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The Warren Court, Criminal Procedure Reform, and Retributive Punishment

Darryl K. Brown

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I. Introduction

Extensive literature on the legacy of the Warren Court's criminal procedure decisions exists. Scholars have chronicled and assessed in considerable detail how a set of landmark decisions fared both in the Court's subsequent thirty-plus years of case law and in terms of achieving practical success in everyday criminal practice. Instead of attempting to supplement this vast and well-executed effort, I want to draw on the approaches of intellectual and social history to offer a broad thesis concerning the impact of Warren Court

* Associate Professor and Alumni Faculty Fellow, Washington and Lee University School of Law.

criminal procedure decisions on the dramatic transformation of the larger criminal justice system in the three decades since Earl Warren's resignation. I would like to suggest an understanding of how the Warren Court's legacy contributed to the current problematic state of our criminal justice system through an argument about how the Court's decisions contributed to larger social debates and political policy choices. My thesis, in short, is that Warren Court criminal procedure decisions – which largely (but not entirely) embodied a theme of strengthening individual rights and entitlements for the criminally accused[1] – indirectly and perversely contributed to the harsh punitivism that characterizes criminal justice today. If that is true, it contributes to a broader thesis about the limited ability of courts to lead large-scale social change, and it also suggests how little courts should worry about the long-term effects of their decisions.

II. Current Scholarship on Courts and Social Reform

Let me situate this story about the effects of the Warren Court's decisions on the criminal justice system in the context of existing scholarship on criminal procedure and, to a lesser extent, on scholarship that assesses the ability of courts to effectuate substantial social change. One of my building blocks is Bill Stuntz's work on the interaction of criminal procedure and substantive criminal law.[2] Stuntz has argued that improving criminal *justice* – key components of which are fair treatment of suspects and effective checks on abuse of police power – is difficult to achieve by a judicial focus on criminal *procedure*.[3] Yet procedure, of course, was the focus of Warren Court jurisprudence on criminal justice.[4] The Court's contributions to constitutional regulation of substantive criminal law are notably sparse and weak.[5]

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1. For obvious countervailing decisions, see, for example, *Schmerber v. California*, 384 U.S. 757, 765 (1966), in which the Court stated that a blood test taken without the defendant's consent does not violate the defendant's privilege against self-incrimination; *Swain v. Alabama*, 380 U.S. 202, 221 (1965), which decided that the Equal Protection Clause does not prohibit exercising peremptory challenges against jurors on the basis of race; and, most importantly, *Terry v. Ohio*, 392 U.S. 1, 27 (1968), in which the Court determined that courts cannot invoke the exclusionary rule for products of legitimate and restrained investigational techniques.

2. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

3. *See id.* at 4 (remarking that judges who make decisions about criminal procedure rules have no real information about crime rates and funding decisions).

4. *See id.* at 72 (concluding that in recent decades constitutional law has focused heavily on criminal procedure, but not on substantive criminal law).

5. *See id.* at 68-69 (detailing Court's attempts to regulate substantive criminal law and concluding that "substantive regulation has shrunk" while procedural regulation has grown).

Other branches of government have in their control two powerful tools with which to respond to criminal procedure decisions. One is enforcement power, which crucially includes funding, but also includes day-to-day discipline, which makes procedural safeguards more or less meaningful.[6] So, for instance, while *Gideon v. Wainwright*[7] guarantees counsel to every defendant accused of a jailable offense,[8] virtually no judicial regulation of how counsel are paid takes place.[9] States can woefully underfund appointed counsel and substantially undercut the meaningfulness of *Gideon*.[10] Or, funding issues aside, police departments still have considerable discretion in their regulation of the meaningful constraints found in *Mapp v. Ohio*[11] and *Miranda v. Arizona*,[12] regulating unwarranted or pretextual searches[13] and incriminating statements[14] respectively.

The second tool that the executive and legislative branches have to undercut criminal procedure is the power to define substantive criminal law.[15] These branches can easily circumvent constitutional limitations on broad, vague criminal statutes[16] by enacting numerous specific statutes, such as traffic codes including every conceivable traffic offense. The more conduct that the government criminalizes, the more frequently citizens commit crimes, and the more readily police have probable cause to stop and search citizens.[17]

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6. *See id.* at 6-12 (detailing legislatures' ability to influence criminal procedure by funding, or not funding, various components of criminal justice system and thus concluding that states "can, to some degree, trump the trump" of constitutional criminal procedure).

7. 372 U.S. 335 (1963).

8. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (finding that Sixth Amendment right to counsel is fundamental right obligatory upon states through Fourteenth Amendment).

9. *See* Stuntz, *supra* note 2, at 70 (arguing that use of substantive regulation governing compensation and performance of court-appointed counsel would make system "substantially fairer" and that failure of constitutional law to so mandate may undercut *Gideon*).

10. *See id.* (stating that "[a]bsent sufficient resources, counsel cannot act as counsel" and that *Gideon* thus should require "some budgetary floors").

11. 367 U.S. 643 (1961).

12. 384 U.S. 436 (1966).

13. *See* Mapp v. Ohio, 367 U.S. 643, 645-46 (1961) (extending exclusionary rule to states).

14. *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966) (requiring warning upon custodial interrogation).

15. *See* Stuntz, *supra* note 2, at 50 (noting that definition of crimes and fixing of sentences is left to legislatures); *see also* Richard A. Posner, *The Most Punitive Nation*, TIMES LITERARY SUPPLEMENT, Sept. 1, 1995, at 3 (arguing that legislatures have responded to increased constitutional rights for criminals by making punishments more severe).

16. *See, e.g.*, Papachristov v. City of Jacksonville, 405 U.S. 156, 171 (1972) (overturning vagrancy statute because it prevented even-handed administration of justice).

17. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of*

If this is true, then we have reason to doubt that the Warren Court's efforts to improve criminal justice through criminal procedure protections yielded a system as substantially improved as the Court and its supporters initially hoped. Taking this view, criminal procedure rules may not fully achieve specific goals (such as reducing illegal searches, coerced convictions, or uncounseled felony convictions) because legislatures can expand criminal law (by giving police more options for legal stops and searches) and underfund courts and public defense (creating systemic pressures that make appointed counsel a formal but ineffective reality).

Another body of scholarship has cast skepticism on the ability of courts to achieve widespread social reform without substantial support from the political branches and the public. Gerald Rosenberg's view of "constrained courts" is a leading work in this vein.[18] Rosenberg has argued that courts are relatively ineffectual institutions for social reform in large part because they depend on other branches of government to implement their decisions, but also because of other factors, such as the limited nature of constitutional rights.[19] Courts are effective at facilitating significant social change, Rosenberg argues, only when they have implicit support in at least one other branch of government and, if not popular support, at least minimal popular resistance.[20]

Along with this argument, also keep in mind a related thesis: Mark Tushnet's case for populist constitutional law and minimal judicial review.[21] Tushnet has argued that court-based systemic reform can have the unproductive effect of disengaging political activism directed at achieving reform through legislative and other political channels rather than through judicial decision.[22] Others who support the same notion note that elected officials, and

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Criminal Law, 91 J. CRIM. L. & CRIMINOLOGY 829, 856-59 (2001) (discussing how possession offenses provide police with tremendous authority to search, arrest, and incarcerate); *see also* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 561 (1992) ("[O]vercriminalization is an easy way to get around Fourth Amendment restrictions."); Stuntz, *supra* note 2, at 7, 54 (arguing overcriminalization).

18. *See generally* GERALD ROSENBERG, THE HOLLOW HOPE (1991) (discussing role of courts in creating political and social change in twentieth century).

19. *See id.* at 9-21 (discussing proposition that courts generally cannot produce significant social reform because of limitations on constitutional rights, lack of judicial independence, judicial inability to develop appropriate policies, and lack of power over implementation).

20. *See id.* at 30-36 (stating that "[w]hen political, social and economic conditions support change, courts can effectively implement social change").

21. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2001) (arguing that public should participate more directly in shaping constitutional law and "reclaim" Constitution from courts).

22. *See id.* at 173-74, 185-90 (discussing connections among politics, abolishing judicial

not the courts, were responsible for key advances in human rights, such as the abolition of slavery in America and the decriminalization of homosexuality in Britain.[23] Arguably, popular debate would focus more on substantive problems at issue rather than on the legitimacy of social reform imposed by judicial rulemaking. Consider, for example, how *Roe v. Wade*[24] transformed the abortion debate into one centrally concerned with the exercise of judicial power.

These differing views of the ability of courts to achieve systemic reform relatively independent of political and social efforts to achieve the same goal suggest that bold rulemaking by courts is often ineffectual. Moreover, in some cases, bold doctrinal choices aimed at social reform arguably can be counterproductive. Perhaps one example outside of the field of criminal procedure is *Brown v. Board of Education*,[25] which struck down racial segregation in state public schools.[26] *Brown* attempted to dictate a change in social practices even more dramatic than *Miranda*,[27] which, unlike other Warren Court decisions, had no widespread predecessor in state law or practice.[28] Michael Klarman has argued that *Brown* did little to achieve racial integration in schools; ten years after the decision the portion of children attending integrated schools had barely increased.[29] It was only after legislative action – the 1964 Civil Rights Act – that real progress began.[30] Klarman suggests that what impact *Brown* did have was indirect and perverse.[31] *Brown*'s impact was perverse because it galvanized conservative, white opposition to integration in the South. The vehemence and violence of that opposition helped galvanize

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review, and "populist constitutional law").

23. *See* Jeremy Waldron, *A Question of Judgment*, TIMES LITERARY SUPPLEMENT, Sept. 28, 2001, at 7 (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2001)) (questioning widely-held belief that electoral politics disenfranchises minorities).

24. 410 U.S. 113 (1973).

25. 347 U.S. 483 (1954).

26. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (stating that doctrine of "separate but equal" does not belong in public schools).

27. *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (holding that police must warn accused party of rights before proceeding with custodial interrogation).

28. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 394 (2000) (noting that *Miranda* required all states to change their criminal procedure law and practice).

29. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994) ("*Brown* was directly responsible for only the most token forms of southern public school desegregation.").

30. *See id.* at 10 (observing that integration rate in South rose significantly after 1964 Civil Rights Act threatened to cut federal funding for southern school districts).

31. *See id.* (noting that forces for racial change would have eventually undermined Jim Crow even without *Brown*).

a growing civil rights movement and popular national support for civil rights reform.[32] Thus, *Brown* helped contribute to integration largely by energizing segregationists and thereby forcing the issue onto the nation's political agenda.

An analysis roughly similar to the *first-half* of Klarman's story about *Brown* – the emergence of opposition – helps explain the effect of the Warren Court's criminal procedure legacy on criminal justice. The *second-half* of the story – the perverse effect of achieving ultimate success through a galvanized political debate – fits less well for these criminal procedure decisions. The Warren Court decisions – *Miranda* foremost – prompted widespread opposition that took the form of political debate and reform efforts.[33] But legislative action in the ensuing years was hardly in a direction that ultimately served the ends pursued by the Court; Congress famously attempted to overturn *Miranda* in particular.[34] On the other hand, a range of Warren Court decisions had at least more *formal* success than *Brown*. In the wake of *Gideon*, felons have widespread access to at least minimal assistance of counsel; the question is how meaningful this minimal help is. There is also wide acceptance of *Miranda* as a police practice; the question is whether it has much practical effect on informing suspects' decisions to talk to police (and on police efforts to undercut its practical effect).

III. Criminal Procedure in Social Context

Thus, the criminal procedure cases did not follow the same path that Klarman describes in the *second-half* of his *Brown* analysis. *Brown*'s goal of integration was achieved, to the very partial extent that it was, largely through political activism resulting in civil rights legislation and its subsequent implementation. *Brown*'s goal of desegregation coincided with social forces pushing for that same goal. Klarman argues that the latter deserves more credit than the former for much of the integration we achieved.[35]

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32. *See id.* at 11 (remarking that crucial link between *Brown* and 1960s civil rights movement was that *Brown* crystallized southern resistance).

33. *See* Stuntz, *supra* note 2, at 53 (stating that "only legislative response" to *Miranda* "was a congressional effort to overrule it").

34. *See* United States v. Dickerson, 530 U.S. 428, 432 (2000) (striking down 18 U.S.C § 3501 (2000), which made admissibility of defendant's statements turn solely on whether statements were voluntary and declaring that Congress cannot overrule *Miranda*).

35. *See* Klarman, *supra* note 29, at 77-85 (discussing conventional view of *Brown*'s impact on civil rights movement and outlining alternative causal chain between *Brown* and civil rights legislation).

Contrast the movement toward integration with the evolution of criminal procedure. Some of the early decisions – *Mapp* and *Gideon* in particular[36] – were in line with policies already in place in a substantial number of states.[37] From that we can infer, if not a consensus for those rules, at least substantial political support and, perhaps, a general political trend in their direction. Yet other decisions – *Miranda* most famously – were not in line with policies already in place, and no such social-political infrastructure of support later developed.[38]

More importantly – and as a partial explanation – the Warren Court's procedural reform effort came at a particularly inopportune moment. If we define the Court's procedural reform period from *Mapp* through Earl Warren's resignation – 1961 through 1968[39] – that coincides precisely with a dramatic rise in crime rates for the first time in decades.[40] Whatever their legacy on ground-level operations in police stations and courthouses, the Warren Court decisions in the context of rising crime and social unrest in the 1960s gave rise to Richard Nixon's crime-control agenda, which Nixon framed explicitly in oppositional response to Warren Court decisions.[41]

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36. *See also* Douglas v. California, 372 U.S. 353, 357 (1963) (concluding that Equal Protection Clause requires appointment of counsel for criminal appeals); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (declaring that Equal Protection Clause bars states from charging fee to indigent defendants for trial transcripts needed to appeal convictions); *cf.* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that Fourteenth Amendment incorporates Eighth Amendment's Cruel and Unusual Punishment Clause and that Clause thus governs states).

37. *See* POWE, *supra* note 28, at 415 ("The vast majority of states already accorded the accused the rights at issue . . . ."); MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 171 (2001) (noting that when the Court decided *Gideon*, forty-five states provided counsel for indigent felony defendants).

38. *See* Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116, 119 (Bernard Schwartz ed., 1996) ("*Miranda* was the case that galvanized opposition to the Warren Court into a potent political force.").

39. We can also date the "real" Warren Court to 1962, when President Kennedy appointed Arthur Goldberg to fill Justice Frankfurter's seat, providing the reliable "fifth vote" for the liberal wing of the Court. *See* POWE, *supra* note 28, at 209-17 (noting that "real Warren Court" was formed when Justice Frankfurter was forced to retire); Kermit L. Hall, *The Warren Court in Historical Perspective*, *in* THE WARREN COURT: A RETROSPECTIVE 293, 298 (Bernard Schwartz ed., 1996) (remarking that shift in Warren Court after 1962 term is generally ascribed to appointment of Justice Goldberg).

40. *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 29 (1993) (reporting increased crime rates that coincided with Warren Court).

41. *See* POWE, *supra* note 28, at 408 (noting that crime was political issue and that conservatives, including Richard Nixon, were calling for "law and order"); Hall, *supra* note 39, at 298 ("After the 1962 term, the Warren Court emerged as the powerful institution of liberal change against which Nixon and others rallied.").

It is easy enough to characterize Warren Court decisions as hindering the government's ability to fight crime at precisely the moment that we needed to fight crime more effectively. *Mapp* extended the exclusionary rule to a much broader set of illegal searches – those conducted by state police for state crime cases[42] – and the exclusionary rule undoubtedly can have the effect of making prosecution of the guilty infeasible. While providing counsel to defendants as *Gideon* mandated can increase the accuracy of verdicts and reduce wrongful convictions,[43] we also suspect defense counsel can sometimes obstruct successful prosecution of the guilty. And *Miranda* clearly raised the fear that it would reduce confessions,[44] a key to conviction in many cases. Opponents of *Miranda* for three decades argued (in my view, and I think in most others', unpersuasively[45]) that it reduced "clearance rates" for reported crimes.[46] Nonetheless, in theory there is no reason that one *must* view the Warren Court's criminal procedure decisions as hindering a societal response to rising crime. Two frameworks firmly established in our intellectual history by the 1960s and 1970s made this view seem the inevitable one. The first explains why criminal procedure rules seem to hinder crime control.[47] The second helps explain why, in reaction to that perceived loss of crime control ability, we not only expanded the scope of substantive criminal law as Stuntz has argued, but we also adopted a new, retributive premise for criminal punishment that we implemented through dramatic increases in sentencing severity.[48]

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42. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying exclusionary rule to states through Fourteenth Amendment).

43. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (recognizing that indigent defendants cannot be assured fair trials without appointed counsel).

44. *See generally* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996) (concluding that *Miranda* causes loss of 3.8% of criminal cases each year); Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) (suggesting that fall in crime clearance rates can be attributed to *Miranda*); 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 (1998) (concluding that *Miranda* has "handcuffed" police by reducing crime clearance rates).

45. *See, e.g.*, Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278, 280 (1996) (stating that increased violent crime rates and lack of adequate police resources "easily explain" decreasing clearance rates after *Miranda*); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Costs*, 90 NW. U. L. REV. 500, 544-47 (1996) [hereinafter Schulhofer, Miranda*'s Practical Effect*] (summarizing data that show virtually no adverse impact on law enforcement resulting from *Miranda*).

46. *See supra* note 44 (demonstrating concern that *Miranda* "handcuffs" police).

47. *See infra* Part IV.A (discussing Packer's dichotomy).

48. *See infra* Part IV.B (discussing switch from rehabilitation to retribution).

IV. Criminal Procedure in the Confines of Intellectual History

A. Packer's Dichotomy and the State's Monopoly on Crime Control

By the end of the Warren Court's period of criminal procedure reform, Herbert Packer developed a well-known thesis about basic choices in criminal procedure regimes that was at once insightful and an articulation of widely intuited assumptions. Packer's famous argument was that criminal procedure regimes can be designed on two basic models, either a crime control model or a due process model.[49] The crime control model's primary objective is, obviously enough, effective crime detection and enforcement; it tries to minimize procedural restraints that hinder those goals.[50] The due process model, on the other hand, adopts a foundational commitment to other values in addition to truth-finding and enforcement, in particular it emphasizes fairness to defendants built on commitments to citizen autonomy and liberty.[51]

In Packer's view – and, I believe, in what became the widespread public view – procedural regimes could adopt one model or the other, or a compromise between the two.[52] But there is the critical assumption: One model inevitably compromises the primary objective of the other. To protect due process values, we trade off crime-fighting effectiveness. To effectively control crime, we must sacrifice the autonomy and liberty values that enliven due process commitments. We can compromise somewhere in the middle, but it is basically a zero-sum game. No win-win solution in which we can choose one and do little harm to the other exists.

It was within this framework that observers interpreted the Warren Court's criminal procedure decisions. In this view, the Warren Court is the paradigm of the due process model because it diminished the state's ability to

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49. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5-6 (1964) (introducing two models as means of discussing "operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems").

50. *See id.* at 9-10 (stating that crime control model considers "the repression of criminal conduct . . . the most important function" of criminal process and, further, that model requires that "primary attention be paid" to system's ability to identify suspects, adjudicate guilt, and impose sentences).

51. *See id.* at 14 (stating that paramount concerns of due process model are development of facts by formal, adjudicative, and adversary processes and defendant's "full opportunity to discredit the case against him" before adjudication of his case); *id.* at 15 (stating that due process model "insists on the prevention and elimination of mistakes to the extent possible").

52. *See id.* at 5-6 (stating that two models reflect "separate value systems that compete for attention" and that models assist in examining "resolutions . . . between mutually exclusive claims").

fight crime. The problem was that it did so during a dramatic crime increase, when crime control tools were suddenly much more important than before. Under the Packer view – which we could think of as Richard Nixon's view as well, or probably the conventional wisdom view – the Warren Court perversely restricted the government's ability to protect citizens at precisely the moment that crime most threatened citizens. Packer's understanding rests on two implicit premises: the state monopoly on crime control and the utilitarian assumption that criminal law deters crime. Both remain vibrant – though perhaps not quite as dominant – to this day.

1. The State Monopoly on Crime Control

First, this dichotomous framework makes sense only if we see the *state* as the sole (or at least, clearly the most important) means for controlling crime. Criminal procedure rules merely tell the *state* what it can and cannot do with regard to investigation and adjudication: it cannot search without probable cause; it cannot question arrestees without informing them of their right to remain silent; and it cannot try suspects without providing them a lawyer. Similarly, the crime control model assumes state actors are most effective at reducing crime.[53] Police investigate crimes, gather evidence, and apprehend suspects. Prosecutors charge and prosecute, courts convict and sentence, and the government administers punishment. The premise that crime control mostly means *state action* to control crime is widely accepted.

Interestingly this was not always so. The public sector did not always monopolize crime control. That task was not always synonymous with law enforcement, but rather once suggested "a more generalized, undifferentiated conception of the agencies responsible for crime control and order maintenance."[54] Part of this notion that the state is not our only means (or the dominant and most effective means) of controlling crime lives on in discussions about the "root causes" of crime and suggestions that education, housing and jobs programs, or well-functioning families will do more to reduce crime than imprisonment.[55] But that notion became decreasingly persuasive (and increasingly parodied) starting in the 1970s.[56] Only recently have we seen in criminal law scholarship a modestly revived interest in private forces rather than public

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53. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 38-39 (2001) (discussing penal-welfarism).

54. *Id.* at 31; *cf.* Dubber, *supra* note 17, at 853 (describing increased role in recent decades for "the state's duty to guard the public welfare against social dangers").

55. *See* GARLAND, *supra* note 53, at 8, 170 (noting continued operation of rehabilitative programs and discussing aspects of penal-welfarism still present in modern criminal control).

56. *See id.* at 53-55 (discussing generally collapse of penal-welfarism).

ones, along with a faith that social influences may be more important to reducing crime.[57]

2. Utilitarian Visions of Crime Control

The second premise underlying Packer's view – and the view that criminal procedure rules have a causal link to rising crime – is the classic utilitarian assumption regarding the deterrence effects of criminal law.[58] As I discuss below,[59] utilitarianism played a dominant role in conceptualizing criminal punishment for most of the twentieth century, although it primarily supported a rehabilitation vision rather than a narrow deterrence goal. Nonetheless, with the implicit framework of utilitarianism readily available, it is easy to link rising crime with procedural limitations on the state's ability to control crime. In the classic deterrence calculus, deterrence effects are a function of two variables: the likelihood of punishment and the severity of punishment.[60] Criminal procedure governs investigation and adjudication – elements in the likelihood of punishment or the state's mechanisms of finding and punishing criminals. If the Warren Court decisions reduce (or are perceived to reduce) the likelihood of detection, arrest, evidence-gathering, and conviction, then they affect the first variable and reduce criminal law's deterrence value. Notwithstanding the persuasive critiques of that narrow deterrence model, many perceived the Warren Court in those terms, and hence, perceived the Warren Court as reducing the likelihood of punishment.[61] After the Warren Court, sentencing reform compensated by increasing the severity of punishment.[62]

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57. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-61 (1997) (discussing interaction between social influence and crime); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 669-70 (1998) (stating that "the structure of the community in which an individual lives interacts in important ways to either facilitate or retard that individual's criminal or delinquent behavior").

58. *See* Packer, *supra* note 49, at 9 (stating that under crime control model, failure to bring criminal conduct "under tight control" will "lead[ ] to the breakdown of public order").

59. *See infra* notes 64-68 and accompanying text (discussing utilitarian and rehabilitation view of criminal punishment).

60. *See* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-77 (1968) (discussing how to determine number of criminal offenses that will occur in an economic model of crime).

61. *See supra* note 44 (demonstrating concern that *Miranda* "handcuffs" police).

62. *See* THE SENTENCING PROJECT, BRIEFING SHEET NO. 1068, THE EXPANDING FEDERAL PRISON POPULATION (rev. 2002) (showing federal prison population growth from 1981 to 2001); THE SENTENCING PROJECT, BRIEFING SHEET NO. 1044, NEW PRISON POPULATION FIGURES SHOW SLOWING OF GROWTH BUT UNCERTAIN TRENDS 1 (2002) (stating that there was 79% increase in state and federal prison population from 1990 to 2000).

So, one aspect of the Warren Court's legacy – the resistance met by its criminal procedure decisions – is a function of the moment in social history in which it occurred and the ideological framework through which we understood those decisions. In an era of rising crime, Warren Court decisions look like ill-conceived restraints on the only effective means with which we have to respond to crime. A sustained, systemic reaction against the Court, in retrospect, looks inevitable. That response could have taken quite different forms. Unlike the issue of racial segregation, however, there was little independent social and political momentum to buttress a commitment to a due process model of criminal procedure, nor was there much conceptual basis for pursuing tools of crime control separate from state-run policing and prosecution.

Instead, that response took the form of emphasizing the remaining components of the state's criminal justice system that criminal procedure rules did not regulate. Those components are, first, the substantive scope of criminal law and, second, the form and degree of punishment. Bill Stuntz, and, to a lesser degree others, developed the story of the first response.[63] Hence, I will merely reference that account here. The second response I will develop a bit more, for I think it is another instance of unintended consequences from Warren Court criminal procedure decisions and, to some degree, that Court's other civil liberties decisions. In short, my thesis in the next subpart is that the Warren Court not only created the impetus for a crime-control reaction, but also provided part of the conceptual foundation for much of its particular form. The Warren Court's emphasis on respect for individual autonomy and due process, in a range of government-citizen interactions, helped feed the critique of rehabilitation-oriented penal sanctions and inspired the turn to retribution and the organizing theme of punishment in the 1970s. And that premise produced (not inevitably, but as it happened) the draconian system of incarceration that we built for the last three decades and are only now beginning to reassess.

B. The Switch from Utilitarianism and Rehabilitation to Punitive Retributivism

People of my generation and younger have no first-hand memory of this fact, but for most of the twentieth century – through the 1960s – society understood criminal punishment in utilitarian terms and criminal punishment aimed to serve the function not only (or even primarily) of deterrence, but also of rehabilitation.[64] As late as 1972, the Model Sentencing Act declared,

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63. *See supra* notes 2-5 and accompanying text (discussing Stuntz's work addressing importance of constitutional regulation of substantive criminal law).

64. *See* GARLAND, *supra* note 53, at 34-35 (tracing evolution of penal-welfarist and

"Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances and needs."[65] Out of this understanding came the long tradition of indeterminate sentencing. Legislatures drafted statutes allowing sentences, for example, of "one to twenty years," and judges would sometimes sentence individual offenders almost as broadly.[66]

Even if the sentencing judge defined a more specific sentence – ten years, for example – everyone involved understood that the offender may well not serve that much time. Parole boards, with the aid of prison officials, were to determine when an offender was rehabilitated or was otherwise ready for release. The goal was an individually tailored assessment of offenders that led to individualized, specifically appropriate sentences.[67] One armed robber might be ready for release after a year in prison; another might need ten years or more for rehabilitation. When the criterion for punishment is an individual's rehabilitative status, it makes no sense to think about standard, determinate sentences, unless one believes that every person is rehabilitated in the same time under the same conditions.[68]

By the late 1960s, this system, and the ideological premises upon which it was built, faced increasing criticism. Interestingly, that criticism arose from both the Right and the Left of the political spectrum, and Warren Court jurisprudence helped shape the Left's response. As has been extensively discussed elsewhere, the criminal procedure cases contributed to a broader Warren Court theme of strengthening individual rights against state action, with a particular concern for personal privacy, autonomy, and equitable treatment. I will simply note this commonplace understanding with a few examples. *Griswold v. Connecticut*[69] joins criminal procedure cases such as *Mapp* in defining greater personal privacy rights against state intrusion.[70] Free

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correctionalist crime control); ANDREW VON HIRSCH, DOING JUSTICE 4, 9-12 (1976) ("Twenty years ago the aim seemed clear: to rehabilitate the offender.").

65. MODEL SENTENCING ACT § 1 (2d ed. 1972).

66. *See* MARVIN FRANKEL, CRIMINAL SENTENCES 5-6 (1973) (remarking that broadly written statutes leave sentencing to "unfettered discretion" of judges).

67. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 2-6 (1981) (describing rehabilitative ideal concept of criminal punishment).

68. This is not to say that the actual practice of criminal sentencing always served, or was actually motivated by, rehabilitative ideals. In addition to the obvious exception to this premise – widespread use of the death penalty in the first half of the twentieth century – the history of punitive incarceration, hard labor, and chain gangs, especially for African American convicts, suggests the formal conceptual foundation for punishment was not always fulfilled in practice.

69. 381 U.S. 479 (1965).

70. *See* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (relying in part on *Mapp*

speech decisions expressed increasing concern for personal expressions (artistic as well as political) that are essential to a robust conception of personal autonomy.[71] And more robust conceptions of fair and equitable treatment informed due process decisions, including the post-Warren *Goldberg v. Kelly*[72] decision, and the nascent prison reform and prisoners' rights litigation of the 1960s.[73] Equitable treatment was an underlying concern of a range of criminal procedure decisions that aimed to reduce the disadvantages of poverty in litigation.[74] It also underlays substantive criminal law decisions, such as *Papachristou v. City of Jacksonville*,[75] which sought to limit police discretion by overturning an ordinance that provided a means for racial (or otherwise illegitimate) discrimination.[76] This overarching theme of individual rights both reflected and contributed to a broader social ethos of the 1960s that included a heightened emphasis on personal autonomy from imperious or inequitable state intrusion.

In the realm of criminal punishment, this theme of individual rights was important to the liberal critiques of the dominant regime of rehabilitative, discretionary sentencing.[77] The American Friends Service Committee's 1971

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to conclude that Constitution gives rise to "zone of privacy created by several fundamental constitutional guarantees"); *see also* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (referring to constitutional guarantee against "unreasonable" searches as "an essential part of the right to privacy").

71. *See* Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1614-15 (2000) (reviewing STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY (1998); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999)) (noting various rationales for protecting free speech in light of Warren Court's expansive protections); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94 (1982) (offering thesis that "individual self-realization" is "one true value" served by free speech).

72. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (requiring hearing prior to termination of welfare benefits).

73. *See* JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 64, 69 (2001) (commenting on connection between civil rights movement and prisoners' rights and commenting on Warren Court's extension of due process and equal protection guarantees to prisoners).

74. *See* Mempa v. Rhay, 389 U.S. 128, 134-37 (1967) (finding right to counsel applicable to probation revocation proceedings); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

75. 405 U.S. 156 (1972).

76. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (overturning vagrancy statute because it prevented even-handed administration of justice).

77. *See* GARLAND, *supra* note 53, at 53-73 (discussing sources and successes of criticisms of rehabilitative "penal welfarism" in 1970s).

report *Struggle for Justice* criticized the premise of individualized treatment that provided the foundation for discretionary sentencing and parole.[78] It argued that the practice of criminal punishment was inequitable, paternalistic, and discriminatory. George Jackson's 1970 prison memoir, *Soledad Brother*, offered a searing account of the alienation and rage engendered in many inmates – as well as the emptiness of rehabilitative ideals – by the realities of indeterminate incarceration.[79] By the mid-1970s, mainstream liberal scholars in criminal law and criminology were advocating – for the first time in generations – a theory of punishment grounded in retributivism rather than utilitarianism.[80] The interesting element here is how many of these initial advocates of "just deserts" theory saw it as a means to *reduce* excessive and inequitable sentencing rather than as a rationale to justify more consistently harsh incarceration, as it was used a few years later.[81]

At the same time, the political Right continued its own attack on rehabilitation-oriented, indeterminate punishment. Richard Nixon's war-on-crime rhetoric set the strategic themes for Republican Party campaigns for the next two decades.[82] Concurrently, prominent academics, such as James Q. Wilson in his popular 1975 book, *Thinking About Crime*, argued for a harsh regime of determinate sentencing that abandoned goals of individualized treatment and rehabilitation in favor of the presumed deterrent effect of tough, certain punishments.[83] This law-and-order response, rather than building on

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78. See ALLEN, *supra* note 67, at 7 (stating that report signaled future decline of "penal rehabilitationism"); GARLAND, *supra* note 53, at 55-58 (discussing report's impact).

79. *See generally* GEORGE JACKSON, SOLEDAD BROTHER (1970) (describing life as young black male in Soledad Prison).

80. *See* GARLAND, *supra* note 53, at 59 (noting that DOING JUSTICE, VON HIRSCH, *supra* note 64, argued for retributive punishment as end in itself for first time in decades); RICHARD G. SINGER, JUST DESERTS, at xv (1979) (noting that DOING JUSTICE, VON HIRSCH, *supra* note 64, recognized that punishment is only legitimate goal of sentencing process).

81. *See generally* SINGER, *supra* note 80 (exploring commensurate deserts approach to sentencing); VON HIRSCH, *supra* note 64 (endorsing retributionist philosophy of punishment); Norval Morris, *Desert as a Limiting Principle, reprinted in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 180 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (favoring sentences that are primarily retributive and relate to crime committed, and viewing just deserts theory as limiting, rather than defining, principle).

82. *See* BRADLEY, *supra* note 40, at 30 (noting that Richard Nixon made Supreme Court centerpiece of his campaign and charging that Court had "'weaken[ed] the peace forces as against the criminal forces'"); POWE, *supra* note 28, at 399 (calling crime "a Republican issue" and noting Richard Nixon's use of crime as centerpiece of domestic side of his stump speech for congressional candidates); ROSENBERG, *supra* note 18, at 2 n.1 (noting that "Presidents Nixon and Reagan pledged to end judicial activism").

83. *See* JAMES Q. WILSON, THINKING ABOUT CRIME 172 (1975) (proposing that function of criminal justice system should be to isolate and punish); *see also* GARLAND, *supra* note 53,

Warren Court premises to criticize the prevailing punishment regime as the Left did, continued the critique of the Court's criminal justice decisions.

This result, then, is the perverse effect of the Warren Court on criminal law and punishment policy for the last three decades. The Court's criminal procedure legacy helped provide both the tools and the foil for critiques of the dominant commitment to rehabilitative punishment. Yet that regime – in theory, though often not in practice – was in much closer accord with the Warren Court's commitments to humane, equitable uses of state power that infringe individual liberty and dignity than the more punitive regime that succeeded it.

V. Conclusion – Lessons for Courts and Others

The lessons we might draw from this understanding of events are more difficult to discern. Would one who likes the Warren Court's decisions and who also favors a less punitive punishment regime advise, with the benefit of hindsight, that the Court not have embarked on this course at all? More generally, does this view suggest that judicial reform is frequently ineffective or even counter-productive, and that social reform comes only through more traditional political action?

On the former question, I do not think one can say that the Warren Court's criminal procedure decisions were, on the whole, ill-advised and counter-productive. It is difficult to measure the success of these decisions, but there are plausible arguments that they gave us lasting, if marginal, improvements in the criminal justice system. *Mapp*'s exclusionary rule is far from an effective (or even consistently enforced) deterrent on illegal searches, but the ensuing four decades have not yielded strong arguments for a better alternative. After *Gideon*, felony defendants have at least token counsel, but it is hard to say whether *Gideon* itself has been ineffective or whether subsequent decisions by the Court, such as *Strickland v. Washington*'s[84] ineffective-assistance standards,[85] account for the poor quality of much felony representation. *Miranda* proved its initial critics wrong and turned out to be a quite feasible practice for police to administer, in part because law enforcement developed interrogation techniques to get statements despite the warning.[86] Thus, whether *Miranda* provides an effective advisory is harder to assess. One cannot conclude with confidence that Warren Court decisions resulted in substantial

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at 59 (stating that James Q. Wilson favored deterrence and control through sentencing).

84. 466 U.S. 668 (1984).

85. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing two-part test to determine whether appointed counsel was ineffective).

86. *See* Schulhofer, Miranda*'s Practical Effect, supra* note 45, at 507-10 (discussing law enforcement's adaptation to *Miranda*).

progress, or even that they are responsible for progress that other more political means of social reform would not have made. In any of these cases, though, it is hard to say the particular practice at issue (illegal searches, felony trial defense, coerced confessions) is in a worse state now than four decades ago.

However, on the latter, broader question of whether social reform is more effective when it comes from courts or through political action, the Warren Court's criminal procedure legacy offers support for the theme we draw from scholars such as Stuntz, Klarman, Tushnet, and Rosenberg.[87] Courts are relatively poor mechanisms through which to effect substantial reform, especially without concomitant support in social and political movements.[88] Without such support, bold judicial decisions are as likely as not to be ineffective or even counter-productive. Such effects are hard to predict at the time of decision.

But this lesson is not so much for courts as for reformers. Courts should pay little attention to the unintended, long-term (and thus, often unforeseeable) consequences that their decisions may have. Courts are not likely to be good at assessing those effects *ex ante*. Because these effects are contingent on the reactions of other political actors and developments, they are hardly predictable. As Garland has argued, the reaction to the failures of rehabilitative punishment could have taken many forms; it did not require wholesale abandonment of rehabilitation and replacement with a harsh retributivism and deterrence model.[89] That reaction was something over which the Court had little influence or responsibility. On the other hand, it does suggest that the Court should be sensitive to *ex post* assessments of its efforts at dramatic change, which it can achieve in at least three ways. First, the Court can be more willing to revisit established rules. Second, it can innovate other doctrines as developments reveal the inadequacy or unintended effects of earlier decisions. Examples of this approach include Stuntz's argument for more rigorous regulation of substantive criminal law and the creation of a stronger *Strickland* standard to buttress *Gideon*.[90] Finally, it can construct doctrines in ways that allow political actors more leeway to make final policy decisions.

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87. *See supra* notes 18-32 and accompanying text (discussing inability of courts to achieve widespread social reform).

88. *See supra* notes 18-20 and accompanying text (discussing popular support and the ability of courts to effect social change).

89. *See* GARLAND, *supra* note 53, at 65 (stating that defenders of status quo could have avoided criticism by pointing to demographic factors, need for greater reforms, and lack of better alternatives).

90. *See supra* notes 7-10 and accompanying text (discussing Stuntz's argument that *Gideon* requires regulation of rates paid to counsel in order to meaningfully guarantee effective assistance of counsel); *supra* notes 15-17 and accompanying text (arguing that expansion of criminal liability has undercut goals of Warren Court and relying in part on Stuntz's work).

However, punishment reform in light of criminal procedure decisions may be more of a lesson for reformers. We already have grounds to reassess both the commitment of limited resources to litigation-based reform strategies rather than more popular political ones and also to assess the risk that litigation not only takes resources, but also undermines commitment to politically oriented reform. We already know that formal victories by judicial decision can have modest effects on broad social change (though they are not *always* modest). The Warren Court's contribution to the political debates that resulted in our sentencing policies of the last two decades is merely a reminder of the law of unintended consequences and of the practical truth that reform through litigation is no easier to manage, predict, or achieve than reform by any other means.