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Sanctioning Government: Explaining America's Severity Revolution

JONATHAN SIMON*

I. INTRODUCTION: A TALE OF TWO REVOLUTIONS

For two centuries, from roughly 1780 through 1980, the politically liberal and economically developed nations¹ experienced a transformation in their practice of punishment that can be described as a “humanity revolution.” In all of these societies, one can trace a robust trend toward a greater concern for the “humanity” of the person being punished.² Like its more famous political counterpart, the humanity revolution in punishment, emerged swaddled in the “rights of man” rhetoric of the Enlightenment. From the start, however, it produced institutions that were shot through with areas of violence and arbitrary power. Penal reform is the name that the episodic process of eliminating those gaps long ago gave to itself.

The landmarks in this tale of reform are well known. Imprisonment replaced torture, execution, and exile as the punishment of choice for serious crimes by the early nineteenth century.³ The death penalty began a process of rarefaction and privatization as it was gradually reserved for some murders and removed from public display.⁴ In the second half of the twentieth century, all of these societies moved toward abolition of the death penalty altogether. This pattern accelerated in the last decades of the century, with the United States and Japan remaining

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1. This roughly defined set includes nations on all the continents but has been most dominant in Europe, North America, and Australia.

2. The literature on this process is extremely rich but some of the most influential works include: DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Robert Hurley trans., New York Pantheon 1977); PIETER SPIERENBERG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION FROM A PRE-INDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE* (1984).

3. There is controversy in the literature as to how abruptly the prison surfaced as a technology of punishment. See SPIERENBERG, *supra* note 2 (criticizing the theory of sudden change associated with Foucault and Rothman). Spierenberg argues that the model of torture as punishment associated with public executions waned gradually and the prison was already in use earlier than the eighteenth century. In contrast, there is wide agreement that by the middle of the nineteenth century the prison had become the punishment of choice for serious felons. For a time, forced exile, known as transportation, provided a second alternative to execution in the United Kingdom and a few other countries. As colonies gained political power, however, most successfully lobbied against the practice and the prison became virtually *hegemonic*.

4. See sources cited *supra* note 2.

the only executors at present among prosperous liberal democracies.⁵ The prison itself frequently came to be criticized as inhumane and ineffective. At the high point of this process, in the late 1960s, national authorities in the United States and elsewhere recommended the reduction and possible elimination of imprisonment in favor of less damaging forms of supervised release in the community combined with behaviorally oriented therapies.⁶

From the start, this process was a largely self-conscious (and self-celebrated) one, understood by philosophers, penologists, jurists, and others largely in terms of the increasingly humane sentiments of an advancing civilization. In the eighteenth century, concern for the protection of prisoners from cruelty was a major cause of mobilization for the educated elites, who built a flourishing and progressive public culture around it.⁷ This consensus implied, that punishments might need to be severe under certain circumstances but never gratuitously so, and always with an eye toward the humanity of both the prisoner and the community itself. In the twentieth century, this ethos was transformed into a support for a scientific penology aimed at rehabilitating the offender.⁸ After World War II, this discourse received the imprimatur of state policy in much of the advanced industrial world.⁹ Prisons were renamed "correctional institutions" and the language of individualized normalization was written into laws and international treaties.¹⁰

Despite noteworthy "progress," especially with respect to the death penalty, the signature of the humanity revolution seemed to be disappearing into the complex pattern of contemporary penal practices in economically advanced liberal societies. While, some version of the "humanity revolution" remains official policy in many countries, it is increasingly confronted by a confusing welter at new practices and narratives that cannot be readily assimilated to the narratives of humanity.¹¹ The main feature of this conjecture include burgeoning prison popula-

5. ROGER G. HOOD, *THE DEATH PENALTY: A WORLD WIDE PERSPECTIVE* (1996).

6. The President's Commission Report, *The Challenge of Crime in a Free Society* 159-185 (1967).

7. MICHAEL MERANTZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835* 144 (1996) (discussing Philadelphia Society for Alleviating the Miseries of Public Prisons).

8. FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1980) (describing the triumph of rehabilitation and its rapid fall during the 1970s).

9. Edgarto Rotman, *Criminal Law: Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1023-24 (1986).

10. On the naming of prisons, see DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980). On the reception of rehabilitative penology into international compacts and treaties, see Rotman, *supra* note 9.

11. See generally Pat O'Malley, *Volatile and Contradictory Punishment*, 3 THEORETICAL CRIMINOLOGY 175 (1999).

tions in many countries, harsh treatment of non-violent crimes including drug violations, public order offenses and illegal immigration. In addition, punishment has increasingly become a dominant political demand in advanced liberal democracies, not by entrenched elites but by average voters.¹²

It is perhaps fitting that the United States, which led the humanity revolution, is far ahead of any comparable societies in developing these new trends. Moreover, while central political institutions in other advanced liberal countries remain cautiously protective of the humanity revolution, American legislatures, executives and courts have openly espoused severity of punishment as an overarching good and have abandoned the long tradition of minimizing pain and cruelty in the penal process. One can justly describe these developments as a "severity revolution."¹³ Imprisonment rates are roughly five times their norm for the first three quarters of the twentieth century, and more than three times the next closest level among advanced liberal societies.¹⁴ The death penalty, is the practice of thirty-eight states and the United States federal government where it has become a consensus in public policy supported across the political spectrum.¹⁵ Cruelty and pain, long treated as inappropriate ends of public policy, are steadily making inroads into the discourse and practice of punishment.¹⁶

The humanity revolution was for a long time a self-conscious signal of both modernity and democracy, (though not always concurrently).¹⁷

12. *Id.*

13. Joseph Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832 (2000) (ascribing escalation in penal severity to search for social solidarity).

14. See Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 64 (1999).

15. Until recently national opinion polls have shown that clear majority of the public of the United States favor retaining the death penalty as a punishment for murder. See Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 21 (1994). Scholars have persuasively argued that this consensus is far narrower and thinner than it appears. Survey responses disguise a good deal of reluctance to impose the death penalty in particular cases and under particular circumstances. See William J. Bowers, Margaret Vandiver & Patricia H. Dugan, *A New Look at Public Opinion on Capitol Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 81 (1994). However, as a values question in United States politics, the death penalty has a clear resonance that is hard to overstate. Virtually all adult Americans know where they stand on it and see that position as decisive for establishing political affiliation with others. In the last several years questions about the administration of the death penalty, especially documented cases of wrongful conviction and of gross misconduct by the government has dampened enthusiasm somewhat but a very strong majority continues to support it.

16. For a survey of some of the measures judges were willing to impose, often with little legislative authority, see Dan Kahan, *What do Shame Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

17. See Ricardo D. Salvatore & Carlos Aguirre, *The Birth of the Penitentiary in Latin*

The rise of the prison, and the ambition to reform rather than destroy the offender, set an agenda for democratic reform that was influential not only on other forms of state power, but also in shaping traditionally private powers such as those of parents, teachers, and employers over children and youth. The severity revolution that has emerged since the 1980s may signal a broader reordering of governance and one that cuts against the democratic character of power, both inside and outside the state.¹⁸ The expansion of the prison population itself constitutes a transformation in the legal status of a significant portion of the population as dramatic as the enclosure movements of the seventeenth century, the end of female coverture and the abolition of slavery in the nineteenth century, and the legalization of organized labor in the twentieth century.

This dramatic change only began to be included in a substantial way on the agenda of sociologists,¹⁹ political scientists,²⁰ lawyers, and legal scholars during the 1990s.²¹ Along with the public, the media, and politicians, most social scientists and lawyers accepted the conventional wisdom that the severity revolution was a response, however misguided in the view of some, to the heightened crime rates plaguing the United States and many of the other advanced liberal societies since the 1960s. Since the early 1990s, critics of this thesis have emerged. These scholars point out that the peak periods of crime growth took place well before the severity revolution and that there has been no consistent rela-

America: Toward an Interpretive Social History of Prisons, in *THE BIRTH OF THE PENITENTIARY IN LATIN AMERICA: ESSAYS ON CRIMINOLOGY, PRISON REFORM AND SOCIAL CONTROL 1830-1940* (1996).

18. I attempt to provide an account of this broader severity shift in power in a book manuscript. Jonathan Simon, *Governing through Crime: Criminal Law and the Reform of American Governance 1873-1998* (2001) (unpublished manuscript, on file with author). The implications of the severity revolution for democracy is considered further in Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 *LAW & SOC. INQUIRY* 1111 (2000).

19. See KATHERINE BECKETT, *MAKING CRIME PAY* (1997); NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY: GULAGS WESTERN STYLE* (1991); MIKE DAVIS, *CITY OF QUARTZ: LOS ANGELES AND THE FUTURE* (1990); Jonathan Simon, *Governing Through Crime*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 171 (Lawrence Friedman & George Fisher eds., 1997); JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS 1890-1990* (1993) [hereinafter SIMON, *POOR DISCIPLINE*]; CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (1998); Caplow & Simon, *supra* note 14; DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

20. DIANA GORDON, *THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS* (1994); STUART SCHEINGOLD, *THE POLITICS OF CRIME CONTROL* (1991). Scheingold's 1984 book, *The Politics of Law and Order*, was the most scholarly work to note this transformation and begin analysing it.

21. MARC MAUER, *RACE TO INCARCERATE* (1999); JEROME MILLER, *SEARCH AND DESTROY* (1996); MICHAEL TONRY, *MALIGN NEGLECT* (1995); FRANKLIN ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991).

tionship between the two over time, even allowing for a considerable lag between felt need and responsive public policy.²² Public concern over crime has fluctuated greatly as well and has tended to respond to political initiatives and media mobilizations.²³ Instead, critics suggest, the severity revolution is being driven by other interests, including politicians, the media, corporations, organizations that advocate for victims, workers in the vast correctional and law enforcement sectors, and capitalism generally. After being largely ignored by the public and the media during the 1990s, this critical discourse is beginning to gain some purchase, aided perhaps by nearly a decade of declining crime rates in most cities in the United States.

As the severity revolution enters its fourth decade and seems poised for global export, it is more essential than ever to have a broad public debate about this potentially profound change in the political culture of the United States and other advanced liberal democracies. This article considers three different critical interpretations of the severity revolution, rooted in three distinct theoretical traditions in contemporary sociology: Political Economy, Cultural Interpretation, and Governmental Rationalities. The term Political Economy encompasses both struggles over asymmetrical power and within the context of broad systems of social stratification, such as capitalism, racism, or patriarchy.²⁴ The term Cultural Interpretation treats punishment largely as a function of the mentalities, morals, and values widely shared among members of society and which provide the basis for social solidarity.²⁵ The term Governmental Rationalities examines the mentalities and technologies that shape the exercise of governance, i.e., power exercised on the conduct of others.²⁶ The diversity within each of these traditions of social

22. BECKETT, *supra* note 19, at 16.

23. *Id.*

24. The vast literature of Marxism constitutes the best-known parts of this tradition. *See, e.g.*, KARL MARX, *CAPITAL* (Eden Paul & Ceda Paul trans., J.M. Dent 1930); JURGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (Jeremy J. Shapiro trans., Beacon Press 1971); GYÖRGY LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTS* (Rodney Livingstone trans., Merlin Press 1971). In the broad sense used here, Political Economy also includes the literature of feminism and anti-racism. *See, e.g.*, W.E.B. DUBOIS, *DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT* (Harcourt, Brace & Co. 1940); CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

25. The modes of inquiry that can lay claim to the title Cultural Interpretation are, if any thing, more diverse. *See, e.g.*, CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Karen E. Fields trans., 1995); CLIFFORD GEERTZ, *THE INTERPRETATIONS OF CULTURE: SELECTED ESSAYS* (1975).

26. *See* MICHEL FOUCAULT, *Governmentality*, in *POWER* 201 (James D. Faubion ed., 2000); FRANCOIS EWALD, *L'ETAT PROVIDENCE* (1984); GIOVANNA PROCACCI, *GOUVERNER LA MISERE: LA QUESTION SOCIALE EN FRANCE 1789-1848* (1993); NIKOLAS ROSE, *POWERS OF FREEDOM: REFORMING POLITICAL THOUGHT* (1999).

theory is almost as great as that between them;²⁷ nonetheless, the sections that follow will focus on specific, recent efforts to use these traditions to analyze the severity revolution. These approaches share considerable common ground, but they also point to differences in both the implications of the severity revolution and for thinking about what we expect these explanations to do. In critically exploring three alternative interpretations I hope, to develop a greater understanding of not only, what is at stake in the severity revolution, but also to understand more about the legacy of modern social theory as a tool to interpret the present.

II. POLITICAL ECONOMY: SEVERITY AS SOCIAL CONTROL

A. Overview

Punishment is quite obviously a way of exercising power on people. It is not surprising that some of the most productive interpretations of penal practices and narratives derive from social theories oriented toward power struggle.²⁸ All of these interpretations, whether focused on class, gender, race, or other kinds of oppression and exploitation, invariably situate practices and rhetorics in terms of a larger constellation of relations that are both political and economic.

Political-economic explanation is thus more than a polite way of saying Marxist, although the Marxist tradition of situating penal trends in class context is at once the oldest and best elaborated. Marx and Engels made only passing reference to matters of criminal law and punishment, but several different lines of Marxist analysis are present in the literature. One such line deals primarily with the role of the penal system as a mechanism for creating and regulating a labor force for industrial capitalism.²⁹ From this perspective, the humanity revolution was a mark of the rising value of labor as capitalism made populations pushed out of the rural economy valuable again. Imprisoning offenders and putting them to work in prisons, rather than executing them, made more sense to societies focused on exploiting as much labor as possible. Economic contractions, in this logic, lead to penal regressions. If sustained

27. For the germinal work for much of the current rediscovery of social theory in the study of punishment, see DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990) [hereinafter GARLAND, *PUNISHMENT AND MODERN SOCIETY*].

28. See, for example, ISAAC D. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION: BLACK REBELS BEFORE THE AMERICAN CRIMINAL COURTS* (1977); STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARK, & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* (1978); STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION* (1985); ADRIAN HOWE, *PUNISH AND CRITIQUE: TOWARDS A FEMINIST ANALYSIS OF PENALTY* (1994).

29. GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1939).

economic depression left the bodies of prisoners valueless, the progressive character of penalty could disappear altogether in favor of making offenders available for the vengeful sentiments of victims or the agents of the sovereign. This is how Rusche and Kirchheimer, two noted scholars, interpreted the severity revolution of sorts that was unfolding in their native Germany in the early stages of Nazism.³⁰

A second approach treats criminal law and the procedures of criminal justice as sites for producing ideological representations of how society works, which legitimize and stabilize the asymmetries created by capitalism. The late British historian, E. P. Thompson, analyzed the dramatic increase in penal severity during the early eighteenth century.³¹ The “bloody code” enacted some 200 new capital crimes in response to vague reports of rural terrorism against the new capitalist gentry that had begun to settle the countryside with trophy homes reflecting its recent gains in the emerging capitalist market. The relatively few executions under this code were the ultimate acts of a complex system, which lent the solemnity of the scaffold to the efforts of the gentry to win popular acceptance of the new rural order it was imposing. Thompson added, however, that in the long run the forms of law under this code established real limits on power that over time served to create more class equality.

A third variant of political economic explanation located the humanity revolution in the transformation of the political technologies which made asymmetry sustainable. Michel Foucault most famously located the rise of the prison in the consolidation of a new technology of power based on discipline, or the meticulous controls over the bodies of individuals in coordinated activity.³² Foucault argued that the official narrative of progressive penal humanity was not so much a deception but a blue print for systems of power intended to operate in and through the useful deployment of human capacities.³³ The prison was the ultimate guarantor of a system which sought to discipline people in groups rendering them docile and useful.

In a recent book, Christian Parenti³⁴ draws on all three approaches to offer a powerful analysis of the severity revolution which he labels “Lockdown America.”³⁵ Parenti locates the origin of the lockdown in the social disruptions of the 1960s, and the response of those in power to these disruptions. In Parenti’s view, the 1960s were far more than the

30. *Id.* at 178-81.

31. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975).

32. FOUCAULT, *supra* note 2, at 173.

33. *Id.* at 29.

34. See PARENTI, *supra* note 19.

35. *Id.* at xi-xiii.

cultural revolution that many commentators seem to treat it as—sex, and drugs, and rock and roll.³⁶ It was a social revolution in which significant resistance to authority was mounted in all kinds of institutional sites, including factories, schools, the military, and prisons. Most of all, this social revolution challenged profitability by threatening to empower the populations of surplus labor necessary to maintain low wages and high profits in key industries.³⁷

The victories for civil rights and the greater generosity of government to the poor in the 1960s raised the militancy of demands of poor and working-class Americans for both wealth and power. This threatened to drive down profits, which were already contracting due to unemployment and inflation, which troubled many of the capitalist countries in the 1970s.³⁸ The broader attack on authority threatened to undermine the ability of institutions, above all business enterprises, to demand disciplined performance from their work force.³⁹ The inability of authorities to maintain control over the streets, campuses, and factories, as well as the losses in Vietnam, threatened to escalate resistance into demands for large-scale redistributions of power.

In Parenti's view, the severity revolution in all its manifestations—the growth in the prison population, the death penalty, the tough populist rhetoric of punishment, and the aggressive policing of public space and public schools—is part of a broad response by capitalism to the social revolution of the 1960s.⁴⁰ The lockdown was a blatant “attempt to reimpose racial and class control.”⁴¹ This counter-offensive operates on a number of distinct class levels. Against the very poor and often minority populations, whose militancy in the urban disorders of the 1960s produced among the most threatening moments of that era, the severity revolution has created both terror and containment—cops who will kill and a prison population with no upper limit. Against the working classes, prone to both collective militancy and private deviance in the 1960s, the severity revolution, combined with an until recently slack market for unskilled labor has operated to re-discipline, tightening surveillance and heightening sanctions for misconduct both on and off the job. For the higher skilled, white collar and relatively affluent middle classes, the severity revolution offers trade off of opportunities for vicarious sadism and resentment-laden affirmation of “their values” in exchange for the

36. *Id.* at 4.

37. *Id.* at 29.

38. *Id.* at 33.

39. *Id.* at 34.

40. *Id.* at 4.

41. *Id.* at 26.

end to utopian promises of personal development promoted during the 1960s.

Parenti's political economic account of the severity revolution is a considerable advance towards drawing together the complex strands of this moment and subjecting them to an overarching interpretation. Parenti is not tempted to over emphasize in his economic argument the proliferation of economic interests that have grown around the severity revolution: to build prisons or supply them with milk, tear gas, or labor.⁴² In a private economy, after all, there is profit to be made off of practically anything the government decides to mobilize itself around, whether it be fighting Communism, poverty, cancer, or crime. For Parenti, the driving force is the needs of capitalism as a system: docile labor at a low price, a secure space in which to cultivate the hyper consumption of a narrower band of affluent Americans than in the past, and, above all, legitimacy in the face of a system that must regularly rely on violence to produce order. His political argument is relaxed enough to acknowledge that the specificity of the severity revolution is driven by factors that are not derivable from capitalism, which includes the specific histories of race and gender construction.

Parenti's analysis brings in a number of features that have received insufficient consideration in the discussion of the severity revolution thus far.

B. *Class Restructuring and the Severity Revolution*

Perhaps the best advantage of Parenti's Marxist political economy is that it carries his interpretation of the severity revolution far beyond the precincts of crime, the criminal justice system, and the immediate interests involved in each. To Parenti, it is United States Capitalism as a social system in crisis that is the real force behind the "lockdown." While there are prices to be paid for so strong and structured a theory, it has the advantage of bringing into view the full range of social relations actually at stake in the crack-down on crime.

From this perspective, Parenti identifies two critical moments that shape the severity revolution. The first takes place in the 1960s during the administrations of relatively liberal presidents—Kennedy, Johnson, and Nixon—as the federal government began a sustained intervention in the quality of local law and state law enforcement. The initial motivations were largely liberal pressures to address racism and a host of other injustices in the under-funded and under-reviewed police and court systems of the United States. As the social turmoil of the 1960s unfolded,

42. *Id.* at 214.

however, the impetus became one of building local justice systems capable of maintaining order in the face of riots, anti-war protests, and a rising tide of aggressive armed robberies and killings in the formerly "safe" areas of the large cities.⁴³

The federal build-up of local law enforcement capacity that the Democratic and Republican administrations initiated in the 1960s and 1970s might not, by itself, have developed into the engine of incarceration that has operated since 1980. For Parenti, the real roots of the severity crisis lie in the transformations in the global economy, which undermined the economic logic of the ameliorist welfare state and initiated a far-reaching reorganization of the post industrial economy.⁴⁴ Through the mid-1970s, the basic economic order of United States society appeared healthy, while the turmoil took place at the margins among those semi-permanently (the African-American poor) or temporarily (affluent white youth in college) outside the class system. But as the dismal "misery index" years of the 1970s unfolded, that class order seemed to be breaking down altogether.

The election of President Ronald Reagan in 1980 was widely recognized at the time, and since, as marking the beginning of a new economic order. This order was viewed as either liberating the energies of over-regulated capitalism or crushing resistance to a unilateral rewriting of the class order in America by large corporations, depending on one's political orientation. Parenti takes the latter view, but his central point is unaffected by which approach one favors. Whether healthy in the long run for ordinary Americans or not, Reagan's political economy created tremendous instabilities in a class system that had prided itself for a quarter century on steady and relatively uniform social outcomes. The new economic policies of the Reagan administration encouraged the rapid growth of both urban poverty and urban wealth.⁴⁵

The ability of the political class during the 1980s to buy off the demands of working and middle-class whites with tough talk and action on crime was a direct result of this second moment. Security from violent crime and drugs became a primary demand for politically visible suburban voters living in the rings of major metropolitan areas and their adventurous friends in the remodeled downtown hubs.⁴⁶ Cut off from the normative and disciplinary influence of the labor market, the largely African-American urban poor began to appear more threatening to the

43. *Id.* at 14.

44. *Id.* at 167.

45. See generally BENNETT HARRISON & BARRY BLUESTONE, *THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA* (1988).

46. PARENTI, *supra* note 19, at 167.

middle class.⁴⁷ In the new gentrification the middle class became familiar with more of what homelessness, permanent welfare dependency, and crack cocaine were doing to America's cities.⁴⁸ The escalation of the war on drugs and crime was a prime result.⁴⁹

A generation earlier, this kind of middle-class insecurity about crime might have lent a new intensity to the war on poverty, but, by the 1980s, Reaganism as an ideology had delegitimized the project of helping the poor. Such assistance was perceived as making things worse. The best thing government could do for the poor on this account, was impress upon them just how responsible they were for their own problems. This facilitated an increasing acceptance by the formerly pro-human rights United States middle class of a regressive, semi-biological view of underclass criminals as "super predators"⁵⁰ and "career criminals"⁵¹ who could not be safely reintegrated into society. This rebirth of the monstrous has had profound consequences for public policy across a wide variety of fields, from criminal penalties (more death sentences and mandatory minimum prison sentences), to welfare, public housing, and immigration.

Crime also became a way to draw clear lines between the socially conservative white working class and the hard core urban poor relegated to the illegal labor markets and welfare. White workers, many of them unionized, found their economic situation and that of their children in stark decline under President Reagan's economic policies. The war on crime, Parenti suggests, served both to remind workers of the price of being placed outside the labor market and served to provide an alternative source of satisfaction at a time when ever-rising living standards would no longer define an honorable working class life.⁵²

Parenti's political economic analysis of our severity revolution is almost the reverse of David Garland's analysis of the humanity revolution in Britain during the late nineteenth and early twentieth centuries.⁵³

47. SIMON, POOR DISCIPLINE, *supra* note 19, at 5.

48. *Id.* at 70.

49. *Id.* at 44.

50. WILLIAM BENNETT ET AL., BODY COUNT: MORAL POVERTY — AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS (1996).

51. Jonathan Simon, *Criminology and the Recidivist*, in THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY (David Shichor & Dale K. Sechrest eds., 1996).

52. PARENTI, *supra* note 19, at 239-40.

53. See DAVID GARLAND, PUNISHMENT AND WELFARE (1984). Garland's analysis in this book is far more oriented toward the mode of analysis I have called Political Economy here, in contrast to his subsequent work that tends toward Cultural Interpretation, as I have characterized it. See GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 27, at 249-76. In *Punishment and Welfare*, Garland provides an analysis of how class mattered, in terms both of political parties and ideas, in shaping the new normalizing penology of that era. This is something Parenti only really sketches in his book. See PARENTI, *supra* note 19.

Then, the rising political and economic power of industrial workers supported a renegotiation of the meaning of crime as a social problem. From a threat associated with the laboring classes in general, crime was recast as a pathology of deviant individuals found among all classes of society (although perhaps most concentrated in the lower classes for over-determined reasons). Today, the declining political power of the working class is reflected in a broadening of formerly discredited notions of group criminality. British workers at the turn of the twentieth century won a new social contract under which even deviants and criminal offenders were included in the human family as potential workers. United States workers at the turn of the twenty-first century, according to Parenti, fight a difficult battle against the increasingly embedded presumption that they are potential criminals.

C. *The Functions of Terror*

Parenti is not the first recent critic of the severity revolution to point to the disturbing trend not simply toward a bigger penal system but toward a meaner, crueller one.⁵⁴ Parenti's class analysis allows him to project a wide variety of functions to terror. Terror operates to reinforce the terms of the new and steeper class gradient in United States society. Parenti surveys the extraordinary, overt, and often ritualized violence which exists in contemporary prisons like California's notorious Pelican Bay Security Housing Unit and in special police details like the New York Police Department's Crime Suppression Unit, whose members shot Amadou Dialo to death in 1999.⁵⁵ The primary targets of this terror are surplus populations unwanted by the current labor market because they are too demanding, too unskilled, and too dangerous.⁵⁶ Against these populations, the terror of the prison system and the death penalty operate as a deterrent and ultimately a form of elimination. Rape, for example, is now a critical part of the maintenance of order inside prisons. It creates a very specific threat that guards can manipulate to achieve submission from inmates.⁵⁷ Other violence, like gladiator-type fights between rival gang inmates staged by correctional officers, seems less focused on control than on satisfying emotional needs of the staff.

Parenti notes that we are also moving back toward the use of public spectacle as a device for social control of the general population, something Foucault theorized was replaced by the emergence of mass surveil-

54. See, e.g., STEVEN DONZIGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* (1996); JEROME MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (1996).

55. PARENTI, *supra* note 19, at 108-09.

56. *Id.* at 46.

57. *Id.* at 185.

lance in the nineteenth century.⁵⁸ In fact, both seem likely to intensify, with terror aimed at the “social dynamite and social junk”⁵⁹ that worry the urban gentry and surveillance aimed at suburban teenagers and others expected to remain part of society. Set in a normatively safe context, like inflicting lawful punishment, terror and cruelty by the state against those defined as moral monsters provides emotional gratification for more privileged working and middle class Americans whose own increasing economic instability may produce real feelings of aggression and resentment.⁶⁰ Middle and working class Americans, faced with lower wages and leaner benefits (i.e., more risk), may feel more comfortable and secure (or at least honorable) knowing that criminals and aliens are treated as having no rights to security.⁶¹ As long as the terror is directed against those considered to be “beyond the law,”⁶² like those who are perceived as in the grip of evil or monstrous desires (sex offenders, drug king-pins, and drug addicts),⁶³ or those who do not yet belong, such as asylum seekers or recent immigrant groups, there is little political price to be paid for the exercise of terror and many interests can be rewarded.

D. *The Limits of Political Economy View of Punishment*

At heart, Parenti’s analysis is a top-down view of punishment. Punishment is about social control. It is primarily directed at those most threatening to the capitalist social order—the poor, unemployed, and racial minorities—but it reinforces the positive incentives of those in relatively privileged employed classes to support the system. In explaining the shift from humanity revolution to severity revolution, Parenti points to a “crisis:” a break down of social control which threatens to allow a serious redistribution of power, in short, a social revolution. Those who made the severity revolution include politicians, the media, certain academics, and powerful penal interest groups such as law enforcement and correctional officers. For Parenti, the logic of their actions lies ultimately in the needs of capitalism as a social system. Parenti’s political economic explanation of the severity crisis introduces its own considerable gaps, some of which leave some of his own best insights about the severity revolution underdeveloped.

First, capitalism at the extremely abstract level at which Parenti casts it explains too little, because it explains too much. The deductive

58. FOUCAULT, *supra* note 2, at 222.

59. PARENTI, *supra* note 19, at 152.

60. *Id.* at 139.

61. *Id.* at 160.

62. *Id.* at 180.

63. *Id.* at 52-58.

power of capitalism to explain almost anything leads Parenti to miss the opportunity to really question what may seem obvious about the severity revolution and how it works. Why is it that correctional officers value the opportunity to physically violate inmates over other things they might value about their careers? What is it about the transformation of the capitalist society since the 1970s that has generated so much anxiety and how does crime fear map on to the landscape of social anxiety produced? Parenti's book is actually full of insights about all of these themes, but they are stuck together by an almost invisible mass called capitalism. In transferring so much explanatory power to this transcendental structure, Parenti treats the nature of penal power and the nature of the subjects involved in or observing punishment as unchanging. Punishment is a way of ratcheting up the pressure on people, but it is not treated as constitutive of what it is to be a subject.

When it comes to explaining the attraction to criminal violence of so many in both the underclass and law enforcement and correctional working classes, Parenti's approach is telling—he falls back on the most mainstream sociological criminology of all, the theory of “relative deprivation.”⁶⁴ Interpreting Durkheim's sociology of deviance, Merton argued that deviant behavior, like crime, is an alternative path toward achieving consensus goals. Parenti suggests that the growing underclass of social dynamite produced by the retrenchment of capitalism is prone toward crime because it is exposed to a consumer culture whose demands it cannot begin to fulfill.

While this move helps Parenti acknowledge the “reality” of high crime levels while simultaneously maintaining his critical stance on the criminal justice system, it does so by recasting both crime and punishment as fundamentally instrumental ways of obtaining wealth, power, or both, over others. Crime is treated as a function of economic gain. Punishment likewise is treated as a strategy of control aimed at recalcitrant members of the subordinate classes. In sum, Parenti views the severity revolution largely as a strategy for bad times, suggesting it might wind down in the stability of good times.

This leaves out the constitutive role of crime and punishment, the role each plays in allowing individuals and collectivities to project interpretations of their moral status. Punishment, as Parenti himself notes, is also aimed at a broad audience that never imagines itself likely to end up in the hands of the law, but does view its moral worth as somehow reflected in the quantity and character of punishment.⁶⁵ As many of Parenti's observations suggest, it is precisely this identification of ordi-

64. PARENTI, *supra* note 19, at 46.

65. PARENTI, *supra* note 19, at 55.

nary people with retributive justice that has fueled the severity revolution in law, but he fails to ask how law and punishment contribute to the construction of political subjects. Parenti can only presume a broad sadism that comes to the fore front at times of social stress.

III. CULTURAL INTERPRETATION: SEVERITY AS SOLIDARITY

A. Overview — Cultural Interpretation

Cultural Interpretation is often contrasted with Political Economy. Where Political Economy is typically top-down in its explanation of change, Cultural Interpretation generally emphasizes processes that move from the bottom up such as changes in values, norms, and tastes. Political Economy typically emphasizes conflict across class lines and other cleavages. Cultural Interpretation typically emphasizes consensus and common ties that bind society. These contrasts have become less clear in scholarship as Political Economy has taken up problems of identity and representation and Cultural Interpretation, in the form of the Cultural Studies movement, has taken up difference and conflict as fundamental issues.⁶⁶

The tradition of applying Cultural Interpretation to punishment stems from the beginnings of modern sociological analysis. Writing in 1896, Emile Durkheim argued that the humanity revolution which had swept modern societies was a product of a fundamental reorganization of society's economic and moral order.⁶⁷ Punishment, according to Durkheim, relieves the emotional demand created by the violation of norms and reinforces the experience of solidarity by illustrating the significance of the norm in its breach.⁶⁸ To Durkheim, the increasing humanity of punishment was a reflection of the moral order produced by a complex division of labor.⁶⁹ Traditional societies, with simple economic structures, formed moral values based on homogeneity and identification with a common deity or ruler, which produced harsh demands for punishment.⁷⁰ In modern societies, in contrast, with moral values that celebrate individual freedom and rationality, acts that violate the moral order do not produce as strong a demand for punishment and punishments reflect those values by emphasizing the humanity of even the offender.

A second important line of the Cultural Interpretation of punish-

66. Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001).

67. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., 1984).

68. *Id.* at 56.

69. *Id.* at 102.

70. *Id.* at 56.

ment has its source in the mid-twentieth century social theory of Norbert Elias.⁷¹ Elias studied the development of manners in Western societies by tracking evolving norms of good manners in etiquette books written for the elite from the middle age through the early twentieth century, and then their diffusion through the lower classes. Tracing what he called the “civilizing process,” Elias found that in practices concerning the public display of bodily functions, e.g., of eating, relieving oneself, sexuality, and death, the development of manners was toward greater distancing of them from public observance or commentary.⁷² Elias theorized that over time individuals (first in the upper class, but eventually across classes) became far more sensitive to encounters with the biological or instinctual layer of existence. This growing refinement of sensibilities, according to Elias, was driven by the parallel expansion of the political state and its capacity to enforce both private rights and a public order.⁷³ As the state became more capable of imposing a uniform level of peace, people became more concerned with self-control. Social mores increasingly discouraged overt aggression or other displays of instinctual desires. The historian Pieter Spierenberg has used Elias’ cultural theory to help explain the humanity revolution in punishment.⁷⁴ Punishments involving open displays of violence increasingly came to seem distasteful and dangerous to elites (and eventually the popular classes) of a society that increasingly valued self-restraint.⁷⁵

The most significant recent effort to apply Cultural Interpretation to the severity revolution, in all of its manifestations, draws explicitly on Durkheim, and resonates with Elias’ concerns as well. Joseph Kennedy sees the “severity revolution”⁷⁶ as an expression of a deep and widely-shared anxiety about the perceived decline in shared social norms in contemporary society. Kennedy views the causal logic of this anxiety as a complex interplay of cultural and socio-economic forces.⁷⁷ United States society in recent decades has been experiencing a high degree of social change, including record levels of immigration, rapid technological innovation, and growing economic inequality. Kennedy, *pace* Durk-

71. NORBERT ELIAS, *THE HISTORY OF MANNERS: VOL. I, THE CIVILIZING PROCESS* (Edmund Jephcott trans., Urizen Books 1978).

72. *Id.* at 59.

73. *Id.* at xv-xvi.

74. See SPIERENBERG, *supra* note 2.

75. See *id.*

76. Joseph Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832 (2000) (“Ultimately, the severity revolution is best understood as an exercise in scapegoating by people who are desperately trying to forge a greater sense of solidarity in a time of unprecedented change and division . . .”).

77. *Id.* at 830, 834. In his integration of economic and moral structures, Kennedy explicitly draws on Durkheim. *Id.* at 834.

heim, sees this as leading to a popular anxiety that society no longer is integrated by shared moral values and that the appropriate boundaries of conduct have to be redrawn in the most explicitly painful ways. Atrocious crimes are perversely functional to social solidarity. They remind the rest of us what we do have in common—outrage.

Political Economic analysis, such as Parenti's, tends to treat public opinion, and its expression in elections and campaigns, as secondary to the fundamental needs of a capitalist system. Cultural Interpretation, however, tends to emphasize popular sentiment, while sometimes ignoring the institutional and political context in which that sentiment is mobilized, shaped, and expressed. Kennedy takes Cultural Interpretation in a different direction choosing to focus on popular anxieties and beliefs, but tying them into the political dynamics of crime control institutions in the United States, particularly to the relationship between courts (prosecutors and judges) and public opinion.⁷⁸ He focuses his analysis on a set of crimes that in contemporary public discourse are seen as the worst and most threatening cases, and in which the perpetrators are viewed literally as monsters.⁷⁹

These "scape-goats,"⁸⁰ most particularly drug dealers, sexually sadistic serial killers, and child molesters, have become an approved vehicle for channeling the very real fears produced by transformations in social and economic life. Monstrous offenses, reinforced by popular culture, especially television news and crime dramas, embody the sense of threat many people experience in a rapidly changing society in terms of individual acts of moral aberration. If these stereotypes, however, originate from general social discourse, then they also come to function as operators in the internal economy of criminal justice. For example, the serial killer comes to justify the use of the death penalty for first-degree murderers in the eyes of voters, legislators, and jurors, even though far less visible technical rules of substantive criminal law make these first degree murder statutes applicable to actors whose conduct is different, at times shockingly different, from the popular image of the

78. Others have also begun to address the profound effects of populist punitiveness on courts. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997) (exploring political pressures on judiciary created around the death penalty issue).

79. Kennedy, *supra* note 76, at 849 (focusing on monstrous offenses generates a maximum sense of shared moral vision in a divided society). See also Jonathan Simon, *Managing the Monstrous: The Sex Offenders and the New Penology*, 4 PSY. PUB. POL. & LAW 1 (1998) [hereinafter Simon, *Managing the Monsters*].

80. Kennedy, *supra* note 76, at 832-33 (stating that, "the essence of scapegoating is the attempt to identify the sources of social problems as external to the group . . ."). Kennedy suggests that scapegoating has become more than a mere metaphor; it has become essential to addressing the anxieties of social transformation.

most heinous killers.⁸¹

Kennedy, drawing on Durkheim's theory, suggests that the increasing tendency to scapegoat arises from the effects of rapid social and economic change on society's sense of moral cohesion. He does not, however, take up Durkheim's implicit thesis that such a reaction is inevitable, and ultimately healthy in restoring social equilibrium. For Durkheim, and many contemporary neo-conservative thinkers,⁸² the fragmenting effect of all these forms of social change is a threat to the self-understanding of shared normative integration which Durkheim termed the "conscience collective." As a sociologist, Durkheim was committed to a "functional" understanding, e.g., he expected the demand for punishment to arise as a direct reflection of declining social solidarity.⁸³ Contemporary neo-conservatives, impatient with society's natural processes, have advocated harsher punishments as a way to build respect for a new normative conformity.⁸⁴

For Kennedy, however, it is not this decline which produces a particular penal effect, but rather the search for normative solidarity that finds in punishment a powerful medium to simultaneously express anxiety and reassert the shared social norms that are supposedly endangered.⁸⁵ Penal severity emphasizes radical discontinuities between criminal behavior and all other kinds of behavior that people typically engage in by highlighting criminal violence and then applying that to many non-violent offenders. This may reinforce norms underlying particular crimes, and provide a measure of recognition for those cast as the victims. This reinforcement, however, comes at a heavy cost to the ability of criminal justice to make nuanced judgments in matters that are of the highest import to individuals facing punishment. Changes in statutory law have arguably stripped judges of the ability to make individualized judgments at all.⁸⁶ Even where judges have the formal authority to exercise discretion, many find it untenable to accord any weight at all to what may be considerable equities on the part of criminal offenders (even though our society may value those same equities in all kinds of other dispute resolution processes).

In choosing not to exercise discretion, judges cite community

81. See, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987) (upholding a death sentence for a defendant who did not kill or intend to kill the victim, but was merely an accomplice in another offense).

82. See DAVID GELERTNER, *DURING LIFE: SURVIVING THE UNABOMER* (1997).

83. *Id.*

84. *Id.*

85. Kennedy, *supra* note 76, at 843.

86. *Id.* at 856. One of the most striking instances of this is the growth in laws bypassing juvenile court jurisdiction for juveniles charged with certain felonies. See BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 189 (1999).

security as an overwhelming interest. Two striking recent examples were sentencing decisions by juvenile courts in Georgia and Oregon. Both courts handed down life sentences in two widely publicized school shootings by juveniles armed with highly lethal weapons. In Georgia, a juvenile court judge waived juvenile jurisdiction for a fifteen-year-old charged with shooting several classmates (none fatally) one month after the killing of thirteen students and faculty at Columbine High School near Denver.⁸⁷ The waiver exposed the defendant to more than one hundred years imprisonment.⁸⁸ Marking exactly the kind of rationality Kennedy identifies,⁸⁹ the Georgia judge stated that "the fact that the child has attempted to copy a heinous, premeditated crime and showed such disrespect for the safety of others . . . makes the public's interest to treat him as an adult paramount to any interest of the individual child."⁹⁰

In Oregon, a trial judge sentenced a fifteen-year-old to 111 years of imprisonment without the possibility of parole.⁹¹ The fifteen-year-old had entered a guilty plea to killing two classmates (and his mother and father) and wounding many other students in a shooting at his high school which preceded Columbine.⁹² The youth's lawyers introduced uncontroverted evidence that he suffered from severe schizophrenia and that voices in his head had goaded him into the killings.⁹³ Citing the inability of experts to guarantee that Kinkel would never harm members of the community again, the trial judge interpreted his mandate as requiring that the youth be held accountable, regardless of the judge's personal capacity to have done otherwise.⁹⁴

The cultural interpretation of the severity revolution succeeds in illuminating features of the contemporary conjuncture that do not come to the fore in the political-economic account.

87. James Leher, *Adult Trial for Georgia Shooting Suspect*, ARIZ. REPUBLIC, Aug. 12, 1999, at A5.

88. *Id.*

89. Kennedy, *supra* note 76, 893-94 (discussing how risk assessment comes to mean eliminating any risk).

90. Leher, *supra* note 87. In other words, in the face of a violent crime (mimicking an even more violent one), a fifteen year old is now in a world where any security interests of the "community," no matter how trivial or speculative, outweigh even the most concrete and certain dangers to the individual.

91. *Frontline: The Killer at Thurston High* (PBS television broadcast, Jan. 18, 2000). Additional information is available at <http://www.pbs.org/wgbh/pages/frontline/shaws/kinkel/index.html>.

92. Jiff Barnyard, *Neurologist says 'Holes' in Convicted Teen's Brains Sign of Mental Disease*, ASSOCIATE PRESS NEWswire, Nov. 4, 1999.

93. *Id.*

94. *Id.* The sentencing order of Oregon Circuit Judge Jack Mattison is reproduced as part of the Frontline website at <http://www.pbs.org/wgbh/pages/frontline/shaws/kinkel/trial/judge.html> (last checked Feb. 5, 2001).

B. *The Expressionistic Form of Penal Legislation*

Modern penal sanctions such as prison and parole are increasingly perceived as failing to express public contempt for and condemnation of criminal offenders.⁹⁵ Many recent penal measures appear to be crafted to provide just such expressiveness not just in the punishment, but in the very language and logic of the law. Consider the wave of “3-Strikes”⁹⁶ laws that swept the country in the mid-1990s, promising to increase punishment for people who repeatedly commit violent crimes, and presumably remove from the game of life altogether those with three or more such acts. Whatever might be said about these quite variable measures in terms of deterrence or incapacitation, much of their appeal was, at the very surface, in the name of the law. Like a bill-board or a bumper sticker, the law simultaneously expressed mistrust of judges and contempt for the intellectual capacities of repeat offenders. Another example is Florida’s recently enacted “10-20-Life law,”⁹⁷ which provides longer mandatory sentencing enhancements for a wide variety of felonies (including drug dealing) if the offender is in possession of a fire arm during the felony, with even longer mandatory terms if the fire arm is used, or if anyone is hurt.⁹⁸ Laws like these reflect a profound skepticism about the existence of shared moral norms.⁹⁹ They state the terms of legal prohibition in a manner that presumes only the crudest levels of comprehension on the part of interlocutors. They deploy punishments in a manner that assumes no reliable faculties of judgment on the part of prosecutors or judges. Like the ubiquitous Sport Utility Vehicles that now darken the suburban horizon, these laws suggest a frontier-like polity where nothing but the simplest edicts, enforced with the most draconian strictness, can provide any measure of public security.

C. *The Populist Quality of Contemporary Punitiveness*

Historically, draconian penal codes have usually been associated with efforts by elites to suppress popular challenges to their rule through

95. Dan Kahan, *What Do Shame Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (arguing that the conventional alternatives to imprisonment do not provide sufficient expressive satisfaction to the public).

96. See generally THREE STRIKES AND YOU’RE OUT: VENGEANCE AS PUBLIC POLICY (David Shichor & Dale K. Sechrest eds., 1996).

97. FLA. STAT. ANN. § 775.087 (West 1999).

98. *Id.*

99. Kennedy, *supra* note 76, at 859 (by creating the impression of monstrous acts everywhere, the severity revolution actually diminishes confidence in shared moral values). See also Tom Tyler & Robert Boeckman, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y. REV. 237 (1997) (presenting empirical evidence that support for punitive laws is linked to anxiety about common social values).

the use of a certain measure of terror.¹⁰⁰ Enlightenment influenced reformers, politicians, and public citizens were among the elites associated with the humanity revolution in penal law. Modern criminal law in the United States has always been a complex balance between expert claims to power and populist pressures expressed through elective offices.¹⁰¹ For much of the twentieth century that balance tilted in favor of expert opinion, whose influence was reflected in the formalization of rehabilitation as an official ideology of state punishment from the 1940s through the 1970s. In the last quarter of the century, however, the balance has swung decisively the other way. Expert opinion has virtually vanished from the field of penal legislation in favor of direct appeals to voters in the form of “sound bite” politics.¹⁰²

Compared to its European peers, the criminal justice system of the United States has always been extraordinarily open to electoral politics.¹⁰³ However, in the last three decades, these effects have been deliberately intensified through a variety of mechanisms, including the use of judicial recalls, popular initiative revisions of state constitutions, and measures aimed at increasing the visibility of discretionary decisions.¹⁰⁴ The result is a kind of hyper-populism in which almost any kind of skepticism about the benefits of severe punishment is not only disfavored, but viewed as an expression of contempt for the interests of victims and potential victims (a near universal class).

Kennedy's analysis of solidarity sheds light on this populist turn. Law, including criminal law, often functions as a tool for the rational interests of democratic polities. But law, and perhaps criminal law in particular, sometimes operates in a very different political circuit—that of reproducing the sense of social solidarity necessary for effective democratic polities. If criminal law has become a more substantial currency of governance, Kennedy and Durkheim would remind us to look to a growing sense of disunity about fundamental values. Fear of difference raises an independent desire for rituals of reassurance. As visible indices of social disintegration arise, penal law becomes a privileged loca-

100. See THOMPSON, *supra* note 31.

101. SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* (1980).

102. Franklin Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on “Three Strikes” in California*, 28 PAC. L.J. 243 (1996).

103. See Joachim Savelsberg, *Knowledge, Domination and Capital Punishment*, 99 AM. J. SOC. 911 (1994).

104. See Bright, *supra* note 78. Florida's “10-20-Life” law, section 775.087, *Florida Statutes*, requires prosecutors to provide written reasons for any case in which they decide not to seek a penalty enhancement. These records must remain public and would likely be a lethal attack point for any competitor seeking to unseat an incumbent prosecutor.

tion for reasserting some fundamental unity of meaning.¹⁰⁵

Something like this may be happening in American politics. The federal government and at least some states, including highly visible ones like Florida, Texas, and California, have begun to make rituals of reassurance a primary government activity.¹⁰⁶ In these polities, penal legislation has become among the most common matters of legislative attention and popular referenda (leaving the massive task of reinventing regulation for a new economy for some other time). Much of this legislative action has no vision of how the larger criminal justice system functions to accomplish specific social goals. Rather, the quite explicit legislative motive has been to document identification with the victimization fears of voters.¹⁰⁷ Much of this consists of small changes in bureaucratic administration, which have gradually produced an increasingly technocratic system, while at the same time invoking the rhetoric of constitutionalism such as a "victim's bill of rights."¹⁰⁸

Kennedy's account causes us to notice many aspects of our system that are not aimed at offenders or their communities. These range from sign posts announcing the beginning of a "drug free" community, school or park, to striped uniforms on jail inmates set to work cleaning streets in a self-conscious imitation of older practice. These measures are in part efforts to constitute a new kind of political community solidified around identification as crime victims.

D. Retribution as Risk Redistribution

Cultural analysis recognizes that at the center of our contemporary penalty is a complex relationship between citizens, government, and risk. The internal expert discourse about punishment has increasingly become obsessed with risk assessment and management.¹⁰⁹ Prisons may be managed by agencies formally known as departments of "corrections," but they are far more concerned with setting risk-appropriate custody levels and removing at-risk parolees from the community, than they

105. Kennedy, *supra* note 76, at 858. He emphasizes income inequality, culture wars, and incivilities, but he might also have mentioned immigration. *Id.*

106. On federal policy, see MAUER, *supra* note 21, at 56-80. On California, see PETER SCHRAG, *PARADISE LOST: CALIFORNIA AND THE AMERICAN FUTURE* (1997). On states in general, see Jonathan Simon, *From the Big House to the Warehouse: Rethinking Prisons and State Government*, 2 PUNISHMENT & SOC'Y 213 (Apr. 2000) [hereinafter Simon, *From the Big House*].

107. Simon, *From the Big House*, *supra* note 106.

108. See, e.g., CAL. CONST. art I, §28(d) (also called the California's "Victim's Bill of Rights," this constitutional amendment was adopted by voters in a public referendum in June, 1982). See also Barry Latzer, *State Constitutional Chutzpah*, 59 ALB. L. REV. 1733, 1734 (1996).

109. See Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449 (1992).

are with rehabilitating offenders.¹¹⁰

Popular discourse about crime is also about risk, although talked about in very different ways. Huge media storms attended the murder of thirteen year-old Polly Klas in California in 1993 and the rape and murder of seven year-old Megan Kanka in 1994. In both cases, young people in presumptively safe places (at home, on the block) were subjected to the kinds of violent victimization usually associated with the circumstances of the poor. In both cases punitive legislation swept the nation with near unprecedented speed.¹¹¹

While the "actuarial justice"¹¹² of correctional administrators recognizes the risk criminals pose as a permanent management problem, popular discourse on the threat of victimization increasingly embraces a "zero-tolerance" approach that defines any kind of criminal risk as unacceptable.¹¹³ As Kennedy points out, this can only be sustained by utterly eliminating consideration of the interests of those deemed the "potential perpetrators" rather than the "potential victims" of this kind of risk.¹¹⁴ Those labeled "criminal" pay the costs for the security of others, by being exposed to the extraordinary risks associated with the criminal process itself (e.g., death or injury during the apprehension and arrest process, erroneous conviction, rape in jail or prison, murders in jail or prison, wrongful execution.)¹¹⁵ One of Kennedy's most important

110. *Id.*

111. The murder of Megan Kanka spurred to the enactment of another wave of legislation mandating lifetime registration requirements for convicted sex offenders, and establishing a mechanism for community notification of the location of those reaching a particular standard of risk. Many of these measures were titled "Megan's Law," or named after a comparable child victim local to that state (in Florida it is "Jimmy's Law"), providing another example of expressiveness in the language of law. See Simon, *Managing the Monsters*, *supra* note 79.

112. See MALCOLM FEELEY & JONATHAN SIMON, ACTUARIAL JUSTICE: THE EMERGING NEW CRIMINAL LAW, IN *THE FUTURES OF CRIMINOLOGY* 173 (1994) (arguing that risk management has replaced punitive or treatment goals in the penal system.)

113. Kennedy, *supra* note 76, at 894.

114. *Id.*

115. The truly extraordinary level of wrongdoing associated with the incarceration side of the criminal process alone has led some states toward utterly stripping inmates of the protection of state civil rights laws. See Editorial, *Attacking Prisoners' Rights*, N.Y. TIMES, Dec. 21, 1999, at A30. This is also the import of the zero-tolerance approach adopted by many schools, under which students engaging in even minor misbehavior are excluded for some period from school. During this time, the misbehaved students are surrounded by the risks associated with being out of school in the name of protecting others against any level of risk associated with the sanctioned student's misbehavior. This tendency to govern even schools through crime is becoming a major civil rights issue. This issue's significance is reflected in Reverend Jesse Jackson's intervention in the expulsion of a number of African-American high school students in Illinois for allegedly brawling at a football game. Without formal conviction, the students were expelled from school for two years, placing on them an enormous risk of drifting into delinquency or academic failure, despite the fact that no one were seriously injured as a result of the incident. *Illinois Judge Lets Brawl Charges Stand*, L.A. TIMES, Dec. 10, 1999, at A27.

insights is that penal severity allows these contradictory rationalities of risk to be mediated in the figure of the "super predator" whose risk is so incalculable that it must be confronted with a "zero-tolerance" approach.¹¹⁶

Kennedy shows how much purchase on the slippery ground of the present can be gained from applying even some of the most well-worn social theory.¹¹⁷ Unlike the application of more reductionist forms of theory, including many variants of economic theory, Kennedy's analysis makes the relatively simple (punishment is a response to crime and public insecurity), relatively complex. What he ends up with is less a global thesis regarding punishment and society as a whole, than a series of insights about our "severity revolution" rooted in different locations within the punishment system—that of the voters who are the main audience for many punitive legislative provisions, and judges and prosecutors who must implement these initiatives at the individual level.

Focusing on social solidarity in the punishment process brings our attention back to actors and aspects of actors largely missed in both the conventional policy discourse about punishment and in the dominant strains of political-economic theorizing about punishment.¹¹⁸ While other accounts have focused on citizens as voters either subject to response or manipulation by the system, Kennedy's Durkheimian account brings people before us as seekers, not of specific commodities from government, but acting on their own and others' moral framework.¹¹⁹ This perspective is a vital missing ingredient in many efforts to describe the logic of our present crime policies. Unfortunately, its most important substantive message may be a deeply pessimistic one. It suggests that reversing our present course will take more than persuading politicians to stop manipulating voters (as if that were easy) or convincing voters directly that crime is not so much of a threat any more after all (never easy historically). So long as the demonization of certain

116. Kennedy, *supra* note 76, at 894.

117. I especially applaud Kennedy for not taking such venerable social theory too seriously, and for being pragmatic in seeking to use it as a catalyst for interpreting the present, rather than as a determining framework from which anything of much interest can be deduced. I have argued elsewhere that lawyers are particularly well suited to use social theory in this sense. See Jonathan Simon, *In Another Kind of Wood: Michel Foucault and Socio-legal Studies*, 17 LAW & SOC. INQUIRY 49 (1992).

118. The former tends to have no explicit social theory, but in fact embraces a kind of loose social choice/rational choice framework. The latter tends to emerge from a combination of Marxist and Foucauldian theory. The major primary texts include: MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Robert Hurley trans., Pantheon 1979); ANTONIO GRAMSCI, *THE PRISON NOTEBOOKS* (1968); DOUGLAS HAY ET. AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN 18TH CENTURY ENGLAND* (1975); DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY* (1978).

119. Kennedy, *supra* note 76, at 843.

kinds of offenders serves principally the ends of social solidarity, and so long as social and economic developments continue to undermine established forms of social solidarity, the severity revolution will be hard to reverse or even arrest.¹²⁰

The insights of a Durkheimian perspective come at the cost of tuning out the interpretive signals from other sites of producing and consuming punishment. Specifically, the cost here is tuning out the role of government and politics as independent sources of meaning-making in punishment, and representing them more as translators of the experiences of an underlying social body whose imagined organic features are never made part of the analysis. While privileging our view of the symbolic uses of punishment, this perspective is at risk of reading back into the symbolic narrative of punishment its own functional *a priori*, the venerable idea that populations find social change stressful.¹²¹

IV. SEVERITY AS A GOVERNMENTAL RATIONALITY

A. *Governmental Rationality*

The remainder of this article builds on the insights of both political-economic and cultural analyses. The key is Michel Foucault's late work on "governmentality."¹²² Foucault's account of the history of the prison attributed its rise (and the humanity revolution generally) to the rise of disciplinary power,¹²³ i.e., forms of surveillance, training, and subtle coercion, embodied not only in prisons, but in the schools, hospitals, and factories that proliferated in the nineteenth century. In a series of lectures during the late 1970s, Foucault took up a question rather ignored in his analysis of disciplinary power: the history of those governmental policies through which power is exercised over the relationships of people to each other and to larger collectivities (e.g., insurance, welfare, consumer credit, pensions, fiscal stimulus).¹²⁴ It is this kind of power relationship (a relationship to other relationships) that governing involves. It is a power often associated with states because they are

120. This helps explain Kennedy's depressingly short section on solutions. *Id.* at 907-08.

121. Maintaining the status quo is also mighty stressful for many.

122. See generally MICHEL FOUCAULT, "Governmentality," in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell et al. eds., 1991); NIKOLAS ROSE, *THE POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* (1999).

123. FOUCAULT, *supra* note 2.

124. See generally MITCHELL DEAN, *THE CONSTITUTION OF POVERTY* (1991); FRANCOIS EWALD, *L'ETAT PROVIDENCE* (1986); MARY POOVEY, *MAKING A SOCIAL BODY* (1995); GIOVANA PROCACCI, *GOVERNER LA MISERE: LA QUESTION SOCIALE EN FRANCE 1789-1848* (1993); Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 *BRIT. J. SOC.* 173, 205 (1992); Jonathan Simon, *The Emergence of a Risk Society: Law, Insurance, and the State*, 95 *SOCIALIST REV.* 61 (1987); Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 *LAW & SOC'Y REV.* 771-800 (1988).

most likely to claim such responsibilities at the societal level, but by no means exclusively so. Many non-state-institutions play a governance role. For example, as the scale of business enterprises has grown since the nineteenth century (in work force as well as consumer base), business has become a governmental power to a considerable extent.

Since the seventeenth century, the task of governing, by states or comparable institutions, has been inextricably bound up with the production of knowledge about populations. Today, of course, we are all too used to discourses like statistics, sociology, economics, and political science that purport quite explicitly to address governance. The separation of forms of expertise appropriate to government was, however, a significant departure from the earlier and more general claims of discourses like law and theology. "Governmentality" was Foucault's term for this problem of thought—of rationalizing government. Although fragmentary, Foucault's research suggested the possibility of a history of governmental rationalities, i.e., a genealogy of those forms of knowledge through which the population, as the subjects of government, have been made a subject object of truth and object of power.

Foucault's analysis highlighted two points of transformation in this genealogy. The first, emerging in the seventeenth century, is the police state, originally understood as a state engaged in a complex mercantilist regulation of society. Police science involved the development of weights and measures, as well as the careful record keeping of an inspectorate. The second, developing in the eighteenth and nineteenth centuries is the liberal state which rejects interventionist police tactics as ultimately harmful to the welfare of the population by interfering with the freedom of individuals to contract with each other, the paradigmatic governing act of liberalism. Knowledge was important here, wielded by judges and legislators, to understand the natural, but elusive, shape of markets and foster them. Work by Foucault's students and others suggests two further points. Beginning in the late nineteenth century, the liberal state was substantially reconstructed around the problems arising from the limitations of individual contract analysis.¹²⁵ Social liberalism came into full form in the United States and Western Europe following World War II. Some scholars have suggested that we are entering a fourth governmental rationality, characterized as neo or advanced liberal. The crisis of the social welfare state and the declining prestige of the social sciences as guides to government, mark the ascendance of a

125. The rise of workers' compensation at the end of the nineteenth century in Europe and a bit later in the United States marked this transition. See EWALD, *supra* note 124; Jonathan Simon, *For the Government of its Servants: Law and Discipline Power in the Work Place, 1870-1906*, 13 STUDIES IN LAW, POLITICS & SOC'Y 105 (1993).

new focus on contract and individuals. Unlike the original liberal state that took such market relations as a natural occurrence which could be fostered, advanced liberal government is self-conscious about the role of government in fostering market relations.¹²⁶

A governmentality approach to analyzing penal severity focuses on three aspects of the problem of exercising power over relationships. The first might be called the "mentality of rule." How do those who exercise power think and talk about the power they are exercising? What discourses, what forms of expertise, what ethical practices are deployed along with power that is considered legitimate and adequate? The second concerns the technologies by which power is brought to bear on the relationships it targets. Where did these technologies originate? What kinds of "truth" do they produce about the population? What forms of resistance do they engender? The third question concerns the kinds of subjectivities and identities that are constituted by the exercise of power. Do these subjects mesh well with the technologies of power, or are they easily turned toward resistance?

Governmentality provides a way to avoid the reductionism of Parenti's Political Economy approach, and the organicism of Kennedy's Durkheimian account, while building on the insights of both. For Kennedy, severity is primarily a story about social anxieties being reflected in the legislative and judicial process. For Parenti and others, severity is an electoral gesture aimed at preserving a power advantage.¹²⁷ From a governmentality perspective, I want to ask how severity functions as a rationality through which to know and act on the increasingly fragmented population in the United States and other comparable societies. This introduces a different dimension into both Parenti's story of a change in the dominant form of capitalism, and Kennedy's story about social solidarity. If the crisis of both power and social solidarity is a result of changes in how we govern, rather than just changes in social experience or consciousness, the role of severe punishment as a symbolic system has to be examined as a governmental as well as social field.

A governmentality account of the severity revolution does not in any sense refute the claim that recent decades have witnessed a reassertion of capitalist hegemony or a solidarity crisis. Instead, it problematizes the conditions under which society experiences authority or solidarity as increasing or decreasing, particularly the notion of anxiety

126. See ROSE, *supra* note 122. Pat O'Mally & Darren Palmer, *Post-Keynsian Policing*, 25 *ECON. & SOC'Y* 137, 141 (1996).

127. See, e.g., BECKETT, *supra* note 19, MILLER, *supra* note 21. Both books offer important insights about the nature of this electoral dimension.

in the face of social change that both Parenti and Kennedy rely upon. If penal severity is an index of social change it is curious that both the prison population of the United States and popular support for the death penalty both reached their twentieth century nadir in the early 1970s, at a time when the nation had been through more than three decades of social change driven by unprecedented affluence and the rise of the civil rights movement. Indeed two other ingredients that might be considered crucial to an escalation of penal severity in that era—real growth in crime and politicization of the crime issue—were both fully present by the early 1960s, however, the severity revolution does not begin in earnest until the late 1970s or early 1980s.

Students of governmentality point to the 1970s as a time of growing crisis for the social liberal state. High unemployment and inflation marked the apparent limits of social liberal strategies of managing social change through regulation and collectivist risk pooling.¹²⁸ Political leaders like Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States helped coalesce growing dissatisfaction with the social liberal mentality of government and point the way to new elements of rule including a reliance on market mechanisms to steer government and less aggregation of both risk and reward (leading to growing inequality of outcomes). My argument is that the origins of the severity revolution lie in the crisis of the social liberal governmentality and the inchoate efforts to shape a new governmentality.

A governmentality approach highlights the way the population is constructed as a subject of knowledge and power by the categories deployed to govern them. The unionized worker, the middle or working class home-owner, the retiree, the subsidized college student, the welfare recipient, the regulated enterprise manager, and the corporate lawyer, are examples of some of the most important subject positions invested with power by social liberal political strategies.¹²⁹ They built on existing institutions and roles, but fundamentally altered the terms and conditions of these ways of existing, vastly opening access to the opportunities and capacities associated with them.

At its peak in the 1950s and 1960s in the United States, this social liberal governmentality made people governable through new kinds of state and economic institutions, such as universities, hospitals, and high

128. Workers' compensation, the first important building block of the social liberal state at the end of the nineteenth century, has come under growing attack as economically inefficient. See Martha McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 662 (1998) (arguing that workers compensation is exemplary of the decline in confidence in social welfare ideals).

129. See Simon, *From the Big-House*, *supra* note 106.

technology industries.¹³⁰ Facilitated by the tremendous economic advantage that the United States enjoyed in the aftermath of World War II, the New Deal governmentality aimed at supplementing the capitalist market with a variety of mechanisms aimed at equalizing both outcomes and opportunities. While never as generous as its European peers, the United States version of social liberal governance maintained high levels of public support, economic growth, and tolerable social conditions for almost forty years after the war.

The rise of rehabilitation as an official penal policy was a product of the importance that scientific expertise played in rationalizing governance along social liberal lines. Rehabilitation included general elements of social liberal political strategy, such as the identification of a client group (here offenders), the mobilization of scientific expertise, and the commitment of government to producing bold and demonstrable improvement in social problems (here crime) with a media interest.¹³¹ As long as this rationality was endorsed by the public in forms such as social insurance, the regulation of work place safety, or the improvement of public schools, its application to the penal realm posed more benefits than costs, at least until social change began to undermine the fabric of social liberal politics more generally.

The story of the decline of the social liberal state has been told by a variety of commentators,¹³² but two strands stand out. One emphasizes the end of the economic conditions under which social liberal governmentality flourished from the Great Depression through at least the 1970s.¹³³ Relatively structured world trade allowed the wealthier industrial nations to build up protected industries with powerful unions and generous wage conditions. As the international political economy shifted toward greater production in low wage, developing countries (a move accelerated by the oil shocks and subsequent inflation of the mid 1970s), the economies of most industrial countries entered a period of stagnant growth and high inflation. In the United States, the failure of New Deal social policies, including deficit spending and other means of

130. A good example of this is the rise of the unions after the New Deal recognition of their legitimacy in the 1930s. The unionized sector of the labor force built a reliable electorate for the Democratic Party, as well as an increasingly docile work force ready to trade control of labor processes for regular income gains and job security. See THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHILE ITS FLAT ON ITS BACK* (1991).

131. CHARLES BRIGHT, *THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE 'BIG HOUSE' 1920-1955* (1996).

132. See E. J. DIONE, *WHY AMERICANS HATE POLITICS* (1991) (explaining the political decay of the New Deal coalition that governed the Nation, many states, and most large cities for anywhere from half to a third of the twentieth century); see also SCHRAG, *supra* note 106 (discussing his view of how this played out in state governments).

133. PARENTI, *supra* note 19.

sustaining consumption levels, proved a major blow to the prestige of the national government.

The second strand in the undermining of confidence in the social liberal governmentality is perhaps best seen as a cultural shift. Social liberal governmental technologies shifted gradually as the cutting edge of intervention moved to traditionally disempowered and marginalized populations (African-Americans, unwed parents, the hard core poor). These new client groups often offended the values of large portions of the middle class populations whose very sense of respectability (home owners, well insured, educated) had come from social liberal programs like federal guarantees for housing and education loans. These groups felt that their middle-class security was endangered by government programs aimed at the poor, including: integrating schools, scattering public housing, and promoting diversity in employment. They felt offended by what they perceived as the disrespectable values of those benefiting from programs like Aid to Families with Dependent Children, popularly known as welfare.¹³⁴

Here we can usefully bring our account together with both the political-economic and the cultural interpretation analyses. In brief, the political-economic and cultural crises undermined social liberalism as a governmental rationality that had dominated United States politics since the New Deal. The severity revolution is less a response directly to political-economic or cultural change and more a response to the decline of social liberal governmental rationality.

First, consider how the success of social liberalism in bringing millions of citizens from the bottom of the labor force (and beyond its boundaries) into relative public visibility through the investment of public funds, the creation of new agencies (like those of the war on poverty) and the media attention that followed. Contrary to popular conception, a vast poverty class with social habits unattractive to the middle class was not a development new to 1960s. Poverty and its "social problems" had always existed, perhaps in rural Mississippi rather than the south side of Chicago, but social liberal governance made it visible and asserted its moral membership in the body politic of the United States.¹³⁵

Second, consider how the failure of social liberalism to cope with the new global economic order of the 1970s exacerbated the crisis of solidarity. Inflation with stagnant wages, the great curse of the 1970s, did more than anything else to disaggregate and individualize the successful clients of social liberal government, undermining the solidarity

134. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE* (1999).

135. See KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (for a constitutional treatment of this side of Post-New Deal governance).

created by its earlier successes.¹³⁶ If this has a moment of emergence, it is perhaps California's Proposition 13.¹³⁷ Inflating real estate prices in California produced a growing wave of political resentment against the state. Taxes, especially property taxes, were the primary target of this resentment because they most clearly caught people in the slippage between inflating real estate prices and declining real wages.¹³⁸

A governmentality approach may also shed valuable light on the way political-economic, cultural, and governmental forces interact. The de-legitimation of social liberal government due to its political economic failures played a central role here. The logical remedy for a crisis of solidarity is more of the kind of social programming that built up social solidarity originally. The quite real economic failures of the social liberal state, however, hampered this tremendously, as has the cultural backlash against the perceived clients of the existing state, including public employees, welfare recipients, and students.

A severity revolution, from this perspective, is the response of the post-New Deal state to the travails of shifting from one governmental rationality to another. In California, for example, since Proposition 13 became law, more than twenty new prisons have been built (far more than in the preceding one hundred and twenty-seven years since statehood).¹³⁹ In the meantime, not a single new four-year college or university has been opened in a state once known for its higher education.¹⁴⁰ To a remarkable degree since 1980, California governors, and even many of their unsuccessful opponents, have tied their claim to govern to their ability to make the penal system larger and more severe.¹⁴¹

This move has been made more promising by the degree to which crime, along with inflation, became a great affront to the political technologies of the social liberal state. The United States experienced a real escalation of violent crime in the 1960s, as did most of the industrialized world. In much of Western Europe, this crime wave produced a successful push for a more intensive integration of youth (thought by many

136. In the labor movement, solidarity has a special meaning: loyalty to the collective needs of fellow workers. The success of New Deal governance in expanding that kind of solidarity may be partially responsible for the sense of high levels of general social solidarity for which the recent past is so nostalgically remembered for by many.

137. The best effort to think about Proposition 13 as a revolution in governance is SCHRAG, *supra* note 106, at 151-52.

138. *Id.*

139. *Id.* at 95-98.

140. *Id.* at 97.

141. In one interview during his successful 1994 gubernatorial campaign, incumbent Pete Wilson described his expansion of the prison system to earlier efforts by visionary governors of the past to build the central valley's aqueduct system and the high technology engine of the University of California system. Daniel M. Weintraub, *No More Mr. Moderate*, L.A. TIMES MAG., Sept. 24, 1994.

to be the main spring of the crime wave) into the work force through more regulation of the entry-level labor market. In the United States, however, the crime wave, coinciding as it did with both the civil rights revolution and the war on poverty, seemed to many a clear indicator that social liberal government could not address the real sources of poverty and might in fact intensify them.¹⁴²

Moreover, for politicians seeking to produce forms of government that can escape this stigma, a severity revolution offered a number of benefits. First, as a form of government, it superficially fit with the resurgent status of market analogies. Raising punishment should lower crime just as raising prices lowers consumption.¹⁴³ Second, in an era of deep suspicion regarding the beneficiaries of social spending, punishment offers a formally equal and general benefit to the whole population (although realistically, its effects—both positive and negative—are far more localized). Prisons, in the emerging logic of governing through crime, have become a kind of entitlement program in reverse.¹⁴⁴ Each prison cell becomes a machine for producing public safety that appears to be general (if it exists at all). The same cannot as easily be said for public colleges or high schools, especially when entry to them may appear to favor minorities. Finally, at a time when the public views government as chronically failing, punishing criminals is seen as one thing the state can virtually guarantee it will succeed at (in sharp contrast to rehabilitating them).

The severity revolution, then, should be examined as part of a political dynamic in which punishment is one of the few registers in which social values can be articulated. On one hand politicians, stripped of their modern technologies of government, have found penal severity a crucial currency of political exchange.¹⁴⁵ On the other hand a public, shaped in many respects by the success of the social liberal form of governance, have experienced a radical sense of exposure and risk associated with the decomposition of those governance strategies, even as they have helped to delegitimize them.

The governmentality approach highlights three features of the severity revolution that are not prominent in Political Economy or Cul-

142. This view was powerfully stated by Charles Murray in his book, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* (1984), and in Ronald Reagan's famous quip that "the government fought a war on poverty and poverty won." See Robin Abcarian, *Can We Stop Laying Blame Long Enough to Talk Cures?*, L.A. TIMES, May 19, 1992, at E1.

143. This was the central thesis of James Q. Wilson's influential book, *THINKING ABOUT CRIME* (1975).

144. A mandatory sentence being the reverse of an entitlement benefit.

145. Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81-114 (1999) (discussing the death penalty is an example of this).

tural Interpretation: punishment as authority, the ubiquity of crime and punishment, and total security.

B. *Punishment as Authority*

To an astounding degree, punishment has become the one exercise of power that adds to the political authority of leaders rather than depleting it. From this perspective it is no accident that the cabinet level officer in charge of the federal government's drug control effort is almost universally referred to as the "drug czar." The term suggests not simply authoritarian techniques, but also an authority to rule that is somehow different from the vicissitudes of ordinary democratic politics. Not surprisingly, politicians of all stripes seek to lay claim to this kind of role, even when their job description may have little to do with it.¹⁴⁶

In the past, severe punishment has often been used by ruling classes to address serious challenges to their rule. This is, in effect, what Parenti asks us to imagine about today's severity revolution. But, as Parenti recognizes, today's uses of punishment seem far more complex. In part, punishments are aimed at terrorizing some portions of the population, such as the minority unemployed, whom Parenti calls "social dynamite" and "social junk". In part, punishments are aimed at providing opportunities for psychic gratification to the lower-middle class employed worker who faces less material well-being than many expected in the immediate preceding generation. In part, punishments are aimed at providing access to physical violence for a portion of the less-educated working class population for whom jobs as police officers, prison workers, or security guards have replaced many of the jobs lost by that class to the globalization of manufacturing. While Parenti is driven to locate his class analysis of punishment within a predictable Marxist narrative about capital, as a descriptive account, it also provides insight into why politicians and other leaders gain authority when they govern through crime. Punishing crimes (and its private analogs) provides a unique activity for leaders which produces both meaning and value for constituencies whose demands are, in other respects, quite antagonistic.

C. *The Ubiquity of Crime and Punishment*

Episodes of governing through crime can be identified at many points in the histories of many societies. This moment is unique because

146. Kathleen Kennedy Townsend, Maryland's current Democratic Lt. Governor, bills herself as Maryland's "Crime Czar," a position she created by arranging to have the head of the state police and the Department of Corrections report to her. See her website at <http://www.gov.state.md.us/gov./ltgovbio.html>.

of the sheer ubiquity with which the structure of crime-punishment proliferates wherever an active effort is made to rewrite the rules by which different institutions will be reformed and run. Welfare reform? Immigration reform? Bankruptcy reform? A walk through any major piece of federal legislation reveals a proliferation of criminal measures, many with historically low thresholds of liability. In any one context it is possible to talk about the economic interest at stake, but, in totality, the increasing weight of criminal law within the body of governmental authority is hard to correlate with economic interests. Even if begun with the intent of disciplining workers or inspiring the barely middle class, the severity revolution has become, above all, a reliable rationality for governing. To varying degrees, crime has become a master prototype of governable social problems to which other issues must be shaped.

Both Political Economy and Cultural Interpretation tend to view crime as a substitute for some other anxiety. In this sense, they follow a dominant theme in American social science of overlooking institutions (where that means the immediate conditions of social order) in favor of pure social forces (including individual rational action for the economists). The Governmental Rationalities approach sees crime anxiety as very much about institutions rather than pure social forces.¹⁴⁷ Severity is a response to the overwhelming perception of government failure and incompetence. The severity revolution reflects a demand for strong and effective institutions which runs beyond electoral politics and into the material environment in which daily life is lived. Strong support for the death penalty, driving an S.U.V., and living in a "gated community," are part of a consistent world view which is skeptical of institutions (whether traffic grids or public schools), but demands a reduction of personal risk to near zero. When politicians run "tough on crime," they often sound off on the theme of personal responsibility consistent with a more limited role for government. But, rather than a retraction of the scope of government, severity means a transferral of action and investment toward points defined by criminal activity.

D. *Total Security*

The popular support for severity is something which both Political Economy and Cultural Interpretation have sought to explain in their respective ways. Parenti suggests that, at least for some middle class voters, severity provides a psychic affirmation of their righteousness. Kennedy suggests that severity signifies the solidarity of a shared moral

147. WALTER W. POWELL & PAUL J. DiMAGSIE, INTRODUCTION IN THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (1991).

outrage confirmed by the existence of someone whose monstrosity serves as a scapegoat for the entire community. The Governmentality approach asks a different question, not *why*, but rather *what* does severity do to those it governs? For criminals and those likely to fall under criminal suspicion, it has a range of effects including terror and incapacitation.

For many others, however, severity may be the product of a kind of mentality, a way of being a subject of government, and of relating to those who govern. Seen in this light, severity is an oddly counter-cyclical indicator. At a time when the dominant trend is toward disaggregating risk and making individuals more responsible for managing all levels of risk, from the possible privatization of social security investments to the deregulation of the power industry, severity promises a classic "Big Government" command-and-control solution. At a time when individuals are supposed to have better information and better access to solutions than government, severity makes people more dependent than ever on government actors who are assumed to be omniscient and omnipresent.

V. CONCLUSION

To conclude, consider the usage of social theory to explain and interpret a compelling feature of our present conjuncture—the severity revolution. Cultural Interpretation and Political Economy belong to the classic tradition of Western social theory. While very different, (in the examples used here) they share a common tendency toward grounding punishment in the unfolding of some other dynamic. For Durkheimian Cultural Interpretation, it is the need for moral and normative integration of society and the inevitable tension and anxiety produced by social change. For Marxist Political Economy, it is the dialectics of capital.

The examples used here demonstrate the power of these concepts, borrowed from the classic tradition of social theory, to shed light on the present conjuncture beyond the terms framed by our public discourse on these matters. Both bring to light features of the severity revolution that have not yet been part of the debate. By using the needs created by changes in capitalism to project the functions of penalty to the full extent of the social order, Parenti's Political Economy understanding of the severity revolution forces us away from a central focus on the immediate context of crime rates and penal forces. The mobilization of social attention and resources in increasing the severity of punishment creates effects on the distribution of bodies and narratives in countless settings across society. By highlighting the moral community defined by crime and affirmed by the severity of punishment, Kennedy's Durkheimian

Cultural Interpretation moves us away from the usual focus on the population of criminal offenders or potential offenders caught up in the constraints of the law. We are suddenly aware how much criminal laws serve to define the audience of those whose democratic will is enshrined in enactments such as "3-Strikes and You're Out" or Megan's Law.

Choosing between these theoretical frameworks, we choose between a significantly different tour of the landscape within which severity is playing out. Kennedy, for example, brings out features of the more legalistic aspects of the severity revolution: the language of legislatures and the posture of prosecutors and judges in punishing offenders. Parenti focuses on the correctional and law enforcement systems through which actual bodies are captured, rendered docile, and punished. The Political Economy analysis emphasizes top-down strategies of controlling populations disrupted by a significant reorganization of capitalism. The Cultural Interpretation confronts us with the bottom-up imperatives behind penal severity, the demands for reassurance in the face of rapid social change and diversification.

Both Parenti and Kennedy succeed, in part, by relaxing the social reductionism of classical social theory. Both pay attention to the role of actors and institutions, especially politicians, in the unfolding of the severity revolution. Both pay attention to the role of expert discourses of various sorts in shaping the severity revolution. A significant limitation in both works derives from the fact that neither theory really internalizes the roles of institutions and discourses, making them largely instrumental to the account of social control or solidarity. The third framework, Governmental Rationalities, starts with the institutional and political problems of how to exercise power, including the power to punish. Which mechanisms should target which aspects of the relations being governed? Which sciences or professions provide the basic discourses in which these problems are thought through and debated?

In viewing severity as largely a solution to the problem of how to exercise power, we need not exclude from consideration other problems to which it may be a solution, namely, social control and solidarity. It would be surprising if the substantive pressures on governing did not influence the kinds of technologies and experts that became relevant. The more we know about the uses being made of punishment, the more we can look for specific chains of dispersal.

The Governmental Rationalities account brings to the fore the whole question of how governable subjects are in fact produced. The severity revolution not only ratcheted up social control, it profoundly altered the forms of social control. Solidarity has not just declined as the collateral effect of a whole set of social changes. Solidarity has been

dismantled. Moreover, recourse to social forces, capitalism, or the moral anxiety brought on by rapid social change and diversification, cannot account fully for the forms that the severity revolution takes. In the 1980s, the growing prison population seemed to track a growing surplus population and a growing hostility to immigrants. In the 1990s, when labor shortages developed, it became far less clear that prison populations are a functional device to regulate labor markets. In any event, it is critical to address how severity works to constitute a sustainable level of consent and social order.

Parenti and Kennedy concluded that there is little hope for "a way back."¹⁴⁸ Whether penal severity is the form of social control necessary to discipline a population made recalcitrant by affluence and social rights, or whether it is an expression of normative strain, it is difficult to see a way to put the genie back in the bottle. If, instead, penal severity is the current form taken by an ongoing struggle to renegotiate the forms and fields of governance, from the federal government down to the family, there are ways to begin reversing it. This would start with the recognition that there is little potential for a return to the forms of social control or solidarity familiar during the second half of the twentieth century. Perhaps social solidarity in a Durkheimian sense was at a higher level,¹⁴⁹ but one can also see solidarity as a product of very specific strategies of governance aimed at giving people a stronger sense of stake in one another. The challenge for governance in advanced societies such as the United States in the first decades of the twenty-first century is to invent (or rediscover) forms of social control and solidarity that can produce social security without the negative externalities that the social control and solidarity machines of the social liberal era produced.

148. Kennedy, *supra* note 76, at 907-08.

149. This is the case especially if you take immigration into account, something Kennedy does not do. This was the period, after all, between the end of most European and Asian immigration in the 1920s and the beginning of a new migration in 1965. See Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 581 (1998).