down. Figure 1 tracks the annual rate of change in the nation's imprisonment rate and in its urban policing rate. The latter figure is shown with a one-year delay: the change in the rate of policing in any given year appears together with the change in the next year's imprisonment rate.

²⁷⁷ For a celebratory survey, see John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995). The law of terrorism fits the pattern. See Robert M. Chesney, *Anticipatory Prosecution in Terrorism-Related Cases*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR (John L. Worrall & M. Elaine Nugent eds., forthcoming 2008).

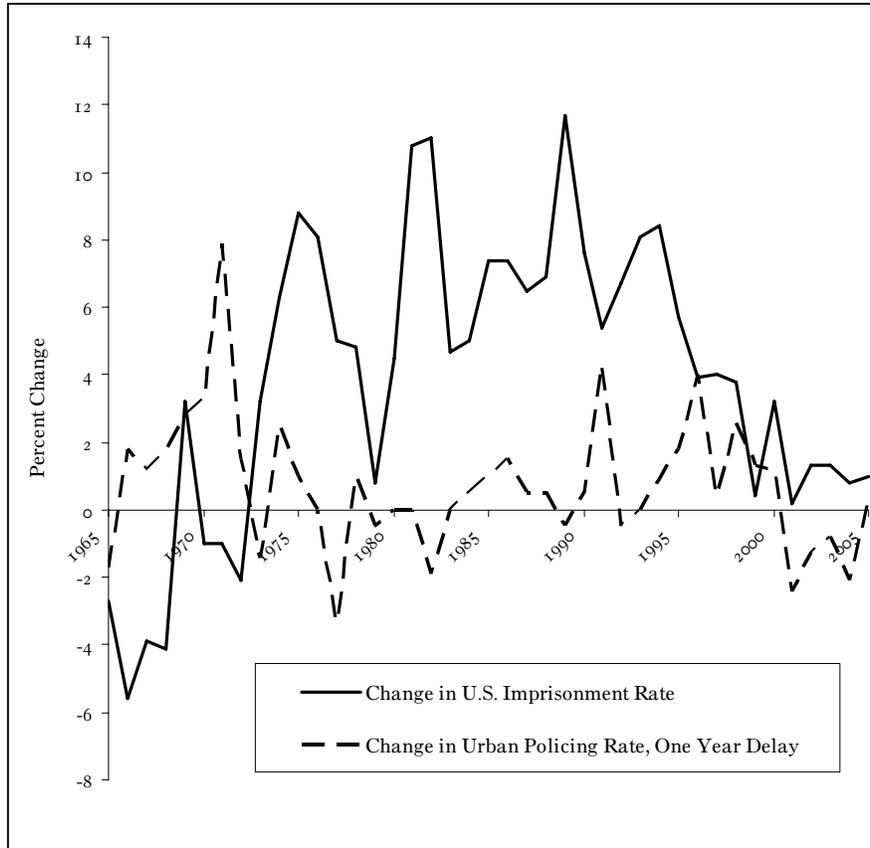
²⁷⁸ For the LEAA's origins and history, see MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968–1978 (1980). On the agency's demise due to Carter Administration budget cuts, see Charles R. Babcock, *By Bits and Pieces, a Crime-Fighting Program Nears Extinction*, WASH. POST, Nov. 29, 1980, at A3.

²⁷⁹ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²⁸⁰ Title I of the Act appropriated \$8.8 billion over six years to help local police forces hire more officers. For a good discussion and analysis of the Act, see Harry A. Chernoff et al., *Essay, The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

²⁸¹ On the LEAA's demise, see sources cited *supra* note 278. On the drying up of Clinton's "100,000 cops" money, see Daniel Richman, *The Right Fight*, BOSTON REV., Dec. 2004–Jan. 2005, at 6.

²⁸² See 1974 SOURCEBOOK, *supra* note 2, at 33 tbl.1.2; 2003 SOURCEBOOK, *supra* note 2, at 4 tbl.1.3.

FIGURE 1.²⁸³

The two curves appear to move in opposite directions: more police officers are correlated with fewer prisoners. This is not simply a by-product of crime trends. The effect appears to hold both in the late 1960s and 1970s — when crime was rising steeply — and in the 1990s and this decade, when crime rates have fallen substantially. Police officers and prison cells are substitutes, alternative means by which governments spend money to battle crime. In the last thirty-five years, the mix of those two alternatives has changed radically. The size of

²⁸³ Annual imprisonment rates for the period covered by Figure 1 appear in ONLINE SOURCEBOOK, *supra* note 2, tbl.6.28.2006. The data used to calculate annual policing rates appear in the relevant volumes of UNIFORM CRIME REPORTS, *supra* note 8, each of which contains a table identifying the number of full-time law enforcement officers in the set of reporting cities, along with those cities' total population. I calculated the year-by-year percentage changes in imprisonment and policing rates.

local police budgets is one reason for that radical change, and those budgets are strained in part because of the dearth of federal aid. Federal and state governments pay a majority of local school budgets;²⁸⁴ local governments pay 90% of the cost of local police.²⁸⁵ Had there been more federal legislation like the 1968 and 1994 Acts, those data would differ. Imprisonment rates might differ as well.

Those two bursts of federal aid for local police not only helped to reduce criminal punishment; they appear to have reduced the level of police discrimination as well. In the late 1960s, discrimination chiefly took the form of underenforcement in urban black neighborhoods. In the four years after the 1968 Act was passed, urban black arrests rose 16%.²⁸⁶ By the mid-1990s, the prison population had topped one million; the chief problem was overenforcement. In the balance of the Clinton Administration, black arrests in cities fell 26%.²⁸⁷ If federal law makes the justice system more discriminatory, federal budget dollars appear to make it less so.

III. EQUALIZING CRIMINAL JUSTICE

No one chose the unequal justice system Americans know today. Rather, that system arose from a great many shortsighted choices and more than a few well-intentioned ones, made by a wide range of actors over a long period of time. Retracing those path-dependent steps is impossible. Undoing the damage may be impossible as well, at least in the near term. Thankfully, more modest goals are also more achievable: stop the downward slide toward ever more inequality; avoid making a bad situation worse — and look for ways to make it marginally better. The bodies of law that define crime and the institutional arrangements through which those laws are enforced may be unable to guarantee genuinely equal justice. But laws and institutional design *can* guarantee a measure of moderation. History suggests that moderation and equality travel together, reinforce one another.

So how does one induce moderation? Place more power in the hands of residents of those neighborhoods where the most criminals

²⁸⁴ See CRECILLA COHEN & FRANK JOHNSON, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2001–02, at 1 (2004).

²⁸⁵ See ONLINE SOURCEBOOK, *supra* note 2, tbl.1.4.2003.

²⁸⁶ Arrests of white suspects rose 13% during the same years. See UNIFORM CRIME REPORTS: 1968, *supra* note 8, at 129 tbl.36; UNIFORM CRIME REPORTS: 1972, *supra* note 8, at 140 tbl.42. Both that figure and the figure in the text are based on the numbers of arrests per 100,000 urban population. Changes in the rates of white and black arrests as a percentage of white and black urban populations, respectively, probably differ slightly from the figures just cited.

²⁸⁷ See CRIME IN THE UNITED STATES: 1995, *supra* note 8, at 235 tbl.49; CRIME IN THE UNITED STATES: 2001, *supra* note 8, tbl.49. The same sources show that the white arrest rate fell only 16% in those six years.

and crime victims live. Because residents of those neighborhoods suffer so much from crime, they are unlikely to support abandonment of the sort that Northern cities experienced in the 1950s, 1960s, and early 1970s. Because those same residents suffer so much from mass incarceration, they are also unlikely to support the mindless severity of the 1980s, 1990s, and this decade. Those propositions fit the historical track record: when high-crime cities have exercised the most control over criminal justice within their borders, punishment levels have been more moderate and discrimination less pervasive than today.

There are (at least) three ways to make high-crime city neighborhoods self-governing without radical changes in legal doctrine or political structure. First, give more state and federal money to urban police forces. Second, increase the number of criminal cases tried by locally selected juries. Third, define frequently prosecuted crimes to include open-ended culpability terms, so that jurors might have room to exercise judgment in the cases they hear. These reforms are eminently achievable; none requires large-scale revision of existing law. Taken together, they would make American criminal justice more democratic, and more equal.

A. Police Funding

According to FBI data, America's policing rate rose 17% between 1989 and 1999.²⁸⁸ Based on the Bureau's "city arrest" data, the black arrest rate fell 17% during those ten years; white arrests fell a mere 6%.²⁸⁹ Between 1995 — the year after Congress passed a watered-down version of Clinton's "100,000 cops" proposal — and 2005, black arrests dropped 30%, compared to a 17% fall in the white arrest rate.²⁹⁰ Raising the level of urban policing apparently makes the pool of arrestees less racially tilted. Better still, more cops on city streets correlates with fewer young men in prison cells. Early-twentieth-century Southern cities had much smaller police forces than their Northern counterparts; Southern prisons incarcerated a much larger share of their states' populations than *their* Northern counterparts.²⁹¹

²⁸⁸ See UNIFORM CRIME REPORTS: 1989, *supra* note 8, at 238 tbl.66; CRIME IN THE UNITED STATES: 1999, *supra* note 8, at 293 tbl.71.

²⁸⁹ In 1989, white arrests per 100,000 urban population stood at 4074; the analogous figure for black arrests was 2164. See UNIFORM CRIME REPORTS: 1989, *supra* note 8, at 199 tbl.44. By 1999, white arrests per 100,000 urban population had fallen to 3821, while the analogous rate for black arrests had fallen to 1790. See CRIME IN THE UNITED STATES: 1999, *supra* note 8, at 239 tbl.49.

²⁹⁰ In 1995, the FBI's "city arrest" figures reported 4187 white arrests and 2195 black arrests per 100,000 urban population. CRIME IN THE UNITED STATES: 1995, *supra* note 8, at 235 tbl.49. In 2005, the analogous table reported 3467 white arrests and 1544 black arrests per 100,000 urban population. CRIME IN THE UNITED STATES: 2005, *supra* note 8, tbl.49.

²⁹¹ See *supra* pp. 1984 (Table 1), 1992 (Table 3).

When the size of urban police forces rose sharply in the late 1960s and early 1970s, the decline in America's prison population accelerated. When policing rates kicked up again in the 1990s, the growth in imprisonment slowed dramatically.²⁹²

Increasing the number of police officers would have another egalitarian result: it would redistribute police attention across crimes. Violent felonies are underenforced in poor neighborhoods; drug crimes in those same neighborhoods are punished too harshly. Increasing the police-to-population ratio would address both problems. New York's experience in the 1990s tends to support that hypothesis: the city's policing rate rose by more than a third, clearance rates for non-drug felonies also rose sharply, and felony drug arrests fell.²⁹³ That combination is natural: massive levels of drug punishment exist in part as a substitute for direct enforcement of violent crimes. More personnel help to correct the latter problem, and thereby also reduce the size of the former.

There is one more reason why more money for urban police would tend to reduce the level of criminal justice inequality. The community policing movement has made urban police forces more attentive to local needs and preferences than a generation ago,²⁹⁴ and far more attentive than urban prosecutors are today. Spending more on urban policing means more funds for the government entity that pays the most attention to residents of high-crime neighborhoods. That would make criminal law enforcement more locally democratic. In this sphere of governance, equality and local democracy go hand in hand.

The Violent Crime Control and Law Enforcement Act of 1994 took a helpful step in that direction by tying federal aid to community policing initiatives. The response was promising: the late 1990s saw both the biggest crime reductions and the smallest imprisonment increases in a generation.²⁹⁵ But the federal subsidies were too modest. Bill

²⁹² See *supra* p. 2030 (Figure 1).

²⁹³ New York's policing rate rose from 367 officers per 100,000 population in 1990 to 508 in 1997. See UNIFORM CRIME REPORTS: 1990, *supra* note 8, at 101 tbl.6, 278 tbl.72; CRIME IN THE UNITED STATES: 1997, *supra* note 8, at 146 tbl.8, 347 tbl.78. During those same years, the ratio of non-drug felony arrests to index crimes (violent felonies plus felony thefts) improved dramatically — from 14% to 25% — and felony drug arrests fell 13%. See Jeffrey Fagan et al., *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 76 tbl.1 (2004).

²⁹⁴ The literature on community policing is massive; even a fair sampling would be too much for a single footnote. For insightful discussions from two different perspectives, the first celebratory and the second mildly skeptical, see Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002); and SKLANSKY, DEMOCRACY, *supra* note 150, at 82–105, 114–24.

²⁹⁵ In 1994, when the legislation was enacted, the nation's homicide rate stood at 9 per 100,000. By 2000, that rate had fallen to 5.5, CRIME IN THE UNITED STATES: 2001, *supra* note 8, tbl.1 — the steepest decline in homicides in sixty years, according to Eric Monkkenen's data. See sources cited *supra* note 89. The late 1990s also saw the nation's imprisonment rate rise 21%, see

Clinton promised to put another 100,000 cops on city streets; in the end, the federal government paid for something in the vicinity of one-sixth that number, and only for a few years.²⁹⁶ Clinton's original number is a reasonable goal: were it achieved, Americans would have roughly 310 police officers per 100,000 population;²⁹⁷ by comparison, the analogous figure in EU countries is 337.²⁹⁸ The cost of an additional 100,000 police officers is not trivial, but neither is it prohibitive. Total spending for local police stands at \$58 billion per year;²⁹⁹ a one-sixth increase in the number of officers (that is what 100,000 more police officers represent)³⁰⁰ might be expected to cost as much as \$15 billion per year. By comparison, total government spending on criminal justice stood at \$185 billion in 2003, of which \$61 billion was spent on corrections.³⁰¹ If, as appears to be the case, hiring more police officers would reduce the number of prison inmates, the net spending increase would be smaller than first appears — and a small price to pay for a more equal justice system.

B. Jury Trials

Jury trials ruled the justice system of America's past; plea bargaining took place in the shadow of substantive law as defined by trial verdicts. In today's justice system, pleas are an autonomous adjudicative process.³⁰² Prosecutors — not juries and trial judges — govern the content of plea bargains, and suburban voters govern local prosecutors. Empowering voters in high-crime cities requires fewer pleas and more jury trials. The surest road to fewer pleas and more trials is

ONLINE SOURCEBOOK, *supra* note 2, tbl.6.29.2006: the smallest six-year increase since prison populations began their upward climb in 1973. See 1991 SOURCEBOOK, *supra* note 2, at 637 tbl.6.72.

²⁹⁶ The 1994 legislation appropriated \$8.8 billion over six years for aid to local police forces. See *supra* note 280. Using 2000 budget figures, that amount paid for just under 18,000 local police officers per year during those six years. See 2003 SOURCEBOOK, *supra* note 2, at 4 tbl.1.3, 37 tbl.1.26.

²⁹⁷ As of 2004, there were 731,903 full-time state and local police officers in the United States, plus an additional 86,627 federal officers (not counting federal prison guards). See ONLINE SOURCEBOOK, *supra* note 2, tbls.1.27.2004, 1.72.2004. That total amounted to 279 officers per 100,000 population. See 2007 STATISTICAL ABSTRACT, *supra* note 1, at 7 tbl.2. Adding 100,000 officers would have increased the nation's policing rate to 313. See *id.*

²⁹⁸ BARCLAY & TAVARES, *supra* note 6, at 18 tbl.3.

²⁹⁹ ONLINE SOURCEBOOK, *supra* note 2, tbl.1.4.2003.

³⁰⁰ See *id.* tbl.1.29.2004.

³⁰¹ See *id.* tbl.1.2.2003.

³⁰² For an explanation of criminal trials' limited effect on guilty pleas in a justice system like ours, see William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004). For the classic discussion of (federal) plea bargaining as an autonomous system of adjudication, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

to make trials cheaper and pleas more expensive, from prosecutors' point of view.

Reducing the cost of criminal trials would require radical change in both the quantity and content of criminal procedure doctrine. Raising the cost of guilty pleas, by contrast, is a simple matter. Military courts (along with a few state appellate courts) offer a useful model: they review the factual basis of guilty pleas with great care, and with little deference to the pleas themselves.³⁰³ That should be the norm everywhere.³⁰⁴ Stringent appellate review, with reversal in cases of what the military calls improvident pleas,³⁰⁵ would amount to a procedural tax on pleas. Tax anything and one is likely to see less of it. Plus, military-style review of guilty pleas would make the pleas that remain more accurate — a large social gain.

Fewer pleas would mean both fewer prosecutions and more trials. More trials could reduce the incidence of discriminatory punishment, but that happy state of affairs is likely to come to pass only if changes are made in the law of jury selection. Current Equal Protection and fair cross-section doctrine encourages juries that represent the jurisdiction from which jurors are drawn:³⁰⁶ usually, the relevant county. If the goal is to protect the interests of residents of high-crime city neighborhoods, that is the wrong pool. Jury selection in large cities should be neighborhood-based, and the number of peremptory challenges should be substantially reduced.³⁰⁷ The latter change would remove the need for the expensive, elaborate, and largely ineffective body of law barring the discriminatory use of peremptory challenges; eliminating that body of law would make criminal trials cheaper: a large collateral benefit.

Fewer peremptories and more localized jury selection might make convictions harder to obtain. That is no bad thing in a system as

³⁰³ For representative examples, see *United States v. Coffman*, 62 M.J. 676 (N-M. Ct. Crim. App. 2006); *United States v. Oglivie*, 29 M.J. 1069 (A.C.M.R. 1990). For a state court case applying a similar standard to the review of a guilty plea, see *State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999).

³⁰⁴ The Supreme Court took a step in this direction with its decision in *Halbert v. Michigan*, 125 S. Ct. 2582 (2005). *Halbert* held that indigent defendants who plead guilty are constitutionally entitled to state-paid counsel on direct appeal, *id.* at 2590–94 — a necessary condition of the kind of review the military employs.

³⁰⁵ See, e.g., *Coffman*, 62 M.J. 676.

³⁰⁶ Fair cross-section doctrine requires that jury venires represent the general population of the relevant jurisdiction. See *Duren v. Missouri*, 439 U.S. 357 (1979). *Batson* doctrine forbids the use of peremptory strikes against potential jurors because of their race or sex. See *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

³⁰⁷ More radical changes in jury selection might be needed. If jurors are chosen based on voter rolls and driver's licenses and if the urban poor appear more rarely on those lists, different means of selection might be a useful means of increasing jury representation among the urban poor.

stacked in the government's favor as ours is. If a prosecutor cannot convince a dozen residents of a high-crime neighborhood that one of their neighbors should be punished, punishment is probably unwise and could well be unjust. Current jury selection rules facilitate conviction in such cases, instead of obstructing it.

C. *Vague Substantive Law*

In 1995, Paul Butler famously — some would say infamously — argued for “the subversion of American criminal justice”³⁰⁸ through jury nullification.³⁰⁹ Butler maintained that far too many young black men were being sent to prison for nonviolent drug offenses, and urged black jurors to respond by refusing to convict black defendants in drug cases, regardless of the governing law and the evidence. The first of Butler's two claims is a truism. Yet even the liberal *New York Times*,³¹⁰ not to mention a bevy of academic opponents,³¹¹ criticized the second. Butler's own words explain why: jury nullification is “subversion”; it undermines the rule of law.³¹² If black jurors will not convict black drug defendants, the law of controlled substances will differ for blacks and whites. Race-based substantive law seems a poor response to criminal justice racism.

But all is not as it seems. For most of American history, white jurors exercised the power that Butler suggests black jurors exercise today: the power to acquit despite proof of intentional criminal conduct. The label “nullification” did not attach to that power. On the contrary, substantive criminal law invited the kinds of discretionary judgment that Butler's critics would call lawless. Extralegal mercy was not extralegal; it was part and parcel of crime definition.³¹³ Butler's critics ignore that fact, and also this one: the mens rea standards and conduct lines that invited jurors to exercise mercy in the past have all but disappeared. Nowhere is that more true than in the criminal law of controlled substances. Once prosecutors file charges and the defense loses

³⁰⁸ Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995).

³⁰⁹ See *id.*; Paul Butler, *Black Jurors: Right to Acquit?*, HARPER'S MAG., Dec. 1995, at 11.

³¹⁰ See Editorial, *When Jurors Ignore the Law*, N.Y. TIMES, May 27, 1997, at A16.

³¹¹ For a sample of the academic criticism, see Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 145–52; Andrew D. Leipold, Essay, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 936–48 (1999); Frank I. Michelman, *Foreword: “Racialism” and Reason*, 95 MICH. L. REV. 723, 733–34 (1997).

³¹² As Darryl Brown has explained, those propositions are (to say the least) debatable. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997). But they remain the conventional wisdom. For an aggressive, smart defense of that conventional wisdom, see Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

³¹³ See *supra* notes 98–105 and accompanying text.

the inevitable motion to suppress, jury nullification is the only means of avoiding disproportionate or otherwise undeserved criminal punishment. Nullification became a much-debated topic during the last generation not because jurors grew less respectful of the law, but because the law grew less respectful of arguments that might prompt the exercise of mercy.

The older state of affairs, the one Butler's proposal seeks to replicate, is nicely captured by Justice Robert Jackson's famous opinion in *Morissette v. United States*.³¹⁴ The defendant took spent bomb casings — metal tubes used by military pilots in practice bombing runs — from government land and sold them for scrap, realizing some eighty dollars in the transaction. Because these events happened in 1948, when military bases filled with unused equipment dotted the countryside, Joe Morissette was charged with theft of government property.³¹⁵ Morissette evidently knew what the casings were and clearly knew they were found on government land. Save for the fact that anyone might care to prosecute him, there was no pertinent fact about which he could plausibly claim mistake. Nor could he raise a claim-of-right defense, since he had no preexisting contractual or property interest in the bomb casings. Jackson nevertheless overturned Morissette's conviction, reasoning that no jury had found "criminal intent . . . *wrongfully* to deprive another of possession of property."³¹⁶ The words "criminal" and "wrongfully" (neither of which appear in the relevant statute) do all the work in that phrase: the kind of intent Morissette lacked was not cognitive or motive-based; it was moral. In *Morissette*, proof of "criminal intent" meant, roughly, proof of the kind and level of moral fault that one ordinarily associates with theft.

Compare *Morissette* with *United States v. Hunte*.³¹⁷ Cheryl Hunte had the poor judgment to have a boyfriend, Joseph Richards, who was a "known drug dealer."³¹⁸ Hunte joined Richards and one of his colleagues for a road trip during which Richards picked up several thousand dollars' worth of marijuana. Hunte made none of the plans, participated in neither the relevant negotiations nor the drugs' packaging and, save for smoking one joint, did not handle the drugs. Most important of all, Hunte neither funded the drugs' purchase nor stood to gain from their sale. She was simply along for the ride.³¹⁹ Even so, a Seventh Circuit panel affirmed her conviction for possession of marijuana with intent to distribute and conspiracy to do the same, on the

³¹⁴ 342 U.S. 246 (1952).

³¹⁵ *Id.* at 247–48.

³¹⁶ *Id.* at 276.

³¹⁷ 196 F.3d 687 (7th Cir. 1999).

³¹⁸ *Id.* at 689.

³¹⁹ *See id.* at 689–90.

ground that there was “some nexus between the defendant and the drugs.”³²⁰

Hunte captures the mechanical nature of contemporary drug law. Distribution is proved by proving possession of more than user quantity, and (as Cheryl Hunte learned to her dismay) possession may be constructive only. Worse, drug law — state and federal alike — assigns punishment based on the weight of the drugs found in the defendants’ possession. That principle leads to decisions like *Whitaker v. People*,³²¹ in which the Colorado Supreme Court affirmed the twenty-year prison sentence of a “mule” carrying a suitcase full of methamphetamine on a Greyhound bus. David Whitaker was charged with importing methamphetamine into the state and with possession with intent to distribute the drug.³²² The government was not required to prove that Whitaker knew how much methamphetamine he carried, nor that he knowingly crossed a state border,³²³ nor that he stood to make a large profit from his errand. (Major dealers rarely travel on Greyhound buses.) As in *Hunte*, both liability and punishment rested on the drugs, and on the defendant’s proximity to them.

Drug laws like those at issue in *Hunte* and *Whitaker* make both convictions and draconian prison sentences nearly automatic. All plausible mitigating arguments — I was traveling with my boyfriend; I had no idea how much I was carrying; at worst, I’m a small player in a large criminal enterprise — are deemed out of bounds. Claims like the one that carried the day in *Morissette* are unheard of. Butler had it right: nullification is the only means of limiting unjust punishment in such cases.

Drug law is more extreme than criminal law as a whole, but the trend in the field runs in the same direction: toward more specifically defined offenses, broader criminal liability, and more severe punishments. The second and third trends are old news. The first is at once poorly understood and terribly important. The premise of vagueness doctrine is that uncertain criminal liability promotes unmerited and discriminatory criminal punishment: that vaguely defined crimes are the government’s friend and defendants’ enemy. The criminal law of drugs teaches the opposite lesson. That law is filled with bright lines; even its few standards function like rules: the seemingly vague “some nexus” requirement in *Hunte* means that everyone in the vicinity of the drugs loses. Not coincidentally, no other class of criminal cases has seen such grossly excessive punishments, or such discriminatory enforcement.

³²⁰ *Id.* at 692.

³²¹ 48 P.3d 555 (Colo. 2002).

³²² *Id.* at 557 & n.1.

³²³ *See id.* at 558–59.

Reintroducing a measure of vagueness to American criminal law would change that state of affairs, by inviting the kinds of jury verdicts Butler encouraged — without the stigma of nullification. Any of three less-than-radical changes would advance that goal. First, courts could reestablish the older concept of mens rea: save when legislators expressly impose strict liability, proof of a “guilty mind” or “criminal intent” — the kind of intent that Justice Jackson found lacking in *Morissette* — is required in every case.³²⁴ Second, judges might apply generally a legal principle at the core of racketeering doctrine: when the culpability of defendants charged with a given offense varies widely, the least culpable members of the group should be excused.³²⁵ Third, courts might import into American law the German legal doctrine that permits any defendant to claim that, though his conduct fits the definition of the relevant offense, it was not sufficiently “wrongful” to merit punishment.³²⁶

Any of those changes would make criminal liability more legally uncertain — yet also, paradoxically, more predictable. A century ago, American criminal law was filled with standards of the sort described in the preceding paragraph. Prison populations were more stable and punishment less discriminatory than in our own time. The explanation for that surprising truth is simple: when prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. Discretion limits discretion; institutional competition curbs excess and abuse. Vague liability rules once were, and might be again, part of a well-functioning system of checks and balances.³²⁷

³²⁴ No doubt legislators would impose strict liability more often. But expressly legislated strict liability would be more transparent than the current regime, which has the functional character of strict liability but retains formal mens rea standards. Plus, at least sometimes, legislators would permit the older mens rea standard to stand — which would be a large gain for the cause of equal justice.

³²⁵ The leading case is *United States v. Viola*, 35 F.3d 37 (2d Cir. 1994), in which the court held that an errand boy for a Mob boss could not be found to have “participate[d], directly or indirectly, in the conduct of [the] affairs” of the boss’s criminal enterprise under 18 U.S.C. § 1962(c). *Id.* at 43.

³²⁶ See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 779–98 (2d ed. 2000).

³²⁷ That proposition probably applies as well to sentencing rules as it does to liability rules. Especially *federal* sentencing rules: bright-line, severe sentencing rules make for more effective threats in plea negotiations and, over the past generation, federal sentencing law has been famously rule-like and severe. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998). Recent changes in federal sentencing doctrine increase district judges’ power over federal sentences. See *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *United States v. Booker*, 543 U.S. 220 (2005). Over time, that should reduce federal law’s effect on state-court plea bargains: a step toward both lenity and equality.

IV. CONCLUSION

“Equal justice under law” — the phrase resonates because of its seeming redundancy. Unequal justice is an oxymoron; law makes justice both equal and just. Those four words are really a long-winded substitute for one: “justice.” Or so the familiar line goes.

That familiar line misleads, because it misperceives the relationship between equality and law. Legal doctrine is not the only means, and in a criminal justice system like ours not the best means, of ensuring rough equivalence in the treatment doled out to black and white offenders, or to rich and poor ones. On the contrary: as America’s criminal justice system has grown more law-bound, both the quality and equality of criminal justice have declined. Law is a centralizing force in criminal justice; the key to a more egalitarian justice system is greater local control. The rise of broader and more specific criminal offenses shifted power over punishment from local jurors to state and national voters. The rise of an elaborate constitutional law of criminal procedure shifted power from local politicians to state and federal appellate judges.

Changes in the politics of crime reinforced those centralizing trends. Thanks in part to Warren Court criminal procedure decisions, state and national politicians came to use rising urban crime as a political “wedge” to win the votes of non-urban voters. Liberal Democrats and conservative Republicans alike played that game; because they did so, poor urban neighborhoods’ power over the fate of their young men declined. From the perspective of those who pay for the never-ending battle against crime in the coin of safety and freedom, criminal justice is no longer an exercise in self-government — not something residents of high-crime neighborhoods do for themselves, but something people who live elsewhere do to them. If we are ever to see a greater measure of equality in America’s unsystematic criminal justice system, that must change.

More law — more carefully defined crimes, more elaborately protective procedures — is not the answer. Rather, the need is for more politics: not the kind in which images of furloughed prisoners swing national elections, but the kind that happens locally, where crime and punishment alike cut deepest. When police chiefs and (especially) prosecutors listen to those who live in the places we call “war zones” and heed their wishes, American criminal justice may, at long last, grow more equal. And more just.