

ESSAY

LAW AND GRACE

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TWO metaphorical wars have defined American politics and American law over the last generation: the culture war and the war on crime—in particular, drug crime. Aside from the fact that these two non-wars have been misnamed, they seem to have little in common. One is about abortion and gay rights, the other is about crack and crystal meth. The key actors in the first are Supreme Court Justices and Religious Right politicians; the key actors in the second are big-city prosecutors and the members of urban gangs. There doesn't seem to be much overlap here.

Actually, I think there is a lot of overlap. Twice in American history, theologically conservative Protestants have been a stable voting bloc—meaning that we have seen two historical periods when the most Protestant parts of the country voted together, and voted differently, than the rest of the country. The first of those periods began in the 1890s and lasted until the 1930s.¹ The second began in the 1970s and lasted at least until George W. Bush's reelection in 2004.² Twice in American history this country's inmate population

* This Essay is based on the 2007 Meador Lecture that Professor Stuntz delivered at the University of Virginia School of Law on October 18, 2007. Professor Stuntz passed away on March 15, 2011. A 1984 graduate of the Law School, Professor Stuntz taught at Virginia from 1986 to 2000 before moving to Harvard Law School for the remainder of his career. Shortly before his death he asked Professor David Skeel to revise the lecture for publication. The text of the Essay has been revised only lightly; the principal addition is the proliferation of footnotes. Professor Skeel is grateful to Ben Thomas for comments and research help as well as to Anne Coughlin and the editors of the *Virginia Law Review* for contributions both professional and personal.

¹ The states carried by William Jennings Bryan, the leading evangelical public figure in this era, in his 1896, 1900, and 1908 presidential campaigns are a good proxy for this pattern. A recent biographer notes that Bryan “came within a few thousand votes of taking all the states that lay outside the northeastern quarter of the nation,” which was its least Protestant region. Michael Kazin, *A Godly Hero: The Life of William Jennings Bryan* 77 (2006).

² See generally George M. Marsden, *Fundamentalism and American Culture* 237 (2d ed. 2006) (describing the rise of the Religious Right, especially in the South and

has exploded. Between the early 1890s and the early 1940s the number of prison and jail inmates per hundred thousand residents rose by more than eighty percent.³ Between 1980 and 2006 the imprisonment rate more than tripled.⁴

This seems like an interesting coincidence, but there is more. In the century and a half since the Civil War, the United States has seen two legal crusades against vice. The first began in 1890 with the passage of the federal law banning the mailing of lottery tickets.⁵ Federal and state laws targeting gambling, prostitution, drugs, and alcohol followed over the next few decades; this long crusade ended when Prohibition was repealed in 1933.⁶ The second of these anti-vice crusades began in 1973, which was the year *Roe v. Wade* was decided; it was also the year Nelson Rockefeller signed New

West, and stating that “it is no accident that almost as soon as the divisive issue of civil rights formally receded, the Religious Right emerged as a national movement with conspicuous southern leadership”).

³ In 1890, the combined prison and jail population per 100,000 residents was 124. By 1940, the rate was 200. See Margaret Werner Cahalan, Bureau of Justice Statistics, U.S. Dep’t of Justice, Historical Corrections Statistics in the United States, 1850–1984, at 30 tbl.3-3 (1986), available at <https://www.ncjrs.gov/pdffiles1/pr/102529.pdf> (listing prison populations in 1890 and 1940); *id.* at 77 tbl.4-2 (listing jail populations in 1890 and 1940).

⁴ The combined prison and jail population in 1980 was 501,886 compared to a total U.S. population of 226,548,632, or about 222 per 100,000 residents. As of 2006, the prison and jail population had climbed to 2,252,690 compared to a total U.S. population of 298,379,912, or about 755 per 100,000 residents. Compare Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics 478 tbl.6.1.2009 (Kathleen Maguire & Ann L. Pastore eds., 2004) [hereinafter Sourcebook], available at <http://www.albany.edu/sourcebook/pdf/t612009.pdf> (listing the number of adults under correctional supervision between 1980 and 2009), with 1 Bureau of the Census, U.S. Dep’t of Commerce, 1980 Census of Population: General Population Characteristics ch. B, pt. 1, at 1–16, available at http://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8011u_bw.pdf (listing census data for 1980), and Bureau of the Census, U.S. Dep’t of Commerce, Intercensal Estimates of the Resident Population by Sex and Age for the United States: April 1, 2000 to July 1, 2010 (Sept. 2011), <http://www.census.gov/popest/data/intercensal/national/nat2010.html> (providing population estimates between the 2000 and 2010 censuses).

⁵ Anti-Lottery Act of 1890, ch. 908, 26 Stat. 465. A second lottery prohibition followed in 1895, based like its predecessor on interstate transport of lottery materials. Lottery Act of 1895, ch. 191, 28 Stat. 963.

⁶ The most comprehensive recent account of this crusade and its antecedents to date is Gaines M. Foster, *Moral Reconstruction: Christian Lobbyists and Federal Legislation of Morality, 1865–1920*, at 3 (2002).

York's new drug statute, which inaugurated the drug war.⁷ The pro-life movement took off a few years later. Two generation-long culture wars and two generation-long battles against vice coincided with two generation-long explosions in the nation's prison population.

The common thread in all the trends just mentioned is the political power of a religious community: my religious community. I'm an evangelical Christian; I belong to a theologically conservative Protestant church. People who belong to churches like mine—meaning, mostly white, theologically-orthodox Protestants—have been a powerful voting bloc for the last generation, as was the case for the first generation of the twentieth century. In between, not so much. America's criminal justice system has become vastly more punitive during the last generation—as it did during the first generation of the twentieth century. In between, not so much. I want to ask, and to take a stab at answering, four questions about those two sets of trends. First, what is the relationship between them? Second, why should that relationship seem surprising? Third, why does this surprising relationship exist; why did things happen this way? And fourth, how might things have happened differently?

Those are the questions; here is a quick tour of the answers: America's justice system is more punitive in large part because voters in church communities like mine supported policies and politicians who made it so. That relationship should seem strange, because my faith—and the faith of the large majority of evangelical Protestants, in the United States and elsewhere—emphasizes grace and mercy, not rules and punishments. Christians of my generation and of some past generations embraced punitive policies because those policies did not seem that punitive. We didn't mean to be unfaithful to our faith; nor did it seem that we were at the time. Nothing turned out the way anyone thought it would. Last question: how might it all have been different? The short answer is, we might

⁷ The Rockefeller laws, as they quickly came to be known, mandated, among other things, a sentence of at least fifteen years for drug defendants who possessed more than four ounces of heroin or cocaine from 1973 until their repeal in 2009. For discussion and a sampling of *New York Times* newspaper coverage, see Times Topics, Rockefeller Drug Laws, available at http://topics.nytimes.com/top/reference/timestopics/subjects/d/drug_abuse_and_traffic/rockefeller_drug_laws/index.html?emc=eta2.

have fought a different kind of culture war, and a different kind of crime war—wars that were less warlike, with many fewer casualties. Here is the surprising part: that other, less warlike kind of war would have been a lot more successful than the wars we actually fought.

I. THE WAGES OF TWO CULTURE WARS FOR AMERICAN PRISONS

Begin with the first of my four questions: what is the relationship between the culture and crime wars and the two explosions in America's prison population? My claim is that theologically conservative Protestants either triggered the rise in punishment in each era or made it more extreme than it otherwise would have been. What is the evidence for that claim?

Both in the generation after 1890 and in our own generation, imprisonment rose most in the most Protestant parts of the country: what we call the Bible Belt.⁸ Both times, the politicians who were most popular with evangelical Protestants—William Jennings Bryan and Franklin D. Roosevelt in the first period, Ronald Reagan and George W. Bush in the second—were prominent practitioners of tough-on-crime politics. (This may not be something any of us learned about Bryan and FDR in our college history classes, but it is just as true of them as it is of Reagan and Bush.)⁹ Both times, anti-vice crusades fueled the growth in the nation's in-

⁸ Imprisonment rates rose modestly in Pennsylvania and Ohio in the two decades after 1890, from 45 to 46 per 100,000 residents in Pennsylvania, and from 45 to 54 per 100,000 residents in Ohio. The corresponding numbers for Virginia and Alabama were 70 to 104 and 72 to 158. Cahalan, *supra* note 3, at 30 tbl.3-3. The recent trends tell a similar tale. See, e.g., Paige Harrison, Bureau of Justice Statistics, U.S. Dep't of Justice, *Incarceration Rates for Prisoners* (Mar. 28, 2011), <http://bjs.ojp.usdoj.gov/content/dtdata.cfm#corrections> (showing a national increase in imprisonment rates from 135 to 460 prisoners per 100,000 residents between 1978 and 1998).

⁹ Bryan regularly called for criminal prohibition of gambling and other forms of vice, as well as of market speculation (which he understood as gambling). See, e.g., W. J. Bryan, *Gambling Must Go*, *The Commoner*, Oct. 1920, at 3, available at <http://chroniclingamerica.loc.gov/lccn/46032385/1920-10-01/ed-1/seq-1/> ("Gambling at cigar counters, gambling with slot machines, gambling with wheels of fortune—all are gambling and should not be permitted."). Roosevelt not only cracked down on crime; he also used the "war on crime" metaphor to describe the effort. See, e.g., V. F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 *Tulsa L. Rev.* 925, 928 (2004) (noting that "few remember that the great liberal President, Franklin Roosevelt, waged a 'war' on crime (borrowing the war metaphor, like much else, from Herbert Hoover)").

mate population. And both times, voters in the Protestant parts of the United States were the political backbone of those anti-vice crusades.

Bryan, the three-time presidential nominee best remembered for his “Cross of Gold” speech at the 1896 Democratic convention, his spirited campaign for Prohibition, and his role in the *Scopes* evolution trial, gave stem-winding speeches calling on Congress to protect vulnerable Americans by punishing the purveyors of vice. His base was “commoners,” most of them evangelical.¹⁰ Although Franklin D. Roosevelt was not himself an evangelical, evangelicals, especially in the South, were a cornerstone of his grand, unwieldy political coalition.¹¹ Especially in his first two terms, Roosevelt peppered his speeches with religious language, as when he famously vowed to ensure that the “money changers” were removed from “their high seats in the temple of our civilization” and that the “temple” would be restored “to the ancient truths.”¹²

Reagan’s crackdown on crime contributed to a massive realignment of southern voters—a large portion of them evangelical—in the 1980s and 1990s.¹³ George W. Bush benefitted from and continued this generational shift, overseeing dozens of executions as governor of Texas. Reagan told a group of evangelical leaders that “I know you can’t endorse me, but I endorse you,”¹⁴ and evangelicals

¹⁰ Bryan’s reputation as “the Great Commoner” was a badge of honor among his evangelical admirers and a source of disdain among his intellectual critics. See, e.g., Kazin, *supra* note 1, at 101 (noting the novelist Willa Cather’s effort “to balance her wonder at Bryan’s oratory with her lack of respect for his mind”).

¹¹ See, e.g., *Encyclopedia of Religion in American Politics* 76 (Jeffrey D. Schultz, John G. West, Jr. & Iain Maclean eds., 1999) (noting that Roosevelt assembled a coalition that included both Southern Protestants and Catholics).

¹² Franklin D. Roosevelt, *First Inaugural Address* (Mar. 4, 1933), available at <http://www.bartleby.com/124/pres49.html>. The Wall Street Protestants targeted by these threats were *liberal* Protestants like John D. Rockefeller, Jr., not evangelicals.

¹³ Reagan first honed his tough-on-crime stance in his successful campaign to unseat popular California governor Pat Brown in 1966. See, e.g., Matthew Dallek, *The Right Moment* 195 (2000).

¹⁴ See, e.g., Robert Marus & Greg Warner, *Ronald Reagan’s Ascent to Office Paralleled Rise of Religious Right*, Associated Baptist Press, June 7, 2004, available at <http://www.abpnews.com/content/view/2147/117/> (characterizing the quip at the Religious National Affairs Briefing in 1980 as “launch[ing] a relationship with conservative Christians that would eventually reshape America’s political landscape”).

had a direct line to the White House throughout the two Bush terms.¹⁵

There are differences between the two periods. A century ago, theologically conservative Protestants leaned to the political left, and their favorite politicians were Democrats.¹⁶ In our own time, voters in churches like mine have leaned to the right and have mostly voted Republican. But the religious left of a century ago and the Religious Right of our own time are more similar than different. The key similarity is that both movements sought to use law and government primarily to condemn and punish moral wrongs. That led naturally to punitive politics and to a more punitive justice system.¹⁷

So American law and American politics turned sharply more punitive at the same time that voters in church communities like mine became a much more powerful voting bloc. And that happened not once, but twice. Could it be a coincidence? Yes. Does it seem likely that it's a coincidence? I don't think so. My church community is not solely responsible for the two punitive turns that America's justice system has taken in the last 120 years, but I suspect we made both of those punitive turns much more punitive than they otherwise would have been.

II. A MORE LENIENT TRADITION

Which leads to the second question: why should that proposition seem strange? The truth is, it would not seem strange to a lot of people. People outside my church community tend to see people inside that community as intolerant, nasty busybodies. Of course prison populations rise when people like that exercise political power. It's the most natural thing in the world.

¹⁵ Anne Warshaw, *The Co-Presidency of Bush and Cheney* 87 (2009).

¹⁶ Bryan foremost among them, since he openly shared their convictions.

¹⁷ The punitive turn carried a new model of crime definition in its wake. Morals crimes (with the surprising exception of prohibition) were defined broadly in order to make conviction easier. The Supreme Court assisted by interpreting the Commerce Clause expansively in *Champion v. Ames*, 188 U.S. 321, 330 (1903) (upholding a lottery statute), and in *Caminetti v. United States*, 242 U.S. 470, 485–86 (1917) (sustaining the conviction under the Mann Act of a man charged with traveling on a train with his mistress), and in subsequent cases.

Only it isn't the most natural thing in the world. If you look at the long history of English and American criminal law, that history does not support the proposition that Christians tend to make justice systems more punitive. More the opposite: Christians and Christianity made English and early American criminal justice more lenient and more libertarian. The last 120 years have been the exception, not the rule.

I cannot take credit for this argument, at least not for the most part; it rightly belongs to Professor Jim Whitman, one of the best legal historians around. Whitman uncovers this history in a recent book titled *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*.¹⁸ As Whitman tells it, the story goes like this. In the centuries before American independence, English criminal justice faced a crisis: the justice system could not punish anyone; most criminals were unconvictable.¹⁹ Christian judges and jurors worshipped a Savior who was Himself the victim of wrongful criminal punishment, and they feared damnation if they convicted defendants notwithstanding doubts about their guilt.²⁰ The beyond-a-reasonable-doubt standard, which we see as a *limit* on criminal punishment, was actually designed to *encourage* it, by reassuring Christian jurors that they could vote to convict without sending themselves to hell.²¹

Whitman's story is powerful, and its power extends well beyond burden of proof doctrine. English criminal law and early American criminal law were much more libertarian than we usually suppose—and much more libertarian than the state and federal criminal codes that govern Americans today.²² Save for murder, violent

¹⁸ James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* 186 (2008).

¹⁹ *Id.* at 4 (“The reasonable doubt rule arose in the face of this religiously motivated reluctance to convict, taking its now-familiar form during the 1780s.”).

²⁰ The terror centered on Christ's pointed admonition “Judge not, that you be not judged.” Matthew 7:1 (English Standard). When Christ warned not to judge one another, they believed he meant what he said.

²¹ See, e.g., Whitman, *supra* note 18, at 204 (describing the rule as designed to provide “moral comfort”).

²² Criminal statutes were both more narrow and more vague, a vagueness that was often interpreted to invite defenses. Michigan case law, for instance, waved off criminal liability for fights in which both parties were willing participants. See *People v. Yund*, 128 N.W. 742, 744 (Mich. 1910). For a much later decision rejecting the doctrine, see *People v. Sherman*, 166 N.W.2d 22, 22–24 (Mich. Ct. App. 1968).

felonies and felony thefts were all defined more narrowly two centuries ago than they are today.²³ Most of the vice crimes and regulatory crimes that we know today did not exist in centuries past.²⁴ The reason for the difference is the sensibility Whitman describes: Christian lawmakers, judges, and jurors were wary of criminal punishment, not eager to impose it.

That same wariness fits naturally with the religious beliefs held by most people in church communities like mine. If there is one New Testament story that lies at the heart of evangelical culture, it's the story of the prodigal son.²⁵ The tale is well known. The younger of two sons demands his share of the father's estate while the father still lives. The father gives the son what he asks, and the son proceeds to squander the money, indulging in every imaginable vice along the way.²⁶ When he is at the end of his rope, the prodigal decides to return home and beg his father to let him work as one of his servants; he doesn't dare ask to be taken back into the household as a son. When the prodigal is on the road toward his father's home—when he is “still a long way off,” the Bible says—the father runs out to greet him.²⁷ The son starts begging—and the father cuts him off, and tells his servants: Bring my best robe; bring sandals for his feet; put my family's ring on his finger. Kill the best calf; prepare the finest food and wine. We're going to have a party, for my son was lost, and now is found.

Then the story takes a surprising turn. Attention shifts from the prodigal to the father's other son—the older brother who did not run away and squander his share of the estate, the dutiful son who remained loyal and did as he was told.²⁸ That older son objects to the father's generosity: He says, in effect, why waste your wealth on my no-good brother? Why not throw this party for me? And

²³ The criminal intent standard also was much higher for these and other crimes, requiring proof of moral fault, not just the contemporary standard of intending to carry out one's physical actions. For a more detailed discussion, see William J. Stuntz, *The Collapse of American Criminal Justice* 260–62 (2011).

²⁴ These laws and the Supreme Court cases that upheld them are discussed in *id.* at 158–95.

²⁵ The parable is recorded in Luke 15:11–32.

²⁶ The Bible calls it “reckless living.” Luke 15:13 (English Standard).

²⁷ Luke 15:20 (English Standard).

²⁸ “Now his elder son was in the field,” the section begins, “and as he came and drew near to the house, he heard music and dancing. And he called one of the servants and asked what these things meant.” Luke 15:25–26 (English Standard).

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when the story ends, the status of the two brothers has been reversed. It is the prodigal who is the member in good standing of the father's household, and it is the dutiful older brother who is now estranged from his father.

What lessons does that story teach about law and government? At one level, this is a crazy question. The story is about salvation; law and politics have nothing to do with it. But the story works only if it is plausible, only if we could imagine real, flesh-and-blood human beings behaving like this. And if it *is* plausible—if ordinary human interactions work this way, then there must be implications for the governmental policies and legal rules that govern ordinary human interactions.

I think two implications are key: one about grace and one about judgment. We are not told what happens to the prodigal after he returns to his father's household, but the story clearly invites us to believe that he is a changed man, a far better and larger and more decent human being at the story's end than at its beginning. What changed him? The answer is his father's embrace. The father has every right to punish him, every right even to banish him—the way we might banish a criminal to a penitentiary—but he doesn't do that.²⁹ Instead, he gives his wayward son an unimaginably valuable gift: a restored relationship. The robe, the sandals, the ring, and the party are the tangible manifestations of that gift. Mercy plus relationship, with a party thrown in for good measure—that's a pretty good working definition of grace. When that kind of grace happens, the story seems to say, lives are changed.

There is some reason to believe that principle applies in this world, not just in the next. Take two examples from the recent past. In the 1960s, abortion was a crime in all fifty states—and the number of abortions soared.³⁰ In the last twenty-five years, abortion has been a constitutional right—and the abortion rate has

²⁹ A son's request to receive his inheritance while his father was still living would be disrespectful even in our own time; in Jesus's time it was unfathomable. "A traditional Middle Eastern father would be expected to respond to such a request with nothing except physical blows," as evangelical pastor Timothy Keller puts it in a short book on the parable. "This father doesn't do anything like that." Timothy Keller, *The Prodigal God: Recovering the Heart of the Christian Faith* 18 (2008).

³⁰ See, e.g., Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 353–55 (1991) (listing and discussing estimates of illegal abortions for each year up until the *Roe* decision).

fallen almost thirty percent; among teenage girls, the drop is close to forty percent.³¹ What accounts for that strange pattern? One potential answer is: the several thousand crisis pregnancy centers that pro-life churches and organizations have founded in the last twenty-five years. Crisis pregnancy centers provide a range of services, from counseling to parenting supplies, or even a place to live for girls and women with at-risk pregnancies.³² Those centers lack the power to punish or coerce, but they seem to have the power to change lives: not with rules and threats, but with mercy and relationship. Notice that the pro-life movement has enjoyed the most success when its tactics have been most grace-like.

The other example comes from the gritty world of urban crime. In the 1990s and the early part of this decade, we saw a combination of three trends that surprised a lot of people: more police officers on city streets, fewer arrests, and dramatically lower crime rates.³³ Urban police forces reduced crime not by locking up more criminals, but by entering into relationship with the communities they serve—and with the churches that serve those communities.³⁴ The best big-city police forces work hard to keep young men out of prison, not to put them there. It works: the jurisdictions that saw the biggest crime drops in the 1990s were the ones that hired the most cops and locked up the fewest criminals.³⁵ Grace and mercy

³¹ See, e.g., Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, *Persp. On Sexual & Reprod. Health*, Jan.–Feb. 2003, at 6, 8 tbl.1 (showing a twenty-seven percent drop in abortions between 1980 and 2000).

³² See, e.g., Frederica Mathewes-Green, *Seeking Abortion's Middle Ground*, *Wash. Post*, July 28, 1996, at C1, available at <http://www.frederica.com/writings/seeking-abortion-middle-ground.html> (describing and praising work of pregnancy centers).

³³ On the rise in the number of urban police officers in the 1990s, see the annual volumes of the Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States* [hereinafter *Uniform Crime Reports*], available at <http://www.fbi.gov/about-us/cjis/ucr/ucr>. On the sharp drop in violent crime, see Franklin E. Zimring, *The Great American Crime Decline* (2006).

³⁴ The trend, known as community policing, was preceded, and to some degree inspired, by works such as Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 *Crime & Delinquency* 236 (1979), and is well described in David Alan Sklansky, *Democracy and the Police* 82–105, 114–24 (2008).

³⁵ The rise in policing got a boost from congressional subsidies, but the impetus came mostly from local decisions. In the past decade, it has fallen victim to cities' economic travails and has been partially reversed. The rate of police officers per 100,000 in population rose from 219 in 1990 to a peak of 246 in 1999. It had dipped to 231 as of

and relationship are transformative, and that truth has practical value for people who think about law, politics, and government.

If mercy and relationship are more powerful than we tend to think, judgment and condemnation are more dangerous than we tend to think. Recall the older son, the one who did what he was supposed to do, yet ends the story at odds with his father. The people who should most fear for their souls, the story seems to say, are not the rule-breakers. Instead, it is the compliant, responsible, law-abiding part of the population: the religious part of the population, the people who keep their noses clean and do what they are supposed to.³⁶

I am basically a dutiful son by nature; most of my Christian friends are, at heart, dutiful sons and daughters. The prodigal son story teaches people like us to hesitate long and hard before we point fingers at anyone else; it tells me not to imagine for a moment that I occupy any superior moral position. It teaches all Christians to be wary not of vice and loose living, but of arrogance and self-righteousness. Mine is emphatically not a faith that teaches its adherents that there are moral lines to be drawn, that we are on the right side of them, and that those on the wrong side of them need to be hammered.³⁷ On the contrary: the God I worship liked to hang around with prostitutes and tax collectors.³⁸ My church community ought to be the last group to seek huge rises in the prison population.

Let me put the point another way. If we had seen exactly the opposite of the criminal justice trends of the last thirty years—if criminal punishment had fallen sharply instead of rising stratospherically—and if the decline in punishment seemed somehow tied to the rising power of theologically conservative Protestants; if

2009. See Uniform Crime Reports, *supra* note 33 (1990), at 239 tbl.66; *id.* (1999), at 293 tbl.71; *id.* (2009), at tbl.71.

³⁶ In Jesus's time, this was the Pharisees, a rigorous and rule-abiding faction whose hard-heartedness Jesus condemned, calling them "whitewashed tombs." Matthew 23:27 (English Standard).

³⁷ A particularly beautiful illustration is Christ's response to the elders who invite him to condemn a woman caught in adultery. John 7:53–8:11.

³⁸ Much to the dismay of the dutiful law abiders of Jesus's own time. See, e.g., Matthew 9:10–11 (English Standard) ("And as Jesus reclined at table in the house, behold, many tax collectors and sinners came and were reclining with Jesus and his disciples. And when the Pharisees saw this, they said to his disciples, 'Why does your teacher eat with tax collectors and sinners?'").

all those things were true, the odds are that no one would have found the combination shocking. It would all have seemed as natural and predictable as the behavior of those jurors and judges about whom Jim Whitman wrote.³⁹ The association between Christianity and leniency is not surprising at all: it is historically common and theologically reasonable. Which means that the association between Christianity and severity that has characterized recent American politics should be very surprising indeed.

III. WHY THE PUNITIVE TURN?

This brings us to the third question—why did that surprising association happen? Why did a community whose faith pushes us toward leniency embrace a style of politics that pushed toward severity instead? In my view, this question is the hardest. I do not have any confident answers—but I do have three un-confident ones.

First, American Protestants of the last 120 years have suffered from a disease that infects Americans generally: we instinctively believe that law shapes culture, when the usual pattern is the other way around. Nearly two centuries ago, Tocqueville wrote that Americans turn all problems into legal problems, and we seem to believe that all legal problems have solutions.⁴⁰ We haven't changed much. Americans are incurable legal optimists. One reason why American Christians have behaved as we have is that we have been more American than Christian. That is why so many of us have believed that criminally prohibiting liquor or cocaine, gambling or abortion, would actually put a stop to those practices—when all the available evidence suggests otherwise.⁴¹

The second reason has less to do with religious believers than with institutional design. America's political system makes criminal

³⁹ See *supra* notes 18, 19, 21 and accompanying text.

⁴⁰ Alexis de Tocqueville, *Democracy in America* 240–41 (J.P. Mayer ed., 1969) (reporting that “every American feels a sort of personal interest in obeying the laws” and that Americans “show great confidence in their country’s legislation, feeling a sort of paternal love for it”).

⁴¹ Bryan’s confidence in Prohibition is a nice illustration. Speaking to the Nebraska legislature after Prohibition passed, he proclaimed that “there will never be another legalized saloon in the United States.” William Jennings Bryan, *A People’s Constitution* (Jan. 12, 1920) (transcript available at William Jennings Bryan Papers, Library of Congress, Container 49).

laws easy to enact, and other kinds of legislation much harder.⁴² Criminal statutes require less work and attract less opposition than just about any other category of legislation. Americans suffer from too much criminal law for the same reason we burn too much gasoline: neither the laws nor the gas cost enough.⁴³

The reason criminal statutes are politically cheap is that they need not be enforced consistently—and almost never are.⁴⁴ Criminal laws are like speed limits: they mean different things in different places. This makes it easy for politicians to vote for tough criminal sanctions—because, most of the time, they know those sanctions won't be applied to their constituents. That tendency has become more pronounced over time, which is one reason drug punishments are so much more severe than the punishments doled out in the various vice wars of the early twentieth century.⁴⁵

The third answer matters most of all, I think. Christians in church communities like mine supported punitive policies because the policies did not seem as punitive as they really were. In part, the rise in punishment of the early twentieth century and the even bigger rise in punishment of the late twentieth century happened by design: tough criminal laws were supposed to put more people in prison, and they did exactly that. But no one expected it to happen in such massive measure. The politicians who wrote the laws, and even more so the voters who elected those politicians, had no idea what forces they were putting in motion.

⁴² For a nice analysis of this “demand” side dimension of American criminal law, which leads to the criminalization of activities that would be treated as civil matters in other counties, see Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* 64 (Michael Klarman, David Skeel, & Carol Steiker eds., 2012).

⁴³ Voting for new criminal laws is all upside for lawmakers, who will be rewarded for being tough on crime but not punished if the laws they enact are misguided or excessive. For a more detailed discussion, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 546–57 (2001).

⁴⁴ See, e.g., *id.* at 548 (noting that prosecutors avoid prosecuting sympathetic defendants).

⁴⁵ The best known illustration is congressional deliberations over the weight ratios at which powder cocaine and crack should be given equivalent sentences. As recounted in a wonderful article by David Sklansky, the ratio was bid up to 100 to 1, the highest ratio that any lawmaker had suggested. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *Stan. L. Rev.* 1283, 1296–97 (1995).

Many of those voters and at least some of those politicians were more interested in protecting vulnerable victims than in punishing wrongdoers. If you look at political debates surrounding gambling, prostitution, and liquor laws in the early twentieth century and drug laws in the last thirty years, you see a lot of talk about victims: poor women forced into prostitution, factory workers tempted to gamble or drink their paychecks and starve their families, and school children lured into life-destroying drug addiction.⁴⁶ The rhetoric is very similar to the rhetoric of the pro-life movement—which really was and is pro-life: it is about saving lives, not punishing evil.⁴⁷ Punitive policies often begin with paternalist goals.

So why do those policies wind up being so incredibly punitive? Because the policies are imposed *against* their targets, they do not arise out of relationship *with* their targets. Here's what I mean by that. In most American cities in 1890 or 1900, the police officers who worked the streets of high-crime city neighborhoods lived in those neighborhoods.⁴⁸ The local prosecutors who filed criminal charges were chosen by political machines that depended on the votes of the residents of those neighborhoods.⁴⁹ Local juries chosen from those same neighborhoods decided which young men to send to prison, and locally elected trial judges decided for how long to send them.⁵⁰ Criminal justice was an exercise in neighborhood-level self-government.

⁴⁶ This was a particular emphasis of William Jennings Bryan's vice campaigns. See, e.g., Kazin, *supra* note 1, at 255 (stating that Bryan "dedicated himself to driving [liquor] concerns out of business forever," and saw himself "as a Christian educator, determined to teach the young about the perils drink posed both to their bodies and to the larger social order").

⁴⁷ In the bumper sticker version: "Abortion stops a beating heart."

⁴⁸ In the North especially, police jobs were plums of the patronage system, doled out by political machines kept in power by the votes of the working-class immigrants whose streets they patrolled. On police and the machines, see Robert M. Fogelson, *Big-City Police 17-22* (1977). On the influence of immigrant voters, see, e.g., M. Craig Brown & Barbara D. Warner, *Immigrants, Urban Politics, and Policing in 1900*, 57 *Am. Soc. Rev.* 293 (1992).

⁴⁹ District attorneys were usually elected by a county-wide vote, as they are today, but the population was heavily concentrated in the city, even if the county extended further. This meant that city votes determined the outcomes.

⁵⁰ The standard historical discussion of the selection of juror pools is William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 *Mich. L. Rev.* 59 (1944).

This means that criminal punishment was embedded in relationship. Everyone knew everyone else: criminals, crime victims, cops, and jurors all lived side by side. Anger at crime was tempered by empathy toward criminal defendants. They weren't abstractions; they were neighbors. You hesitate before you send your neighbor's kid to the state penitentiary.⁵¹ Not surprisingly, state penitentiaries had fewer inmates.⁵²

Today's system is very different, in large part because of the politics of vice. Pressure for tough vice laws always comes from outside the neighborhoods where the laws are enforced most aggressively.⁵³ The police officers who enforce those laws never live where they work. The laws themselves are written in ways that encourage easy guilty pleas; there are very few jury trials in drug cases, as there were few such trials in gambling, prostitution, and liquor cases in the past.⁵⁴ Sentencing is usually governed by rules written by legislators or sentencing commissions—not by locally elected trial judges.⁵⁵ Criminal justice is no longer something crime-ridden neighborhoods do for themselves; rather, it's something other neighborhoods do to them.

When you divorce punishment from relationship, when you separate justice from empathy, justice inevitably takes on a more severe cast—as it has over the past century, and especially over the past generation. The government has two main tools for fighting crime: more prison beds or more police officers on city streets. The first tool destroys relationship; the second creates opportunities for

⁵¹ In the early twentieth century, more than three-fourths of the homicides in Chicago did not lead to criminal punishment because juries would not convict. Jeffrey S. Adler, *First in Violence, Deepest in Dirt: Homicide in Chicago, 1875–1920*, at 115–16 (2006). When the homicides came in bar room fights and the like, the accused often claimed self-defense, and jurors often agreed. *Id.* at 116.

⁵² The proportion of citizens in prison in 2008 was over six times as high as the proportion a hundred years ago. Compare Cahalan, *supra* note 3, at 30 tbl.3-3 (showing 75 prison inmates per 100,000 in population in 1910), with Sourcebook, *supra* note 4, at tbl.6.29.2009 (showing 504 prison inmates per 100,000 in population in 2008).

⁵³ The tendency for contested moral issues to move from the state and local context, where the vice actually takes place, to national politics is discussed in more detail in David A. Skeel, Jr. & William Stuntz, *The Criminal Law of Gambling: A Puzzling History*, *in* *Gambling: Mapping the American Moral Landscape* 257, 268–69 (Alan Wolfe & Erik C. Owens eds., 2009).

⁵⁴ These patterns are discussed in Stuntz, *supra* note 23, at 32–33.

⁵⁵ *Id.* at 32.

it. In earlier generations in the United States, there were twice as many cops as prison inmates. Today, there are twice as many prison inmates as cops.⁵⁶ That is what happens when criminal justice ceases to be something local neighborhoods do for themselves.

If there is one core mistake my religious community has made in our approach to the justice system, I think it is this: we have been far too willing to support rules and policies designed not for ourselves and our own neighborhoods, but for others who live in neighborhoods far removed from our homes. That is often a bad way to do politics, and it is a terrible way to do criminal justice.

IV. THE GOOD CULTURE WAR

One last question: how might it all have been different? And could it have been different?

The sad thing is, I think it might have been very different indeed. When the culture war that is now coming to an end was just beginning, it might have taken as its model not the vice wars of the early twentieth century, but another, very different and much more successful culture war: the battle for civil rights for African-Americans—the culture war that was fought, mostly, by black Protestants rather than by white ones.⁵⁷

Notice the relationship between that battle and legal punishment. Today, we would expect the civil rights movement to try to make the architects of Jim Crow pay for the evil they did. Yet they did not pay. There was no damages claim attached to *Brown v. Board of Education*,⁵⁸ no reparations bill accompanying the Civil

⁵⁶ In 2008, the number of police officers and prison inmates per 100,000 in population were 230 and 504, respectively. Uniform Crime Reports (2008), supra note 33, at tbl.71; Sourcebook, supra note 4, at tbl.6.28.2009. Earlier numbers are harder to come by, but the pattern is clear. In 1880, the ten largest cities averaged 152 police officers per 100,000 in population. Lawrence M. Friedman & Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910*, at 78 tbl.4.2 (1981). That same year, the nation's prisons held 61 prisoners for every 100,000 in population. Cahalan, supra note 3, at 30 tbl.3-3.

⁵⁷ As brilliantly and poignantly evidenced by the tone of disappointment in Martin Luther King, Jr.'s Letter from Birmingham Jail. Martin Luther King, Jr., Letter from Birmingham Jail (April 16, 1963), available at http://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf.

⁵⁸ 347 U.S. 483 (1954).

Rights Act of 1964,⁵⁹ no massive criminal punishments trailing in the wake of the Voting Rights Act of 1965.⁶⁰ The large majority of those who went to jail because of the civil rights movement were those who were seeking civil rights, not those trying to deny them.⁶¹ Martin Luther King's movement rested on a very simple, very strange, and very Christian idea: the idea that sacrifice—unmerited suffering—produces reconciliation.

And reconciliation, not retribution, was King's goal. Think about the two great legal victories of King's movement, the Civil Rights and Voting Rights Acts passed in the mid-1960s. The Civil Rights Act of 1964 created the law of employment discrimination, which gave us an integrated economy in which blacks and whites can work side by side. The Voting Rights Act of 1965 created the modern law of voting rights—which gave us an integrated political community, in which blacks and whites can vote side by side.

It is so familiar, we have come to take it for granted—and yet the idea is astonishing. King fought and bled and died for the right to have relationship with those who refused relationship with him. He did not seek to punish, though he had every excuse and every right to seek precisely that. He wanted his enemies' embrace. It's an utterly captivating vision. And it changed the culture.

I grew up south of the Mason-Dixon line in the 1960s; I remember that world well. As great as our failures have been over the past generation, and despite the many promises made that have yet to be fulfilled, even so, the scope of the change King wrought is staggering. And he did it all without putting anyone in prison.

By and large, law can do three things: it can punish wrongdoing; it can relieve suffering; and it can promote and protect and, sometimes, create relationship. The culture wars of the early and late twentieth century focused on the first of those three roles. King's

⁵⁹ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to h-6 (2000)).

⁶⁰ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-74e (2000)).

⁶¹ One of the best accounts of the movement and its nonviolent objectives is Taylor Branch's magisterial, three-volume history. Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (1988); Taylor Branch, *Pillar of Fire: America in the King Years 1963-65* (1998); Taylor Branch, *At Canaan's Edge: America in the King Years 1965-68* (2006).

culture war focused on the second and third. King got it right, and my generation of American Protestants got it badly wrong.

In the weeks before these words were first written, I spent many hours watching Ken Burns's documentary on World War II.⁶² Everything about the film is striking, but what most strikes me is the contrast. On the one hand, Burns shows the unremitting horror of that war; he does not for a moment stint on the terrible reality. On the other hand, he shows the inspiration, the generosity, and above all, the unity that ran through all aspects of the American war effort. All wars are awful, and yet that war deserves the name it is often given: truly, it was our Good War.

I believe King's movement was America's Good Culture War, one that was fought as such battles ought to be: aggressively and passionately and with deep commitment to principle, and yet also with love for those with whom the movement did battle. Call it the marriage of law and grace. Legal change helped produce social and cultural change—not by locking up evildoers, but by building the beginnings of an integrated national community. Abraham Lincoln, the historical leader whom King most resembles, would have understood. Lincoln fought a terribly bloody war (one memorialized by another, even better Ken Burns film)⁶³—and yet, as hard as he fought, Lincoln could not bring himself to hate those he fought. They are our countrymen, he liked to say; we should approach them “[w]ith malice toward none; with charity for all”—famous words that define the spirit of the one who spoke them.⁶⁴ That spirit, and King's spirit, have been too little evident in the culture wars of the recent past.

Some might wish for an American future free of culture wars. I do not; I think these battles are worth fighting. But I do wish for good wars: the kind King fought—the kind in which we love our enemies, and fight for the chance to embrace them.

⁶² Titled *The War*, the series was directed by Ken Burns and Lynn Novick, and it first appeared as seven episodes (each either two hours or two and a half hours long) on PBS starting on September 23, 2007 and concluding October 2, 2007. The official website is <http://www.pbs.org/thewar/>.

⁶³ *The Civil War* (PBS television broadcasts Sept. 23, 1990–Sept. 27, 1990). The official website is <http://www.pbs.org/civilwar/>.

⁶⁴ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=38&page=pdf>.