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Articles

Monstrous Offenders and the Search for Solidarity Through Modern Punishment

by
JOSEPH E. KENNEDY*

Whoever fights with monsters should take care that in the process
he does not become a monster.

—Friedrich Nietzsche¹

Introduction

Think of the following three terms: drug dealer, child molester, and violent crime. In the abstract, each term is usually taken to refer to the most monstrous offense and offender possible. The term “drug dealer” conjures up an image of an Uzi-toting, gold-chain wearing, remorseless urban predator. The term “child molester” elicits images of a strange man who cruises playgrounds in the hope of luring unattended children into his van, where he commits kidnapping, rape, murder, or all three. “Violent crime” triggers thoughts of a vicious assault, if not a rape or robbery involving a weapon. In each case, the

* Assistant Professor, University of North Carolina School of Law. I owe thanks to many people who provided valuable comments on earlier drafts of this article: Lou Bilonis, John Conley, Maxine Eichner, Arnold Loewy, Robert Mosteller, Eric Muller, William Nelson, Maria Savasta-Kennedy, Jonathan Simon, Chris Slobogin, Carol Steiker, and Ron Wright. Robin Henderson and the faculty and staff of the UNC Law Library provided important research assistance, and I owe a special thanks to my partner in teaching, Michelle Robertson, for her support during this project. Portions of this article were presented at panels of the 1998 Annual Meeting of Law and Society and at the 1999 Southeastern Regional Conference of the Association of American Law Schools.

1. FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* (Thomas Common trans., Prometheus Books 1993) (1883-85).

linguistic category used to describe crime and criminals evokes images of the most serious offenses and offenders. Such offenders do exist, but there are nowhere near as many of them as society imagines, and they constitute a tiny fraction of the actual population of offenders prosecuted. The monstrous images evoked simply do not correspond with the average offender included in the legal category of offense to which the term refers. For example, most "violent crimes" are simple batteries which involve no physical injury, most injuries sustained in such cases do not require medical treatment, and most cases requiring medical treatment do not require hospitalization.² Similarly, the average offender convicted for drug sales is probably a drug user who sells two rocks of crack cocaine in the hope of clearing enough to be able to smoke a third himself,³ and the average "child molester" is not a stranger but a household member who molests without kidnapping or raping.⁴ Why are we so preoccupied with the worst case? Why are we so eager to believe in monsters?

Monstrous crimes and monstrous criminals provide appetizing fare for a society hungry for agreement and cohesion. Individuals in our society attempt to forge solidarity through the process of punishment by focusing on the worst possible offenses and offenders. Simply put, we exaggerate the worst in order to experience the best: moments when we feel as a society that we have transcended the many differences that keep us apart. My primary thesis is that the changes, divisions, and tremors in our social and economic structure over the last several decades and the anxieties which they have produced about social solidarity have manifested themselves both in the way we speak and think about crime and in the hyper punitiveness of our criminal justice practices as well. Crime has

2. See BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 18-19, 22-23, 75-76, 79-80 (2000)).

3. "[O]f the more than 150,000 drug offenders incarcerated in state prisons in 1991 [a]most 127,000 of these offenders, or 84 percent, had no history of a prior incarceration for a violent crime, and one half of the offenders had no prior incarcerations at all. One third of the drug offenders sentenced to state prison had been convicted of the less serious possession offenses." MARC MAUER, RACE TO INCARCERATE 157 (1999) (citing JAMES LYNCH & WILLIAM SABOL, URBAN INSTITUTE, DID GETTING TOUGH ON CRIME PAY? (1997)). Even in the federal system whose targets are supposedly major drug dealers, the story is much the same. According to the U.S. Sentencing Commission's analysis of defendants in crack sales in 1992, "only 5.5 percent of the defendants were classified as high-level dealers, while 63.7 percent were considered street-level dealers . . . and 30.8 percent mid-level dealers." *Id.* at 156 (citing U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 172 (1995)).

4. See PHILIP JENKINS, MORAL PANIC 10 (1998); see also PAULA S. FASS, KIDNAPPED: CHILD ABDUCTION IN AMERICA 213-63 (1997).

served as a rallying cry for a divided and insecure society, and many in our society use the criminal justice system to send symbolic messages reaffirming and defining core values during this time of flux. These anxieties explain a great deal about our move toward a more determinate form of sentencing, the increasing length of the sentences awarded under that system, and a way of thinking which frames society's interest in punishment exclusively in terms of minimizing the risks of reoffense by those convicted of a crime. Criminal punishment has come to serve as a new civic religion of sorts for a society which worries about its ability to cohere, and the depths of our anxieties about our social solidarity express themselves in our conceptions of crime and in the corresponding severity of our punishment.

By any measure, the nineteen-eighties and nineties saw an unprecedented increase in the severity of criminal punishment in the United States.⁵ The percentage of the population incarcerated, the length of sentences imposed, and the number of offenses which carried automatic prison sentences regardless of mitigating circumstances all increased drastically during a relatively short period of time. The number of people in prison in the United States has increased by almost 500% since 1972 while the population itself has increased by only 28%.⁶ The number of prisons constructed in this country from 1985 to 1995 was equivalent to a new federal or state prison opening *every week* somewhere in the United States during that ten-year period.⁷ Furthermore, four million Americans were on

5. A short catalogue of some of the more notable punishment measures adopted during this time is illustrative: "Harsher sentencing and the increased use of imprisonment; 'Three Strikes' and mandatory minimum sentencing laws, 'truth in sentencing' and parole release restrictions; no frills prisons laws and 'austere prisons'; retribution in juvenile court and the imprisonment of children; the revival of chain gangs and corporal punishment; boot camps and supermax-prisons; the multiplication of capital offenses and executions; community notification laws and pedophile registers; zero tolerance policies and Anti-Social Behavior Orders—there is now a long list of measures that appear to signify a punitive turn in contemporary penalty." David Garland, *The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies*, 40 BRIT. J. CRIMINOLOGY 347, 349-50 (2000) [hereinafter Garland, *Culture*]. See generally MAUER, *supra* note 3; NATIONAL CRIMINAL JUSTICE COMM'N, *THE REAL WAR ON CRIME* (Steven R. Donziger ed., 1996); JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (1996).

6. The prison population in 1972 was just under 200,000 and the number of people in county jails was 130,000. The prison population in 1997 was 1.2 million and the jail population was 567,000. These figures do not include juveniles incarcerated in youth facilities, of which there were more than 100,000 in 1997. See MAUER, *supra* note 3, at 1, 9, 19.

7. See MAUER, *supra* note 3, at 19.

probation or parole during 1998.⁸ Adding the almost two million people incarcerated in 1998, 5.9 million people (3% of the population) were under some form of correctional supervision during that year.⁹ To put these numbers in perspective, the entire population of Manhattan, New York was approximately 1.5 million in 1997, and only thirteen of the fifty states had more than 5.9 million residents in 1997.¹⁰ This means that we have more people under criminal justice supervision than we have living in Indiana, Washington, Missouri, Tennessee, Wisconsin, Maryland, or any one of thirty other states and that we currently have enough jail and prison capacity to incarcerate every woman, man, and child in Manhattan with room to spare.

The breadth and depth of the political consensus behind these increases in the severity of criminal sentences may be without parallel in contemporary political history. Most, if not all, of the legislative enactments increasing criminal sentences on both the national and state level have commanded widespread bipartisan support.¹¹ Moreover, attempts to undo some of the more draconian features of recent penal reforms are not considered politically feasible even where agreement among criminal justice professionals is widespread. For example, the Federal Courts Study Committee heard testimony from 270 people, including prosecutors, probation officers, and judges, on the subject of the federal sentencing guidelines. Only four people testified in favor of the guidelines and each of the four was associated with the Sentencing Commission that had promulgated them, yet the guidelines remain politically untouchable.¹² The declaration of war that followed the attack on Pearl Harbor aside, it is hard to think of an issue where the political balance has been so one-sided.

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: Not just scapegoating in the traditional sense (the

8. See WALL ST. J. August 23, 1999, at A1 (citing a report by the Department of Justice).

9. See *id.*

10. See WORLD ALMANAC AND BOOK OF FACTS 380 (1999) (citing the Bureau of the Census).

11. See generally Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

12. See MICHAEL TONRY, SENTENCING MATTERS 74-75 (1996) [hereinafter TONRY, SENTENCING]. "[T]he guidelines have few vocal proponents outside the . . . Sentencing Commission . . . [and] objections to the guidelines transcend ideological and partisan differences." *Id.* at 99.

demonization of minorities and other outsider groups as the source of criminal activity) but scapegoating in a subtler and more pervasive form as well. The essence of scapegoating is the attempt to identify the sources of social problems as external to the group, and an analysis of some of our society's crime obsessions of the eighties and nineties—drug use, the sexual abuse of children, random violence and serial killers, juvenile “superpredators”—reveals a common pattern. In each case, people eagerly believe in a populous category of “monstrous offenders” and then project onto those offenders more basic anxieties about social problems that are both widespread and intractable.¹³ As a result, the abstract categories of offenses in our penal laws are tied to sentences that are disproportionately harsh for the average offense. We have developed a draconian system of punishment for dealing with the monsters that we have imagined being everywhere, a system that swallows up hordes of lesser offenders.¹⁴

In Part I of this article I will use the theory of Emile Durkheim to argue that people in diverse, secular societies such as our own try to forge social solidarity through criminal punishment. Terrible crimes provide our society with a supply of what I call *shared stories of the secular sacred*, and we try to strengthen social cohesion through our collective response to these stories. In Part II, however, I will argue that anxieties about social solidarity have shaped punishment in two conflicting ways: we have tried to minimize potentially divisive controversies about the role of race in sentencing decisions by making the visible parts of the sentencing process more determinate and less contextual at the same time that we rely upon punishment to express our shared values. A tension exists between determinate and expressive punishment, however, because punishment that is truly morally expressive must make individualized and contextual judgments about the moral worth of each offender—his degree of culpability for the crime he committed and his potential for reintegration into the community. In a review of the moral panics of the eighties and nineties, Part III argues that our society has attempted to exorcise its solidarity anxieties and the tensions in punishment which they produce by focusing on the worst types of

13. See *infra* Part III.

14. See TONRY, SENTENCING, *supra* note 12, at 24 (“[T]he mechanism of the two-axis grid and the law-and-order politics of the last two decades have too often converted offenders into abstractions and produced a penal system of a severity unmatched in the Western world.”); see also *infra* Part III.

offenses and offenders. Part IV explores how these conceptions of crime have distorted the way we frame decisions about when to release criminal offenders back into society: we consider only the risks of reoffense and not the risks to society of unnecessary incarceration. Part V relates this Durkheimian perspective to the literature of Expressive Punishment and argues that the choice of a sentencing *process* is itself expressive in a way which complicates efforts to moderate severity in punishment. The Conclusion offers a few brief observations about the prospects for less severe punishment policies.

I. Solidarity and Symbolism in Modern Punishment

We have only to notice what happens particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions that are exchanged, from all the temper that gets itself expressed, there emerges a unique temper, more or less determinate according to the circumstances, which is everybody's without being anybody's in particular. This is the public temper.

—Emile Durkheim¹⁵

Criminal punishment serves as a communicative realm for the expression of sacred values within our society. Talking of the “sacred” in societies as diverse and secular as our own, however, raises conceptual problems for many. In this Part, I will argue that the more diverse and the more secular a society, the greater the need for belief in some set of core values around which the disparate elements of our society can coalesce. These core values constitute what I call the *secular sacred*, and I will further argue that the secular sacred is most easily expressed in societies such as our own through stories about its violation. Through punishment, society defines itself by its response to these stories of violation. In this sense, criminal punishment performs an internal communicative function whose importance deepens in times of flux and acute anxiety about social cohesion. The more we fear division in our society the more importance we invest in stories about society's response to terrible crimes, and this investment is reflected in the pivotal role which “special crime stories” have played in major criminal justice reforms

15. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102 (George Simpson trans., MacMillan Co. 1933) (1893).

over the last two decades.

The social thinker who thought most about the connection between punishment and social solidarity was Emile Durkheim, and in the first section of Part I, I will summarize key aspects of Durkheim's theory of punishment drawing heavily on David Garland's interpretation of Durkheim's writings. In the second section, I will provide my own account of how Durkheim's theory best translates into our contemporary context, an account which emphasizes the importance of special crime stories in shaping and expressing our sense of ourselves as a society.

A. Punishment and Solidarity in the Thought of Emile Durkheim

While the emphasis of the rhetoric which has accompanied contemporary severity in punishment often emphasizes deterrence of wrongdoers, Durkheim would most probably see the true audience of the "message" sent by these punitive practices as the "rightdoers," the people in society who accept the society's moral framework and who wish to see it affirmed.¹⁶ For Durkheim, punishment's primary function was not to "correct the culpable" or to "deter potential wrongdoers."¹⁷ Punishment's core function was to maintain social cohesion by affirming the moral order by which upright people lived their lives. "Crime brings together upright consciences and concentrates them."¹⁸ The punishment of crime in the Durkheimian view provides "an occasion for the collective expression of shared moral passions, and this collective expression serves to strengthen these same passions through mutual reinforcement and

16. Cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 422 (1999) [hereinafter Kahan, *Secret Ambition*]. Kahan argues that the large role which deterrence arguments play in public debate is misleading because the opinions of citizens and public officials on crime policy are ultimately grounded in concerns about moral values. See *id.* at 435-76. Kahan, however, seems to fear the potentially divisive consequences of a punishment discourse about moral values. See *id.* at 413. ("[T]he rhetoric of deterrence displaces an alternative expressive idiom that produces incessant illiberal conflict over status."). Durkheim, on the other hand, celebrates the role of punishment in expressing a society's moral framework. While I acknowledge some potentially divisive aspects of punishment practices in Part II, I believe that Kahan is mistaken in arguing that society is well served by the "secret ambition" of deterrence to mask the more expressive dimensions of punishment. As I will argue in Part III, the severity of our punishment practices are a function of anxieties about the vibrancy of our society's shared moral framework, anxieties which are probably exacerbated by the way in which deterrence talk mutes the expressiveness of punishment.

17. DURKHEIM, *supra* note 15, at 108.

18. *Id.* at 102.

reassurance.”¹⁹

Social scientists raising Durkheimian questions have found evidence that the public's attitudes toward issues of punishment are driven more by symbolic concerns about values than by instrumental concerns such as the actual reduction of crime.²⁰ Support for the death penalty, for example, has been shown to be rooted in the symbolism of society's willingness to provide the ultimate punishment for the most serious crimes.²¹ A survey exploring support in California for that state's Three Strikes initiative recently found that “support for the three strikes initiative, as well as for overall punitiveness, are linked to judgments about moral cohesion and not to judgments about dangerousness.”²² A review of the main points of Durkheim's theory of punishment provides insight into the relationship between the severity of current punishment practices and concerns about the solidarity of contemporary society.

At the heart of Durkheim's thought are the reciprocal relationships that he believed existed between crime, punishment, and moral order. “The existence of strong bonds of moral solidarity are the conditions which cause punishments to come about, and, in their turn, punishments result in the reaffirmation and strengthening of these same social bonds.”²³ Crime demands punishment because crime constitutes a challenge to the moral framework of a society and

19. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 33 (1990) [hereinafter GARLAND, PUNISHMENT]. Durkheim's main concern was how modern societies maintained their solidarity. His work has been described as “a single-minded search for a sociological grounding for moral bonds in societies which, to many observers, appear to have become far too complex, chaotic, secular, and atomistic for any such moral frameworks to exist.” Roger Cotterrell, *The Durkheimian Tradition in the Sociology of Law*, 25 L. & SOC'Y REV. 923 (1991).

20. See Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 145 (Melvin J. Lerner & Sally C. Lerner eds., 1981).

21. See Tom R. Tyler & Renee Weber, *Support for The Death Penalty: Instrumental Response to Crime or Symbolic Attitude?*, 17 L. & SOC'Y REV. 21 (1982).

22. Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 L. & SOC'Y REV. 235, 237 (1997). The California study sought to specifically measure concerns about social cohesion by asking respondents to respond to statements such as “Others in my community have similar values to mine.” *Id.* at 235. Those who expressed concern about things like “the decline in morality and discipline within the family and increases in the diversity of society” were more likely to support Three Strikes than any other group. *Id.* See generally TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997)(arguing that people's subjective sense of whether something was just affects their willingness to accept results regardless of self interest).

23. GARLAND, PUNISHMENT, *supra* note 19, at 28.

"the only means of affirming it is to express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent."²⁴ This act of punishment creates tangible moments when a society's collective moral framework can be experienced as real and vibrant.²⁵ Punishment "witnesses that collective sentiments are always collective, that the communion of spirits in the same faith rests on a solid foundation, and accordingly, that it is repairing the evil which the crime inflicted upon society."²⁶ Durkheim referred to this phenomenon as the "expiatory character of punishment."²⁷ Because society experienced affirmation in this collective expression, the penal sanction both "expressed and regenerated society's values."²⁸

Punishment's role in expressing and regenerating social values means, in essence, that reasoning about direct costs and benefits applies in only a limited way to punishment practices. Societies punish even when the costs of punishment outweigh the direct harms of the crime because punishment is necessary to uphold the moral order.

In reacting to particular crimes, punishment has the task of upholding the overarching moral order and of preventing its erosion and collapse, so even where the costs of punishing an offence appear greater than the direct harms caused by it, there is always another consideration weighing in the balance which indicates that punishment is required.²⁹

In this sense, "punishment is never merely a reaction to particular crimes and the direct harms that they cause because in addition to this immediate crime-control function, punishment also has a system-maintaining function which, in sociological terms, is more essential."³⁰

Durkheim did not pretend that all crimes threatened social cohesion in the same way or to the same extent. He distinguished between laws which were mere "conventions or regulations" and laws which were "sacred prohibitions which command widespread assent."³¹ By "sacred," Durkheim was referring to collective values which "occupy a position of depth in our psychic organization, and

24. DURKHEIM, *supra* note 15, at 108.

25. See GARLAND, PUNISHMENT, *supra* note 19, at 22-33.

26. *Id.* at 68, 76.

27. *Id.* at 44.

28. *Id.* at 23.

29. *Id.* at 58.

30. *Id.*

31. *Id.* at 30.

are thus fundamental to who we are.”³² More importantly, with reference to social solidarity, sacred values are also incontestable ones. “Unlike abstract ideas, to which we attach ourselves on only a superficial level, and in which we can tolerate contradiction, these deeper moral feelings have a force and importance which brooks no disagreement.”³³ It is this incontestable quality of the sacred which gives punishment an essentially spontaneous quality.

To think of punishment as a calculated instrument for the rational control of conduct is to miss its essential character, to mistake superficial form for true content. . . . [T]he essence of punishment is irrational, unthinking emotion fixed by a sense of the sacred and its violation. . . . The criminal act violates sentiments and emotions which are deeply ingrained in most members of society—it shocks their healthy consciences—and this violation calls forth strong psychological reactions, even among those not directly involved. It provokes a sense of outrage, anger, indignation, and a passionate desire for vengeance.³⁴

Punishment in this sense is not a means to achieving some abstract greater end such as public safety but a spontaneous reaction to a transgression that moves us deeply. It is an “expressive institution—a realm for the expression of social values and the release of psychic energy” with no objective or goal other than itself.³⁵

Although Durkheim developed the idea of the sacred within the context of what he referred to as “primitive societies . . . where laws and collective sentiments are clearly framed within a religious idiom and are deemed to be shaped by divine decree,” Durkheim believed that the sacred continues to be “an essential aspect of the moral order” of advanced, secular societies.³⁶

32. *Id.*

33. *Id.* at 30-31.

34. *Id.* at 30-32.

35. *Id.* An “expressionist” school of punishment philosophy exists, but these thinkers do not seem to conceive of punishment in terms of the sort of internal communicative function that Durkheim describes. See generally Carol Steiker, *Twenty-Sixth Annual Review of Criminal Procedure—Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 805 n.171 (1997). Jean Hampton, for example, has described punishment as an attempt to restore the moral worth of the victim by collective condemnation of the transgressor’s acts. See Jean Hampton, *Correcting Harms vs. Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992). Durkheim’s emphasis, however, is that it is the damage to the society’s moral framework as a whole which is repaired by the act of punishment, not merely the moral worth of the particular victim directly affected. In a sense, the victim is a means to the end of affirming moral order for Durkheim.

36. GARLAND, PUNISHMENT, *supra* note 19, at 54-55.

Despite the fact that morals are now understood—on an intellectual plane—as being a product of social convention and convenience, they continue to impress individuals—at least emotionally—as being somehow elevated, supernatural, having a power and a quality which places them on a higher plane of existence. The attitude that is adopted towards such ‘sacred’ entities is not one of everyday utilitarian calculation. They are not simply rules like any others to be rationally understood and instrumentally obeyed. Instead, they strike the individual as superior to him or her, and inspire feelings of deep respect, awe, love, and even dread.³⁷

For Durkheim, these secular transcendent values command the same emotional commitments of absolute, unthinking faith in secular societies that transcendent values in religious societies elicit. Durkheim’s concept of the secular sacred is fundamentally non-instrumental in nature: it is not a means to a higher end but an end in itself that defines who we are as a society.³⁸

This emotional and non-utilitarian quality of the punishment role survives the institutionalization of punishment that takes place in modern societies. The “spontaneous social action of the outraged community comes to be institutionalized in the form of a tribunal and a penal apparatus,”³⁹ but these institutions continue to draw their authority and their power from the collective conscience which drives punishment. The institutionalization of punishment concentrates and channels society’s collective punitive energies in important ways,

37. *Id.* at 55.

38. Garland acknowledges that something like the sacred may continue to play an important role in modern societies, but he describes it in terms of the aura of sovereign power. He sees an analogy between Durkheim’s concept of the sacred and Max Weber’s concept of charisma: “the quality of extraordinary power and grace which is widely ascribed to certain individuals or institutions.” *Id.* at 55. In a similar vein, he quotes the anthropologist Clifford Geertz on the sacredness inherent in the power of the sovereign:

[A]t the political center of any complexly organized society . . . there is both a governing elite and a set of symbolic forms expressing the fact that it is in truth governing. No matter how democratically the members of the elite are chosen . . . they justify their existence and order their actions in terms of a collection of stories, ceremonies, insignia, formalities, and opportunities. It is these—crowns and coronations, limousines and conferences—that mark the center as center and give what goes on there its aura of being not merely important but in some odd fashion connected with the way the world is built.

Id. at 56 (quoting Clifford Geertz, *Centers, Kings and Charisma: Reflections on the Symbolics of Power*, in *LOCAL KNOWLEDGE, FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (Basic Books 1983)). Ultimately, Garland sees the sacred as an emanation of the power practices of any society, as attaching to “those norms and rituals of power which are crucial to a particular version of social order.” *Id.*

39. *Id.* at 34-35.

however.

[T]he fact of institutionalization has important consequences. It gives added strength to the moral order by 'realizing' it in practical and continuing ways. It also ensures the existence of routine procedures and formal occasions that will help evoke the proper moral response to criminality, while simultaneously moderating the expression of moral passions and putting them to proper use.⁴⁰

Whereas most modern theorists of punishment see the institutionalization of punishment as "the supplanting of emotion by calculation, rationality, and administrative forms,"⁴¹ Durkheim believed that the energizing force behind punishment—the individual's sense of the sacred—and the key function which punishment spontaneously performs—the reaffirmation of the shared moral order—survives and transcends the modern forms employed to realize punishment in complex, modern societies. Durkheim is well aware that many seek to control punishment, to use it as an instrument in the service of some goal or interest. He believed, however, that "the petty calculation of social controllers . . . rarely succeed in their control and reform ambitions."⁴² Even in modern, secular societies, punishment functions as "a kind of routinized expression of emotion, like the rituals and ceremonies of a religious faith."⁴³

40. *Id.* at 35.

41. *Id.*

42. *Id.* at 33.

43. *Id.* at 35. Durkheim's ideas about punishment have often been either invoked or associated with the ongoing debate about "expressive punishment." Much of this debate has focused on "shaming penalties" such as forcing offenders to wear signs or be publicly identified in some fashion. See, e.g., Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998) (distinguishing shaming penalties which aim to educate from penalties which aim solely to shame and offering educative model as a way of fulfilling punishment's expressive function without offending human dignity); Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349 (1997) (arguing that imprisonment may sometimes be justified by something other than a conventional cost-benefit analysis since enforcement of criminal law shapes how individuals perceive one another's values and behavior); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) [hereinafter Kahan, *Alternative Sanctions*] (arguing that alternative sanctions have not supplanted imprisonment because such sanctions are not sufficiently condemnatory to fulfill punishment's expressive function and that shaming penalties would be expressive yet avoid the irrationalities of unnecessary incarceration). But see Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 689 (1997) (arguing that shaming penalties give birth to a vicious cycle of shamelessness and punishment); Michael Tonry, *Rethinking Unthinkable Punishment policies in America*, 46 UCLA L. REV. 1751 (1999) [hereinafter Tonry, *Rethinking*] (arguing that neither empirical literature about public knowledge and opinion about punishment nor theoretical

Durkheim's theory presupposes the existence of a widely shared moral framework in a modern society, an assumption many have challenged. Indeed, his work has been described as a "single-minded search for a sociological grounding for moral bonds in societies which, to many observers, appear to have become far too complex chaotic, secular, and atomistic for any such moral frameworks to exist."⁴⁴ Durkheim clearly believed that even modern, secular societies needed "a shared framework of meanings and moralities" in order to function.⁴⁵ In David Garland's view, however, Durkheim's theory

work of expressivist philosophers and Durkheimian functionalists justifies "disintegrative" quality of shaming penalties which degrade the offender and praising John Braithwaite's paradigm of "reintegrative shaming" as logical alternative); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998) (arguing that the chief evil of public humiliation sanctions is not their effect on an offender but their effect on a society of onlookers whose punitive sensibilities will be inflamed by publicly sanctioned shaming); but cf. Dan M. Kahan, *Unthinkable Misrepresentations: A Response to Tonry*, 46 UCLA L. REV. 1933 (1999) [hereinafter Kahan, *Unthinkable Misrepresentations*] (arguing that the point of shaming penalties is to minimize degradation of an offender by reducing pressures for imprisonment and that seeing shaming as a politically feasible alternative to imprisonment is grounded in a view of public opinion about punishment as complicated and not simply punitive).

A variant of this debate has concerned itself with the expressive quality of certain law enforcement practices. See, e.g., Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997) (arguing that policies such as curfews, gang-loitering laws, and shaming penalties are justified on grounds that they may alleviate criminogenic conditions in crime-ridden communities and thereby alleviate pressure for more severe punishment). But see Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (arguing that the empirical claims of "Broken Windows" law enforcement are not substantiated and criticizing the theoretical foundations of policies as repeatedly relying on an overly simplistic dichotomy between "honest people and the disorderly").

My argument focuses on a different type of expressiveness in punishment in a number of important ways. First, the expressive function of punishment in our diverse, secular society cannot be separated from the negotiation of the moral framework which punishment purports to express: We use punishment not merely to express but to identify shared sacred values in our society. See Part I. Second, the *process* that leads up to the choice of a sentence is itself expressive in ways that have not been sufficiently appreciated. See *infra* Part II. Third, society expresses itself not just through the punishment imposed but in the way in which it conceives of criminals and crime. See *infra* Part III. Finally, each of these expressive dimensions of punishment have combined to create a deeply embedded way of thinking about sentencing which focuses primarily on the risks of reoffense. See *infra* Part IV. I discuss Expressive Punishment more fully in Part V.

44. Roger Cotterrell, *The Durkheimian Tradition in the Sociology of Law*, 25 L. & SOC'Y REV. 923, 943 (1991).

45. GARLAND, PUNISHMENT, *supra* note 19, at 23. This moral framework, which punishment reinforces, must exist independently of punishment itself. "[P]unishment cannot by itself *produce* authority, however harshly it strikes: it can only reinforce a moral order which is already, authoritatively, *there*." *Id.* at 60.

does not presume the existence of a total consensus on social issues, however. Durkheim believed that "underneath the surface of clashing interests and social difference there is in operation a moral framework which holds competing interests together and provides a basis for their resolution."⁴⁶

B. Punishment and the Secular Sacred in Contemporary American Society

Politicians and other public figures often speak of the nation's "moral fabric," but what does such an amorphous term really mean in a society as diverse and as changing as our own? Does some sort of moral framework exist which binds us all together and provides a basis for resolving conflicts in values? Much of the law and order rhetoric surrounding punishment is filled with communicative metaphors about "sending a message." Such talk is simply incoherent in the absence of some common moral framework to be communicated.

A trade off probably exists between how determinate such a framework would be and how widely it would be shared. With reference to law, H.L.A. Hart once distinguished between a legal rule's "core of settled meaning" and the "penumbra of debatable cases" which experience inevitably throws up.⁴⁷ To exist in a society as diverse as our own, a widely shared moral framework would have to allow for unresolved penumbral cases yet be sufficiently determinate to mean something in core cases. Definitions of values in such a framework would have to be capacious, and the interpretive practices employed would have to be flexible. Such a framework would constitute a somewhat fuzzy middle ground between the opposing poles of nihilism and orthodoxy usually triggered by talk of shared values in a society as diverse as our own.

Some empirical support exists for the proposition that much of the American middle class thinks in terms of such a flexible moral framework. Eschewing the use of written surveys and telephone polls, the sociologist Alan Wolfe conducted a series of in-depth focus groups with suburban middle class respondents from all regions of the country. Wolfe found that while his respondents were not "postmodernist" in their approach to the existence of transcendent ideas and sacred values, they also were not fundamentalist in their

46. *Id.* at 51.

47. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

interpretive approach.⁴⁸ "It is not that people are skeptical of the old virtues . . . instead, they hold such truths to be sacred, but not so sacred that they should be inflexible."⁴⁹

Furthermore, even if one denied the possibility of a shared moral framework in a society as diverse as our own, Durkheim's theory of the process by which modern secular societies *try* to negotiate such a framework is still relevant. There may be no "there" there in the sense of a foundational vision of society upon which most would agree, but perhaps secular societies continue to seek, to negotiate, and to construct a shared framework of values which is as meaningful as possible to as many as possible. Durkheim may have identified what amounts to an irrepressible urge for a measure of moral consensus in society, one which some thought we outgrew as our society became more modern and more secular but which persists in ways that the rational, secular outlook of much modern social thought tends to underestimate.⁵⁰

Durkheim's use of the concept "sacred" to describe the energizing values of such a shared moral framework raises a number of difficulties. First, the idea of the sacred connotes a certain type of emotional state and both contemporary legal and political theory tend to neglect emotional states in general.⁵¹ Second, sacred is a word with religious connotations, connotations which by definition seem incompatible with the secular sensibility of modern societies such as our own. Indeed, many believe that solidarity in a religiously diverse society depends upon keeping quasi-religious concepts such as the sacred outside of the fora where social issues are resolved.⁵² Third, the sacred, by definition, speaks to something that is an end in itself. To this degree, the sacred rubs against the grain of the utilitarian and instrumental quality of much modern social thought. Much of political discourse is dominated by discussions of what would result in the greatest good for society, an orientation which permits the balancing of competing interests and which facilitates negotiation, compromise, and conflict resolution in a diverse society. Recognizing

48. ALAN WOLFE, *ONE NATION AFTER ALL* 300 (1998).

49. *Id.*

50. *See id.* ("Americans do feel that they have lost the distinction between right and wrong and desperately want it back," yet "middle-class Americans no longer believe that right and wrong provide unerring guidelines for informing them about how to lead their lives.").

51. *See generally* THE PASSIONS OF LAW (Susan Bandes ed., 2000).

52. *See generally* STEPHEN CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1994).

the existence of something called the sacred would seem to be recognizing the existence of something which would either trump that greater good or to define that greater good in a way that gave exclusive priority to a particular perspective.

Yet, some shared concept of the sacred continues to exist in modern society and punishing crime plays an important role in expressing it. The sense of awe, of dread, of outrage which most feel when they read of truly horrible crimes comes from some sense—however inchoate and inarticulate—of a violation of something sacred. Consider the following crime, which occurred in a small town in the rural South last summer. A man becomes angry when he learns that his wife refuses to become pregnant with his child. He plans to murder his wife's infant child by a previous marriage. When his wife is at work, he holds a plastic bag over the eight-month-old girl's head until the child turns blue and stops breathing. He chooses this method because he believes that the baby's death will be attributed to Sudden Infant Death Syndrome.⁵³

Such a crime does seem to violate something so important, so incontestable, so fundamental to how we see ourselves as human beings that the words "violation of the sacred" seem appropriate. The mere words "right and wrong" seem inadequate in the face of such a crime: they seem too abstract, too detached, too philosophical. What most feel in the face of such a terrible crime is a sense of terrible awe that anyone could watch an infant suffocate inside of a plastic bag he was holding over her head. Such a crime produces a sense of horror in the dictionary definition of the word: "a painful and intense feeling of fear, dread or dismay."⁵⁴ A sense also would exist that these emotions would be widely shared ones. Most people reading such a story would feel confident that they could tell this story to a person of any race, class, or political party and elicit the same emotions. Different people might attribute the causes of such behavior differently, but all would feel one in the sense of horror at the crime itself.⁵⁵

53. See, e.g., *Father Says Revenge Led Him to Kill Son*, RALEIGH NEWS & OBSERVER, June 28, 1999 at A5.

54. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 582 (1988).

55. Some might argue that such a strong example says little about punishment in general. The routine fare of the criminal justice system is thefts, assaults, and other transgressions that are far too mundane to elicit such strong reactions. As I will argue in Part II, however, it is our tendency to think of crime in terms of heinous acts and actors which has driven criminal justice policy in the last few decades. In this sense, the sacred is very much a factor in the revolutionary increase in severity that this period has seen.

Following close upon the sense of awe and horror that such a crime produces would be a powerful anger—perhaps even a sense of hatred—that would demand punishment. People would feel that there would be something deeply wrong with a society that failed to severely punish a person who did such a thing. It is this sort of thirst for punishment which Durkheim has in mind when he argues that we punish violations of the sacred in order to uphold the moral order of a society.

This desire for punishment would also not be susceptible to instrumental arguments about the greater social good. Assume for the sake of argument that it was established beyond any reasonable doubt that this person would never reoffend and would constitute no threat to public safety. Assume further that the sorts of people who commit such crimes are simply not susceptible to deterrence. Most people would want this man punished, nevertheless. While it is easy to label such a sentiment retributionist, Durkheim's theory suggests that the desire to punish is linked strongly to some sense of who we are as a society. There would simply seem to be something wrong with us if we did not punish this man to some degree; we would have trouble living with ourselves as a society. It is at this point that some public official would probably talk about the *symbolism* of letting such a person go free: when people talk about the symbolic in such a context, they are really talking about what signal a specific punishment decision gives about the nature of the moral framework which exists in that society. The audience for this signal is the society itself, and it is the incontestable nature of the sacred that demands punishment.⁵⁶

C. The Role of Crime Stories in Negotiating the Sacred in Our Society

We live in an era of “special story legislation” in matters of punishment. Vivid stories of individual tragedies have served as catalysts for sweeping changes in policy a number of times during the

An anthropologist or a philosopher might argue that some culture might exist in which such a crime would not be considered a violation of the sacred. This would not establish that no concept of the sacred existed in such a society; it would prove only that the anthropologist or philosopher had imagined or discovered a society fundamentally different from our own in very important ways.

56. Some might feel that dwelling at length upon such a horrible crime in this context is either gratuitously shocking or improperly manipulative of the reader's emotions. Part of my argument, however, is that our thinking about punishment has failed to properly appreciate the role which emotions play in our practices of punishment. Writing about punitive emotions in a detached way simply fails to communicate this point because emotions themselves are best appreciated experientially and not just intellectually.

eighties and nineties. In 1986, the death by cocaine overdose of a black college basketball player who had been the first round draft pick of the Boston Celtics precipitated efforts by then-Speaker of the House Tip O'Neill (a Boston native) to impose strict mandatory sentences for possessing or selling crack cocaine, legislation that would ultimately result in a dramatic increase in federal prison populations. In California, the passage of the Three Strikes initiative owes much, if not all, to the horrifying murder of Polly Klaas. Klaas was a twelve-year-old girl who was abducted from her own living room during a slumber party while her mother was sleeping in an adjoining room. Her death at the hands of a recidivist offender, who had been released on parole, galvanized support for a Three Strikes measure whose provisions included mandatory life sentences for any felony conviction by an offender who already had two serious (but not necessarily violent) felonies. In New Jersey, the sexual murder of eight-year-old Megan Kanka by a recently released sex offender resulted in the passage of "Megan's law," which requires public notifications anytime a person convicted of a sex offense is released back into a community, a measure which was subsequently adopted in a number of jurisdictions.⁵⁷ Perhaps the most politically influential story of the period, however, regarded crimes committed by an inmate named Willie Horton while on a prison furlough. That crime story may have influenced the outcome of the 1988 presidential election and established the power of a simple theme in criminal justice policy: any politician, judge, or prosecutor who authorizes the release of a potentially violent offender will be held politically accountable for any future crimes committed by him.⁵⁸

Stories of crime and punishment are deeply intertwined with a secular society's search for a collective sense of the sacred because the most powerful stories about the sacred tend to be stories about the violation of the sacred. In part, these may be an extension of the well known psychological aversion of the human mind to loss: people respond more powerfully to stories of prospective loss than to prospective gain.⁵⁹ In a similar vein, society finds a more powerful experience of its sacred attitudes toward children, for example, in

57. See Phillip Jenkins, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 197-207 (1998).

58. For a fuller discussion of the Horton controversy and of this particular dynamic, see *infra* Part IV.

59. See Amos Tversky & Daniel Kahneman, *The Psychology of Preferences*, *SCI. AM.*, Jan. 1982, at 160 ("[T]he threat of a loss has a greater impact on a decision than the possibility of an equivalent gain.").

stories of death or injury to children than in stories about the health and welfare of children. The special power of stories of terrible crimes entails more than simply the loss of the sacred, however, as some element of deliberate human action plays an important role. A busload of children killed by a freak avalanche on a mountain road involves a sacred loss, but absent some sort of negligence on someone's part that loss has a tragic quality which does not energize people in the same way that a crime does. If some element of human agency can be identified as the cause of a sacred loss, people's sadness turns into a more powerful outrage. A story about a busload of children killed because of a driver who failed to drive carefully mobilizes sentiment more than a freak accident because the element of human agency involved implicates society directly, and upholding the moral order requires condemning that negligence in some way. A drunk bus driver mobilizes more social energy because the deliberate nature of the act of drinking and driving injects an element of wrongfulness into the equation which challenges the society even more directly. A murderous bus driver, one who comes to work one day with an automatic weapon to shoot his charges, unleashes the most powerful social energies because his actions are a truly deliberate violation of the welfare of children. Here, society has not only a "body to kick" (a human agent responsible for the loss) but "a soul to damn" (a person who has deliberately done something so reprehensible as to be beyond the understanding of almost all of society's members).

The deliberate violation of the sacred provides a society with the most powerful and the most unambiguous moments of collective passion about those things that that society cherishes most deeply. Horrible crimes provide moments of communion for a secular society that no longer comes together within the walls of any one church or around any one text. In these moments of communion, society finds respite from anxieties about the things that divide it. Such respites in turn may build confidence that what binds the society together—a deeply felt and widely shared understanding of "the important things in life"—is stronger than the forces that threaten to pull it apart.

Indeed, the absence of a common philosophical approach to moral questions and the lack of a shared vocabulary for the expression of transcendent principles may make modern secular societies *more* dependent on the stories of violation of the sacred which crime provides. How do the diverse members of large and changing modern societies talk to one another about the important

issues of social life in an environment where abstract principles are subject to misinterpretation for linguistic and cultural reasons and where the power of the abstract to command allegiance is accordingly diminished? We communicate most easily in such environments through stories about the violation of the sacred: narratives which create in the listeners a common emotional experience, an experience which more homogeneous societies might be able to create through the mere incantation of some abstract principle or dogma from a shared sacred text.

A moral framework developed principally through stories about violation of the sacred would inevitably have a patch quilt quality, not the finely woven feel of a coherent set of philosophical principles. This piecemeal quality simply reflects in part the limits of language where the interpretive approaches of the various audiences of a social text are not always compatible. In part, this piecemeal quality also might reflect the limited scope of agreement possible in a diverse society regardless of barriers to communication. Stories can serve as cultural resources for discovering the maximal amount of solidarity possible between groups with very different perspectives. Stories may permit you to patch together more of a common moral fabric in a diverse society than the more rigorous methods of philosophical analysis could weave.⁶⁰ In this sense, diverse secular societies may be even more likely to rely on punishment to experience and negotiate their shared sense of the sacred than more homogenous societies with more uniform religious beliefs.

II. Race and the Durkheimian Double Blind

Since the beginning of the nation, white Americans have suffered from a deep inner uncertainty as to who they really are. One of the ways that has been used to simplify the answer has been to seize upon the presence of black Americans and use them as a marker, a symbol of limits, a metaphor for the "outsider."

—Ralph Ellison⁶¹

Race has made it difficult for punishment in our society to be truly morally expressive in the way that Durkheim envisioned. Most jurisdictions have moved toward a more determinate process of sentencing, partially as a response to controversies about the role of

60. See generally Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & SOC'Y REV. 197 (1995).

61. Ralph Ellison, *What America Would Be Like Without Blacks* (1970), quoted in CORNEL WEST, RACE MATTERS 1 (1993).

race in punishment. These more determinate sentencing processes ultimately mute the expressive force of punishment, however, because they minimize the degree to which individualized assessments of the moral culpability of the offender can be used in deciding upon a sentence. The result is what I call the *Durkheimian Double Bind*: more objective punishment processes that seek to minimize social division also minimize punishment's ability to be truly expressive of society's moral values. One way to evade this tension is to focus on monstrous conceptions of crime and criminals: the monstrous criminal elicits maximal condemnation at minimal cost to social solidarity. To the degree that punishment practices designed with monstrous criminals in mind are applied to lesser offenders, however, the sense of solidarity created is false and one which ultimately exacerbates racial divisions.

A. Race, Social Control, and The Neglect of Durkheim in America

Race makes Durkheim hard to swallow in America. Imagine that the entire population of the state of Delaware was black: we have the equivalent of a black state of Delaware incarcerated on any given day.⁶²

While African-Americans constitute only 12% of the general population, they constitute half of the prison population: one out of every fourteen adult black males is incarcerated on any given day. When probation and parole are included, one out of every three black males in the 20-29 age group is under some form of criminal justice supervision.⁶³

Durkheim's punishment theory has been generally eclipsed by theories of punishment as social control by elites. Criminal justice has often been used in this society as an instrument of racial subordination and of control of other "dangerous classes" such as immigrant groups and the urban poor.⁶⁴ To the degree the connection between American punishment and social solidarity is discussed, it is usually not the happy tale of affirming widely held sacred values which Durkheim tells but a dark and dysfunctional

62. See World Almanac, *supra* note 10, at 381 (citing the Bureau of Census population figure for Delaware in 1997 as 731,581); MAUER, *supra* note 3, at 124 (stating that half of our 1.5 million people in prison are African-American).

63. See MAUER, *supra* note 3, at 124-25.

64. See LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 83-106 (1993); DIANA R. GORDON, THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS (1994); RANDALL KENNEDY, RACE, CRIME AND THE LAW 76-136 (1997).

story about social segregation and control: mainstream America defining itself in opposition to the criminal "other" through punishment. Outsider groups are persecuted in order to reinforce their distinctness and to maintain the dominant social, economic, and political position of the in-group.⁶⁵

This standard account undoubtedly explains some of the support for the recent severity revolution in American punishment, but as I will argue in Part III, it does not explain everything. Some portion of those who support severity undoubtedly do so out of pure racism or out of more inchoate desires to maintain their social and political position. But the salient point for the purposes of my argument is that a neglected portion of the political support for increased severity may come from those who rely upon punishment to make symbolic statements about their society's moral order. This segment of the polity does not need punishment to be either racist or draconian, but they do want it to be expressive for the reasons that Durkheim explained in terms of a felt need for social cohesion.

Ultimately, all accounts of punishment are partial accounts. No one theory explains the whole enterprise. My claim for Durkheim's theory is that it constitutes a partial explanation for severity, which has been neglected, and a particularly useful explanation at that. Racists and those who simply fear "the dangerous classes" will probably always support severity. The utility of Durkheim's partial account is that it may generate insights about that segment of the public whose support for severity may be contingent in ways that have not been sufficiently appreciated.

B. The Turn Toward More Determinate Sentencing Processes

What does Durkheim have to tell us about race and punishment? Durkheim provides us with a different lens for looking at the problem of race. Rather than viewing race and punishment exclusively as matters of social control, Durkheim focuses our attention on the ways in which controversies about race complicate punishment's ability to foster social cohesion. Race raises questions in American society about the meaning of the moral framework which punishment is supposed to help forge and express. These questions run so deep that they make contextual decisions about sentencing inherently

65. See, e.g., KATHERINE BECKETT, MAKING CRIME PAY 11, 28-43 (1997) ("The rhetoric of law and order was first mobilized in the late 1950s as southern governors and law enforcement officials attempted to generate and mobilize white opposition to the civil rights movement.").

contestable. Ultimately, the Durkheimian perspective helps us to see determinate sentencing not just as an attempt to minimize racial disparity or as an attempt to entrench it but also as a (failed) attempt to minimize controversies about racial disparities in criminal justice.

A majority of jurisdictions in this country have moved to a more determinate sentencing process. This has been accomplished through a variety of measures which all either constrained or eliminated the judge's discretion at sentencing. Mandatory minimum penalties prevent a judge from imposing a sentence below a statutory minimum; structured sentencing pursuant to guidelines developed by the legislature or a sentencing commission typically creates a sentencing grid by using the dual axis of seriousness of offense and prior criminal record. Presumptive sentencing schemes such as California's involve legislatively set sentencing ranges for each offense with specified aggravating and mitigating factors identified. Between mandatory minimums and various structured sentencing arrangements, many states have made their sentencing more determinate over the last two decades. Sentencing in the federal system is heavily constrained by both mandatory minimum penalties and by the 273 box grid of the U.S. Sentencing Commission's Guidelines. As of 1996, sentencing commissions existed in nineteen states.⁶⁶ The use of mandatory minimums is also widespread. All fifty states and the District of Columbia employ some form of mandatory minimum sentence: forty states have mandatory minimums for repeat or habitual offenders, and twenty-four of these states do so in the form of a Three Strikes measure; thirty-eight states impose mandatory minimums for crimes involving use of a deadly weapon; thirty-six have mandatory minimums for drug possession or trafficking; and thirty states impose mandatory minimums for certain sex offenses.⁶⁷

66. BUREAU OF JUSTICE ASSISTANCE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 11-12 (1998).

67. See *id.* at 1 n.1, 4-8, 16. For an overview of current research, policy developments, and practical experiences with these more determinate forms of sentencing see TONRY, SENTENCING, *supra* note 12. Ron Wright has pointed out to me that the stated rationale for the movement toward more determinate sentencing shifted from initial concerns about disparity and fairness in the eighties to subsequent concerns about overcrowding, taxpayer expense and "truth-in sentencing" in the nineties. See also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 223 (1993) (describing the subtle transformation of federal sentencing reform from an anti-imprisonment and anti-discrimination measure to a law and order crime control measure). While I acknowledge that this standard account has much truth to it, I offer my account about *contestability* as a necessary supplement to

Given the absence of incontestable external criteria for punishment decisions, it is perhaps not surprising that systems of sentencing have been constructed around the two internal criteria with the strongest claim to objectivity: the defendant's prior criminal record and the charge for the instant offense. These factors provide the axis for almost all structured sentencing grids, the key variables for all legislative determinant systems, and the main ingredients of the patch quilt of mandatory minimums which many jurisdictions have laid over their sentencing systems. Ultimately, these more determinate sentencing processes can be understood as attempts to reduce the contestability of sentencing decisions.

There is a revealing irony in this trend in our sentencing processes at the same time that special crime stories have greatly influenced criminal justice legislation. The move toward more determinate sentencing schemes in a majority of jurisdictions has created a decision making process that is less contextual and more mechanical. While legislation is increasingly being crafted and passed with compelling narratives about individual cases in mind, the actual sentencing of offenders in individual cases is increasingly determined by the application of a sentencing formula. These formulas are based on determinations made about criminal conduct in the aggregate. In this sense, criminal justice decision making has become contextual and story-driven on the macro level but abstract and almost mathematical on the micro level.

C. Determinate Sentencing as a Response to Racial Disparity

Ironically, this upside-down quality of contemporary criminal justice decision making is in part a product of anxieties about social solidarity. The move toward more determinate sentencing schemes in the seventies and eighties was in part a response to the enormous racial disparities of the criminal justice system under the more indeterminate sentencing practices of the sixties and seventies. In the standard account, liberals supported more determinate sentencing as a means of reducing invidious racial discrimination in the criminal justice system. It was *not* generally thought that more determinate sentencing would be less severe, just less unequal. Conservatives supported the move toward more determinate sentencing as a means of moving from rehabilitation to strict accountability in punishment. More determinate sentencing would reduce opportunities for judges

that account. Indeed, *contestability* may help explain how a bipartisan coalition of support for more determinate sentencing survived a shift in fundamental motivations.

to mitigate sentences for socioeconomically deprived offenders. Ultimately, the compromise struck by more determinate sentencing processes was that judges would be less able to discriminate against *or* for a defendant on account of their race.

While some might argue that more determinate sentencing has reduced invidious racial discrimination in judicial sentencing, it is simply a fact that radical racial disparities remain. Critics of the status quo have offered a number of explanations for the continued disparities: discrimination in the discretionary law enforcement, including charging and plea bargaining decisions which precede and—to a greater degree than before—determine judicial sentencing; disproportionately severe sentences for crimes that are committed predominantly by people of color such as the infamous “500:1” disparity between federal penalties for crack and cocaine in its powder form; inequalities in the access of the poor to quality legal defense. Defenders of the status quo opine that racial disparities in incarceration reflect racial disparities in crime (despite social science evidence to the contrary).

In light of the continued racial disparities in criminal justice, a variety of theories are possible about the move toward greater disparity. Some believe that it was a good faith effort at reducing racial disparity that failed. Some believe that it was a bad faith effort to entrench racial disparities (and the social control which these disparities entailed): a formal, acontextual and highly analytical judicial sentencing process confers a patina of objectivity over a system where racial discrimination is embedded in legislative practices and is ubiquitous in the discretionary decision processes of police and prosecutors. To the degree that the move toward determinate sentencing was the result of a broad political consensus, there is undoubtedly some truth in both accounts. Durkheim’s ideas about the primacy of social cohesion in punishment practices suggests a third account of the initial and continued popularity of more determinate sentencing processes, however, one which focuses not on the results of sentencing systems but on their apparent legitimacy. This third account views more determinate sentencing processes as a means of reducing the *contestability* of judicial sentencing.

D. The Inherent Contestability of Contextual Sentencing

Determining whether someone is discriminating on racial grounds when they do not accept an application for employment, higher education, or housing from a person of color is difficult.

Determining if a judge is discriminating on racial grounds when she decides what sentence a defendant of color "deserves," or whether the defendant is a danger to society, or whether the defendant should be afforded an opportunity to rehabilitate is infinitely more difficult. At least in the contexts of housing, employment, and higher education, an external market of sorts exists which provides some baseline for comparison. While that baseline is often attacked as a social construction which itself embodies racist assumptions and practices, it at least provides a starting place for analysis. An African-American denied housing on economic criteria, for example, could provide wage statements, bank balances, and debt histories which might constitute some objective evidence of discrimination. In contrast, criminal sentencing is a social construction without an external market: the only thing it can compare itself to is itself. An African-American defendant denied probation and sent to prison on a first offense could compare himself to a white defendant given probation for the same first offense, but comparing sentencing decisions is inherently difficult. Victims do not provide offenders with a receipt specifying the seriousness of the harm inflicted against them. No "Internal Rehabilitation Service" exists to provide each citizen with a statement indicating his or her potential for rehabilitation for any given year of their life. Did the judge have a legitimate basis for concluding that the white offender either committed a less heinous crime or was more likely to rehabilitate? The absence of objective, external measures for use in comparing criminal sentences makes it difficult to assess whether race is playing an improper role in any given case.⁶⁸

The difficulty of dealing with race sentencing has also grown as a result of the continued economic decline of many of America's inner cities.⁶⁹ To the degree that employment can serve as one objective indicator of rehabilitative potential, the disappearance of work in the inner city during the seventies and eighties made the sentencing decision in communities of color even more difficult. Jonathan Simon provided evidence of this dynamic in his account of parole practices in California.⁷⁰ Simon explored the connection between the

68. To be sure, the criminal justice system generates internal criteria that could be used to evaluate claims of discrimination. Criminal records are compiled, but the race neutrality of the convictions underlying those records are themselves at issue.

69. With respect to the economic decline of the inner cities see WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997).

70. See JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990* 205-67 (1993).

disappearance of jobs for inner city residents and the reorientation of parole in California from a rehabilitative orientation to one of risk management. In his account, a parolee's ability to secure and hold employment was seen as evidence that he was rehabilitating. Employment status was an easy external indicia of normalization which the parole agent could verify. With the disappearance of low-skilled industrial jobs in the inner cities, however, parole agents were forced to rely on more therapeutic-based assessments of the parolee's adjustment back into society. With the further decline of the labor market in the seventies and the accompanying destabilization of inner city communities, parole abandoned the rehabilitative enterprise altogether and embraced internally generated criteria such as drug testing, rate of failures to report to the supervising agent, and arrests for subsequent offenses. They simply sought to manage and monitor the parolee.

I call this problem *contestability*. The role of race in criminal sentencing is inherently contestable in the sense that it is difficult to either prove or disprove whether racial discrimination is taking place in any given case, contestable because there is no objective baseline for comparing cases of disparate treatment. A contextual sentencing process is thereby a contestable sentencing process, and contestability continues to matter because racial disparities continue to plague the criminal justice system. A contestable sentencing process is a site for continued and insoluble controversies about racial justice, and these controversies exacerbate anxieties about the solidarity of our society. Solidarity-related concerns about contestability have helped push sentencing in our society in a more determinate and less contextual direction, and this constitutes one half of the Durkheimian Double-Bind.

E. The Inevitable Tension Between Morally Expressive Punishment and Determinate Sentencing

In a very important sense, our severity revolution is schizophrenic in nature: "getting tough on crime" has come to mean *both* expressing society's values and trying to protect the public at all costs. These two themes of punishment have been wrapped together in the "law and order" policies of the last two decades.

The first point to make about these 'tough on crime' measures is that however much they engage in an expressive mode of action—punishing for its own sake, conveying public sentiment, emphasizing punitive or denunciatory objectives—they simultaneously evince a more instrumental logic. Typically each

measure operates upon two different registers—an expressive, punitive scale that uses the symbols of condemnation and suffering to communicate its message; and an instrumental register, attuned to objectives of public protection and risk management. The favored modes of punitive expression are also, and importantly, modes of penal segregation and penal marking. The policy concern today is neither purely punitive nor solely oriented towards public protection. *The new penal ideal is that the public be protected and its sentiments be expressed.* Punitive segregation—lengthy sentence terms in no frills prisons, and a marked, monitored existence for those who are eventually released—is increasingly the penal strategy of choice.⁷¹

So familiar are these dual themes that no conflict between expressive punishment and instrumental punishment seems to exist in public discourse about punishment. The longer, more frequent, and more automatic prison sentences of the severity revolution both express our moral outrage at crime and better protect the public by incapacitating offenders. What is the problem?

The problem is that a society's choice of sentencing scheme must inevitably balance the moral dimension of punishment against moral instrumental concerns such as public safety: this tension constitutes the second half of the Double-Bind I have been describing. The more determinate sentencing schemes which are at the core of the severity revolution are exercises in what Albert Alshuler has called a "harm-based system of penology."⁷² The nature and length of the sentence is based primarily on the harm to society deemed to result from the offense committed. A robbery carries a certain range of sentences because of the harm the legislature or the sentencing commission deems to flow from the occurrence of robberies in society; assaults carry a different range of sentences based on the harm to society of assaults and so on. The other principal factor is the defendant's past criminal record, and the influence of prior convictions in the sentencing calculus is also a function of the seriousness of the harm to society of those past offenses.

More determinate sentencing and the harm-based penology upon which it is based inevitably leave less room for an individualized assessment of an offender's circumstances. A defendant who has committed a crime despite every advantage in life is often given the

71. Garland, *Culture*, *supra* note 5, at 350.

72. Albert W. Alshuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908-09 (1991) (arguing that "offenders who have produced comparable harms differ greatly in culpability").

exact same sentence as a defendant who has received no opportunities to develop his potentiality for good. This is what the philosopher John Kekes has called *the hard reaction to evil*. The hard reaction to evil defines a person's character solely in terms of actions: if you do bad things you are bad. It is a fundamentally utilitarian approach to justice because it defines morality solely in terms of what might minimize harm.⁷³ Kekes contrasts this approach (which he defends) to what he terms *the soft reaction to evil*.

The more intimately we know others, the more familiar we are with their motivation, circumstances, the information they have, and the constraints under which they operate, the less likely it is that we would be willing to allow their evil actions to reflect on their characters. Intimate understanding of human conduct tends to reveal complexities disguised from superficial acquaintances. These complexities, then, function as excuses, preventing us from judging the agents of evil actions as harshly as would be entailed by calling *them*, and not only their actions, evil.⁷⁴

The soft reaction to evil attempts to weigh both a person's past opportunities to choose good and their future potentiality to become good: this requires an individualized consideration of the past circumstances of each offender. Ultimately, it approaches justice in terms of a more transcendent sense of morality, one which attempts to measure the moral worth of the offender and not merely to measure the harm that the offender has caused.

Ultimately, the more determinate the sentencing scheme—the *harder* the system's reaction to evil—the less opportunity that exists for punishment practices to express the sort of transcendent moral principles which Durkheim saw as central to functional punishment in modern, secular societies. In this sense, there is an inherent tension between punishment as pure "crime control" or "risk management" and punishment as an attempt to express and reinforce a society's moral framework in meaningful ways. Ultimately, contemporary penalty is an attempt to force punishment to serve two incompatible masters.⁷⁵

73. See JOHN KEKES, *FACING EVIL* 6 (1990).

74. *Id.* at 5-6.

75. Garland sees a "deep connection between the development of an administrative form of penal sanctioning—premised upon behavior control rather than moral appeal—and the decline of moral community in modern society." GARLAND, *PUNISHMENT*, *supra* note 19, at 76.

Unlike Puritan punishments, for example, where penal measures were conceived as an aspect of community life and which aimed for the moral reintegration of the offender, modern penalty is seen as a management problem, aimed at the

F. The False Solidarity Created by the Monstrous Offender

There is one way to allow punishment to be both instrumental and expressive of a more transcendent morality at the same time: offenders must be conceived of in as absolutely evil terms as possible. The monstrous offender eliminates the tension between a penology based on minimizing risks of harm to society and expressive punishment: monstrous conceptions of crime make the hard reaction to evil embodied in more determinate sentencing processes less controversial. The crimes of the monstrous offender demand harsh punishment, and the failure of the sentencing scheme to consider the past circumstances and future potential of the offender diminishes in importance. Monsters are monsters, whatever the origins of their birth, and the felt need to incapacitate the monstrous offender on the pragmatic grounds of self-protection would bring together those who might disagree on the moral culpability of an offender whose crimes had their origin in life conditions which were the product of racial and socioeconomic inequalities.

Punishment of crime conceived in monstrous terms could also forge social solidarity between those who disagree about whether punishment should be about moral culpability at all. The harsher punishments which would logically flow from such conceptions would seem to carry greater expressive force, and this would seem comforting to those who seek to affirm society's moral framework through punishment. Those who have lost faith altogether in punishment's expressive moral force—or in the very existence of a moral framework which is actually shared by those subject to the practices of punishment—would be satisfied with the maximal amounts of incapacitation and deterrence achieved by the harsher sentence. Monstrous offenders resolve the schizophrenic tensions of contemporary penalty by allowing society to foster solidarity by being maximally morally expressive while hedging its bet with the greatest degree of self-protection. Problem solved?

To the degree that the monstrous conceptions of crime upon which such a system would be premised are myths, however, the actual effects of such practices on social solidarity would be disastrous, especially in a society such as our own where punishment practices fall disproportionately on communities of color and the poor.⁷⁶ Sentences whose severity was based on conceptions of crime

containment of deviant groups who are, in all likelihood beyond real integration.

Id.

76. See generally TONRY, SENTENCING, *supra* note 12.

more serious than what actually exists and whose imposition ignored the differing potentialities of each offender for good and bad would not be interpreted as being expressive of a shared moral framework by the people and communities most subject to penal practices. In communities of color, a more plausible interpretation would be simple racism. For example, drug laws which impose draconian prison terms on "drug dealers" would appear to be necessary expressions of a widely shared morality to a white middle class which conceives of drug dealers in the abstract as violent and uncaring sociopaths who prey on the young and the vulnerable. People who live in the communities where such draconian drug laws are enforced would see a different reality, however. The "drug dealers" they would see arrested most frequently would be "runners" who were often addicts themselves and had no history of violence. Watching such offenders sentenced to long prison sentences under mandatory drug laws would probably seem immoral, irrational, and racist. To the degree that the white majority of society believed in their monstrous constructions, however, the hostility of communities of color to the prosecution and enforcement of the criminal laws would seem inexplicable. (Occasionally, a murder case might even come along involving a famous black defendant and white victims which might reveal just how differently the two groups saw the criminal justice system in their society). The sense of racial division furthered by such punishment might fuel further anxieties about the degree to which all members of our diverse society truly share some common moral ground, anxieties which might lead to even more severe punishment practices in a continuous upward spiral of severity which would baffle experts and occasion numerous law review articles.⁷⁷

In the remainder of this Article, I will try to demonstrate that this is exactly what is happening in contemporary punishment. We conceive of crime in monstrous terms and we sentence accordingly, in order to exorcise our anxieties about solidarity and to justify a risk management approach to justice. These monstrous conceptions have disfigured our shared vision of moral order. In the severity revolution, we are reaping what our anxious imaginations have sown.

77. Indeed, experts are somewhat baffled and disheartened about the degree to which public opinion and policy seems impervious to empirical arguments about crime and sentencing policies. See, e.g., Samuel H. Pillsbury, "Why Are We Ignored?" *The Peculiar Place of Experts in the Current Debate about Crime and Justice*, 31 CRIM. L. BULL. 305 (1995); Franklin E. Zimring, *Populism, Democratic Government, and The Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243 (1996).

III. Scapegoating and Social Constructionism

BEWARE!

There is a new GANG INITIATION!!

This new initiation of *murder* is brought about by Gang Members driving around at night with their car lights off. When you flash your car lights to signal them that their lights are out, the Gang Members take it literally as "Lights Out," so they follow you to your destination and kill you! That's their initiation.

Two families have already fallen victim to this initiation ritual. Be aware and inform your families and friends.

DO NOT FLASH YOUR CAR LIGHTS FOR ANYONE!!

—flyer circulated in Chicago, 1993⁷⁸

The warning contained in the above quoted flyer was circulated nationally during the fall of 1993: law enforcement sent out alerts; the press issued warnings; the message went out through countless faxes and phone calls.⁷⁹ The crimes described in the warnings never happened, however. No killing was ever linked to a "lights out" initiation.⁸⁰ Why were so many people so willing to believe such a story about such a meaningless, terrible crime? "*It could happen*, people told themselves. *That's just the kind of thing gangs do.*"⁸¹ People had constructed an image of gang members as remorseless predators who would readily kill a family for a whimsical reason, and they had constructed an image of the gang problem as widespread. Such a warning fits effortlessly into such constructions, and in the process apocryphal tales such as these reinforce those constructions.

This tendency to think in terms of the worst has operated powerfully during recent "moral panics" about sexual abuse of children, violent juvenile crime, crack cocaine use, and various forms of random violence. Social constructionists have studied many such panics about crime.⁸² While some of the panics were built around events such as the "lights out" story which are purely fictional,⁸³ most exaggerated relatively rare crimes as being widespread, often

78. JOEL BEST, RANDOM VIOLENCE 1 (1999) (quoting circulated flyer).

79. *Id.*

80. *See id.* at 5.

81. *Id.* at 2.

82. *See, e.g.*, IMAGES OF ISSUES (Joel Best ed., 1995).

83. For example, the previous year's gang initiation story had described "ankle grabbings" where gang members would wait under parked cars, grab the ankles of the driver when they approached, and then slash the Achilles tendon of the victim before robbing, raping, or killing them. *See id.* at 2.

distorting the nature of the crime in the process. The common theme which runs through many of these accounts is scapegoating: society has used monstrous conceptions of crime and criminals as scapegoats to divert attention and anxiety away from social problems which threaten to further divide society. In this Part, I will offer a constructionist "meta-account" of the overall increase in the severity of punishment as a whole: inchoate anxieties about the cohesiveness of our society have driven the movement toward more draconian punishment. I will then illustrate that account with an analysis of several of the more notable moral panics of recent years.⁸⁴

A. The Severity Revolution as an Exercise in Deep Scapegoating

Durkheim would probably interpret the severity of our contemporary punishment practices as a direct result of the widespread and profound anxieties that we harbor about our solidarity as a society.⁸⁵ Durkheim recognized that the relationship between social solidarity and punishment could exist in both functional and dysfunctional forms. In a stable society, punishment may help maintain that stability by reinforcing the society's moral framework. An unstable society, however, may express its insecurities through practices of punishment that are overly harsh.

Punishment is used most frequently where authority is weakest—but in such cases it has least effect. Alternatively, a strong and legitimately established moral order requires only token sanctions to restore itself and deal with violators.... [T]he more authoritative, stable and legitimate the political-moral order, the less need there is for terroristic or force displaying uses of punishment.⁸⁶

The incarceration boom of the last two decades can be interpreted in this light as the desperate attempts of an insecure society to reassure itself of the strength of the moral framework which binds its disparate elements together.⁸⁷ Punishing harder becomes the anthropomorphic

84. For a general review of the literature on the public's fear of crime, see C. Hale, *Fear of Crime: A Review of the Literature*, 4 INT'L REV. VICTIMOLOGY 79 (1996).

85. See generally MARK COLVIN, PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS (1997) (arguing from a Durkheimian perspective that historically punishment has increased in the United States during times of perceived social disintegration).

86. GARLAND, PUNISHMENT, *supra* note 19, at 61.

87. Some argue, of course, that contemporary severity in punishment is simply the expression of a harsher and more rigid set of public attitudes towards punishment. My argument is that many have mistaken anxiety about change with a desire for draconian punishment. The literature exploring contemporary attitudes about punishment provides no clear support for a claim that people have simply become more punitive. See

equivalent of raising your voice in order to be heard.⁸⁸ Punishing harder to reassure ourselves of the continued vibrancy of a shared moral framework is an exercise in scapegoating to the degree that those punished are not responsible for what is threatening the moral order—or that their punishment is disproportionate to the threat to that order which their criminal behavior constitutes.

A scapegoat is generally understood to be “one that is made to bear the blame of others.”⁸⁹ The severity revolution is an exercise in what I call *deep scapegoating*. Deep scapegoating is the identification of some person, group, or thing upon which one projects things that no one person or group or thing is to blame for. Deep scapegoating involves assigning blame for fears and frustrations that are inchoate and that have no readily identifiable or attackable cause. In studying scapegoating in American culture, Andrew Delbanco found a perfect example of this sort of thinking in Herman Melville’s *Moby Dick*:

Gottfredson et al, *Conflict and Consensus about Criminal Justice in Maryland*, in PUBLIC ATTITUDES TO SENTENCING 16, 50 (Walker & Hough eds., 1988) (finding “pluralistic ignorance” where both public officials and one public “assign high priorities to the goal of rehabilitation or treatment and agree that simple retributive punishment is the least desirable goal for a correctional system” but public officials believe that “the general public strongly support the goal of retributive punishment and would offer only very weak support to the goal of rehabilitation.”); see also Francis Cullen et al., *Explaining the Get-Tough Movement: Can the Public Be Blamed?*, 45 FED. PROBATION 2, 16-54 (1985); JOHN DOBLE, CRIME AND PUNISHMENT: THE PUBLIC’S VIEW (1987); Timothy Flanagan, *Change and Influence in Popular Criminology: Public Attributions of Crime Causation*, 15 J. CRIM. JUST. 231 (1987); Julian Roberts, *Public Opinion, Crime and Criminal Justice*, in 16 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH. But see Joseph Jacoby & Francis Cullen, *The Structure of Punishment Norms*, 89 J. CRIM. L. & CRIMINOLOGY 245 (1999) (arguing that the public prefers linking prison only to the harm of the offense and not the offender’s characteristics although acknowledging that focus groups reveal a greater malleability of opinion). See also *supra* sources cited notes 21-22. In light of the ambiguity of empirical work studying punitive public sentiments, this Part argues that the public’s tendency to conceive crime in monstrous terms is linked to an increase in felt anxieties about social solidarity (regardless of whether an increase in those anxieties is actually justified). I offer this account as a plausible (and hopefully persuasive) explanation of a social phenomenon which has resisted direct, empirical analysis.

88. This interpretation recasts the statistics comparing incarceration rates between the United States and other countries in an interesting light. The United States is perhaps the most culturally and socioeconomically diverse western society. Is it a coincidence that the United States is also the most punitive? The United States currently incarcerates at the rate of approximately 600 inmates per 100,000 members of its population, a figure which translates into incarcerating 1 out of every 155 citizens (and that is including newborn babies and senior citizens in the calculation of the total population). The closest Western European country is Spain which incarcerates 105 inmates for every 100,000 citizens. See THE SENTENCING PROJECT, AMERICANS BEHIND BARS: U.S. AND INTERNATIONAL USE OF INCARCERATION, 1995 (1997).

89. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1611 (3d ed. 1992).

Captain Ahab's implacable hatred of the whale which he hunts to the point of Ahab's own extinction.

All that most maddens and torments; all that stirs up the lees of things; all truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil, to crazy Ahab, were visibly personified, and made practically assailable in Moby-Dick. He piled upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it.⁹⁰

For Delbanco, the power of this passage flows from its insight into an unattractive but enduring trait of human nature: the desire to make meaning out of suffering in the simplest way possible. Many of life's frustrations can not be traced to any definite source. To be able to locate "all that maddens and torments" in a form that is "assailable" has obvious appeal.

For Delbanco, Ahab prefigures the demagogues of the coming twentieth century in his ability to enlist his crew in his vision of an external, attackable source of all evil in the world. "The demagogue replaces the sense of life as a series of random defeats with the possibility of righteous struggle against a huntable enemy."⁹¹ The Nazis, the Ku Klux Klan, the McCarthyites of the fifties, all drew their strength, in Delbanco's view, from an "ability to sweep away people's fear that their sufferings were meaningless, and to convince them instead that there exists a gloating consciousness that has arrayed the world against them."⁹²

How does Ahab draw the entire crew of his ship, the *Pequod*, into his vision of whale-as-evil-incarnate? The simple answer is that Ahab builds solidarity around a sympathetic identification with a victim—in this case, himself.

He does it by compelling them to feel his suffering as their own. He touches their private heart-wounds. He makes them *feel* how 'Ahab and anguish [had lain] stretched together in one hammock,' how 'his torn body and gashed soul [had] bled into one another,' and in so doing he makes them feel that he is at one with them—victims all, wounded discards, sufferers *almost* beyond

90. HERMAN MELVILLE, *MOBY-DICK* 200 (Penguin Books 1992) (1851), *quoted in* ANDREW DELBANCO, *THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL* 181 (1995).

91. *Id.*

92. *Id.*

recompense.⁹³

Ahab's use of victim-hood to concentrate group emotion has obvious analogies to contemporary crime discourse where the victim of crime has come to serve as a "representative figure"⁹⁴ whose sufferings have been accorded sacred status in debates about crime policy.⁹⁵ But this answer only takes us so far. What is the source of the power of the victim as a symbol? Why was Ahab able to draw his crew so completely into his own suffering?

Ahab's appeal can be best understood in terms of a longing for cohesion by his crew, a longing of cohesion which has obvious analogies to our somewhat alienated and divided modern society. Ahab offered his men an experience of communion that they deeply desired but would have had trouble articulating. A band of essentially isolated figures, each cut off from kith and kin, they worked and lived in close proximity subject to a discipline that was based on the most impersonal and instrumental ties. They faced danger and death as part of their life at sea, and, perhaps, the greatest part of that challenge was that they faced the danger of a typically modern death in terms of its meaninglessness. The crewman who lost his life or his limb on board knew in his last moments that his loss served nothing greater than a commercial enterprise, and his own loss now greatly exceeded his share of the gain.

Ahab offered them something more. He offered them a vision of their lives as bound together by something more than the harsh discipline of maritime law or a sterile concert of commercial interests. He offered them the prospect of a meaningful death, a death lost in the expiation of their own suffering and of all the suffering of all of their shipmates. He offered them a vision of their life on board as bound together by love, a love born of the hardships they suffered together, a love which would give some transcendent meaning to their long, lonely years spent at sea together. Ultimately, Ahab offered his crew a vision of shipboard life as a community of love—for what else is it when a group of men sacrifice and risk in response to a vision of suffering of one among them.

Telling a group of hardened sailors that they are lonely and spiritually yearning for love would probably not have worked very well for Ahab, of course. This appeal had to be masked behind something else, and that mask was the hatred of Moby Dick. Men

93. *Id.* at 181 (quoting MELVILLE, *supra* note 90, at 200).

94. Garland, *Culture*, *supra* note 5 at 351.

95. *See infra* Part IV.

who could not look at one another and profess love could turn together toward a vision of absolute evil and express hate, and in that expression of hate they would be affirming in a safely obscured way their love for all men who suffered the hardship of a seagoing life together.

This is deep scapegoating at its most sublime. In the sections which follow, I will argue that the inability of the crew of the *Pequod* to affirm in a positive way the ties which bound them to one another mirrors contemporary difficulties about defining our society's common ground during a period of tremendous change. In crime, we have found our own White Whale.

B. Contemporary Sources of Anxiety About Social Cohesion

Anxieties about the solidarity of our society have their roots in the enormous economic, social, and ideological changes of the last three decades. Economic life has changed in ways that have reduced stability of employment for the average American household. Even people who are doing well in this present time of unprecedented prosperity worry that the job which supports their current standard of living could disappear overnight. The inflation of the late seventies and the recession of the early eighties profoundly destabilized the American workplace, and the economic growth of the late eighties and early nineties has created a prosperity which still feels unstable to many. More recently, radical and rapid changes in economic fortunes in certain industries and markets has created a great degree of economic mobility—both downward and upward. Whether one's neighbors moved out of the neighborhood because they suddenly lost their old job and are moving down or because they cashed in their newly appreciated stock options and are moving up, the anxious sense of constant, unpredictable change is the same.⁹⁶

During this same period of economic change, we have also seen enormous social changes. Gender roles in the family and the work place also began to change significantly during this time, and the end of the resulting changes which have resulted in both family and economic life are not yet in sight. During the fifties, sixties, and seventies, marginalized racial and socioeconomic groups in our society mobilized in both peaceful and violent ways to challenge longstanding inequalities in our society. The burning cities and mass protests of the sixties have given way to what feels like an intractable

96. See generally BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* (1989); WOLFE, *supra* note 48, at 261.

political stalemate on issues of racial and socioeconomic equality. As a result, Americans may be more aware of the diversity of their society and more aware of the persistence of serious social, economic, and political inequalities attendant to that diversity than at any other point in our recent history. While the United States has always been a diverse society afflicted with invidious forms of inequality, it is the heightened awareness of these divisive aspects of our common life which has created a marked anxiety about our ability to cohere as one society.

Cultural and ideological developments during the last few decades have heightened concerns about our solidarity as a society. Whatever the term "Culture Wars" means, its constant and familiar use to describe aspects of our civic discourse indicates a sense of ongoing conflict between groups in our society which have very different ways of looking at life. These cultural conflicts flow from the growing pluralism of civic life as well as the changing social and family formations which have developed over the last several decades. Running through many of these conflicts is an articulated concern that the diversity of our society has resulted in a sense of right and wrong that may ultimately be too relativistic to provide a clear framework for orderly and meaningful common life. The politics of the period have also grown more divisive. Political rhetoric has become progressively more antagonistic and more personality-centered, and personal attacks seem to be the principle coin of the political realm. Politicians often seem more bent on demonizing their opposition than on working with them: whether you claim to be a "New Democrat" or a "Compassionate Conservative," any effort at consensus governance by one party is ruthlessly spun as "stealing our ideas" by the other.

The last few decades may have also seen the ascendancy of what Lawrence Friedman has labeled an "exaggerated individualism" in which "one's main task in life is to forge a separate, unique self; to develop one's potentialities" and where people's civic and social obligations are not emphasized.⁹⁷ "The culture simply does not encourage people to be modest, self-effacing, to submerge their egos, to sacrifice their personal desires on the altar of some higher cause."⁹⁸ America has always been a strongly individualistic society, but that aspect of our social character seems to have grown more pronounced

97. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 438 (1993).

98. *Id.* at 439.

during this period of rapid social and economic change, and a growth in individualism naturally implicates concerns about group solidarity.

Finally, social scientists have noted changes in the nature of participation in civic activities which heighten concerns about social cohesion. "At work and in their civic lives, people's ties are increasingly instrumental, based less on a sense of loyalty and more on the utilitarian benefits such ties can offer."⁹⁹ Social scientist Robert Putnam has argued that civic participation in America has greatly declined and with it Americans sense of identification with their communities, an argument which he based in part on his finding that Americans are bowling alone more than in leagues.¹⁰⁰ In-depth focus groups with middle-class respondents qualified Putnam's thesis, finding that it was the quality and not the quantity of civic activity which had declined.

[I]t is not the overall decline in group membership that is crucial—for, when added up properly, there may not be that much of a decline—but a change in the qualitative nature of those ties that matters. Active engagement in social and civic life is important, not as an end in itself, but because it expresses an altruistic desire to do something for others. If, instead, people are joining groups to do something for themselves—to win friends and influence people—then society could experience a *rise* in organization memberships and still be facing a situation of depleting social capital.¹⁰¹

Community activities, in other words, were not engaged in for the reasons which transcended personal interest, and in this sense these activities merely reinforce anxieties about the absence of transcendent values binding the community and the society together. "[T]he fact that, in spite of their organizational activities, so many of them believed that selfishness in America has increased suggests that, in their view of the world, the quality of the social ties they experience are not as rich as they ought to be."¹⁰² Like the crew of

99. WOLFE, *supra* note 48, at 261.

100. *Id.* at 230 (citing ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000)).

101. Wolfe, *supra* note 48, at 261.

102. *Id.* at 261-62. Ultimately, Wolfe concludes, however, that

Civic America . . . is not so much in decline as . . . going through changes, and those changes may be for the best, even if they do produce anxiety in the short run. Instrumental ties clearly do not bind as tightly as those of family, church, and community, but Americans have never liked to be bound that much at all. Neighborhoods may—or may not—be quite as committed to an ethic of belongingness, but, more important, people get to choose for themselves the forms of their involvement with others.

Id. Middle-class Americans, Wolfe believes, understand that "all was not well at a time

the *Pequod*, we labor alongside one another, feeling mutually dependent but increasingly alone.

The sum result of these changes and divisions is a wide spread and deeply felt sense of anxiety about the solidarity of contemporary society. Books and articles discussing the anxious nature of civic life have been numerous, and it is difficult to pick up a newspaper without seeing this theme picked up in at least one story each day. It bears emphasis that our society may be no more in flux now than it has been during any other decade of the past tumultuous century. The awareness of and anxiety about challenges to social cohesion do seem to be at historically high levels, however.¹⁰³

C. Social Cohesion and the Moral Panics of the Eighties and Nineties

Concentrating group hatred toward an unworthy object is at best, however, a dysfunctional way to foster cohesion. The hunt for the scapegoat diverts attention from the true sources of group concern—those things which challenge our allegiance to the group and our love for one another. The destruction of the scapegoat provides no direction for the daily decisions which social life requires of us. Furthermore, the sense of solidarity created by scapegoating is often fleeting. With the lone exception of Ishmael, the teller of Melville's dark tale, all of Ahab's crew perished in their effort to destroy Moby Dick. Had they survived, one wonders how enduring would have been the sense of solidarity created by their quest. For those with a low threshold for self-deception there may be a moment of inner

when organizations and individuals were much more tightly bound together," and they remain hopeful that someday the right balance will be found. *Id.*

103. A footnote which listed every book and article in the popular press picking up this theme would run on for pages. See, e.g., MARTIN ANDERSON, IMPOSTERS IN THE TEMPLE: AMERICAN INTELLECTUALS ARE DESTROYING OUR UNIVERSITIES AND CHEATING OUR STUDENTS OF THEIR FUTURE (1992); E.J. DIONNE, WHY AMERICANS HATE POLITICS (1991); THOMAS BYRNE EDSAL, & MARY EDSAL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS (1991); BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS (1989); SUZANNE GARMENT, SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS (1991); TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995); HAYNES JOHNSON, DIVIDED WE FALL (1990); JOHN KATZ, VIRTUOUS REALITY: HOW AMERICA SURRENDERED DISCUSSION OF MORAL VALUES TO OPPORTUNISTS, NITWITS AND BLOCKHEADS LIKE WILLIAM BENNETT (1997); MARTIN MARTY, THE ONE AND THE MANY: AMERICA'S STRUGGLE FOR THE COMMON GOOD (1997); DANIEL PIPES, CONSPIRACY: HOW THE PARANOID STYLE FLOURISHES AND WHERE IT COMES FROM (1998); ARTHUR SCHLESINGER, JR., THE DISUNITING OF AMERICA (1994); CHARLES SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER (1993).

truth after the destruction of the scapegoat when the individual admits to himself the deception which he and his fellows have willingly perpetrated upon themselves, a moment of recognition of the absence of a relationship between the scapegoat and the social pain that the group was trying to escape. Such moments can take a toll on the very solidarity which all were so anxious to forge and affirm in the first place. Ironically, the ephemeral quality of the false solidarity which scapegoating creates may create a hunger for more of the same. In an effort to escape once again its troubled sense of reality, the group may look for its next sacrificial victim.

Like the alcoholic who lives from drink to drink, our society has gone from one moral panic about crime to another during the last few decades. Many of the public's major crime obsessions of the eighties and nineties have proved to have been gross distortions of social reality. Epidemics of child kidnapping, ritual satanic abuse, murders by serial killers, juvenile violence, and crack cocaine addiction which were exhaustively covered by the media have upon closer examination turned out to be more fiction than fact. Each panic was itself an exercise in deep scapegoating. In each case, a monstrous type of offender (or in the case of crack cocaine a monstrous drug) was imagined to be responsible for committing widespread crime, and hyper-punitive strategies were adopted for dealing with the problem. In each case, however, the problem was constructed in a way that tapped into underlying anxieties about divisive social problems.

The scholars who have studied these panics in depth have come to be known as "social constructionists" because they emphasize the degree to which social problems are "constructed" by political elites, the media, and activist groups as opposed to merely being "discovered" by these groups in ready made form. Social constructionists have examined a broad range of social problems and the hallmark of their work has been a careful, empirical examination of particular social problems at particular times.¹⁰⁴ In studying these moral panics, social constructionists have tended to focus their attention on the role of interest groups in selling particular constructions of a social problem to the public. My principal focus,

104. See, e.g., IMAGES OF ISSUES, *supra* note 82. For a discussion of the controversies attendant to Constructionism, see Joel Best, *But Seriously Folks: The Limitations of the Strict Constructionist Interpretation of Social Problems*, in CONSTRUCTIONIST CONTROVERSIES: ISSUES IN SOCIAL PROBLEMS THEORY (Gale Miller & James A. Holstein eds., 1998); Gary Fine, *Scandal, Social Conditions, and the Creation of Public Attention*, 44 SOC. PROBS. 297 (1994); Erich Goode, *Round Up the Usual Suspects: Crime, Deviance, and the Limits of Constructionism*, 94 AM. SOCIOLOGIST 90 (1994).

however, is upon the anxieties about social cohesion to which these rhetorical strategies have appealed, not the motivations and tactics of those making the appeals.¹⁰⁵

(1) *Random Violence*

Just as Melville's *Moby Dick* really was responsible for the loss of Ahab's leg, so too do some of the moral panics of our time have their seeds of truth. Not all panics are built around urban legends such as the "lights out" gang initiations of the early nineties.¹⁰⁶ Often, two or three crimes with a striking similar feature get packaged as a "new crime problem." Joel Best has analyzed one such "mini-panic" which flared briefly but never got off the ground: freeway shootings in the summer of 1987.¹⁰⁷

The story began when reporters juxtaposed stories of two shootings on L.A. freeways during the same June weekend. When a third shooting occurred a few weeks later, the press declared that they had spotted a trend, and for three weeks in late July and early August, news stories about L.A.'s 'road warriors' riding 'hair-trigger highways' attracted national attention. . . . However, it soon became obvious that freeway violence was not spreading across the country or increasing in southern California; it was not even all that common in L.A.¹⁰⁸

Other panics take hold of more substantial categories of crime and exaggerate them to epidemic proportions. During the mid-eighties for example, numerous media reported that the United States was experiencing a serial murder epidemic.¹⁰⁹

The media reports repeated the claims of a Justice Department official that as many as 4,000 Americans a year, or about 20 percent of all homicide victims, were murdered by serial killers. . . . It turned out that the numbers of serial murders reported by the federal government were fake. In effect, the government interpretation made every one of the 4,000 or so unsolved murders in the United States a "serial killer." It was later shown that there were only about fifty to sixty murders per year by serial killers

105. Cf. Fine, *supra* note 104, at 297 (arguing that social constructionism "systematically neglects the conditions that produce the recognition of social problems" and that "sociologists should analyze conditions that generate public attention, seeing structure as providing constraints on interpretations").

106. See BEST, *supra* note 78, at 1-2.

107. See *id.* at 4.

108. *Id.*

109. See NATIONAL CRIMINAL JUSTICE COMM'N, *supra* note 5, at 68.

between 1971 and 1987.¹¹⁰

Sometimes, very diverse types of crime are packaged together in a way that purports to represent a pattern. Best, for example, has tracked the appearance of the expression "random violence" in major newsmagazines and newspapers and identified a four-year period of peak usage from 1989 to 1993.¹¹¹ "This usage corresponds to the rise of several moral panics about new crimes during the late 1980s and early 1990s, including freeway violence (1987), wilding (1989), stalking (beginning around 1990), kids and guns (1991), carjacking and ankle grabbing (both 1992), lights-out gang initiations (1993), and sexual predators (1994), to say nothing of other concerns—such as serial murder (1984) and drive-by shootings (1985)—that maintained high levels of visibility."¹¹²

(2) *Crack Cocaine*

Moral panics sometimes represent an existing problem as spreading to hitherto untouched areas of society. Perhaps, the most extreme example of such a construction occurred when the President of the United States began a national address by holding up a bag containing crack cocaine, which he claimed was seized during a sale which took place across the street from the White House. This particular claim turned out to be a "construction" in the most literal sense of the word.

"The idea of the President holding up crack was first included in some drafts" of his speech by advisors. . . . [President] Bush and his advisors decided that the crack should be seized in Lafayette Park across from the White House or nearby so that the President could say that crack had become so pervasive that men were "selling drugs in front of the White House". . . . Despite their best efforts, top Federal drug agents were not able to find anyone selling crack (or any other drug) in Lafayette Park, or anywhere else in the vicinity of the White House. Therefore, to carry out their assignment, DEA agents had to entice someone to come to the Park to make the sale. Apparently, the only person the DEA could convince was Keith Jackson, an 18-year old African-American high school senior. . . . The DEA's secret tape recording of the conversation revealed that the teenager seemed baffled by the request: "Where the [expletive deleted] is the White House?" he asked. [The DEA agent] told the *Post*, "we had to manipulate him

110. *Id.*

111. See BEST, *supra* note 78, at 6-7.

112. *Id.*

to get him down there. It wasn't easy."¹¹³

The President's claim dramatized a widespread—and to a great degree ongoing—scare about the prevalence of crack cocaine in society. During the mid to late eighties, a barrage of media coverage described crack cocaine use in the terms of a growing epidemic. Crack was routinely described as a drug of unparalleled addictive powers: it was widely reported that youth often became addicted after a single incident of use, for example. These reports emphasized that crack use was spreading to white suburban neighborhoods where hard drug use was virtually unknown. All of these claims were either baseless or highly disputable.¹¹⁴ Despite widespread media reports during the eighties that crack had invaded the suburbs and the middle class, crack use was mainly confined to poor, urban neighborhoods.¹¹⁵ The best data available on use of cocaine during the mid-eighties suggests that cocaine use had begun declining around the same time that the "crack epidemic" was supposed to be taking off. (The same data suggests that cocaine use has continued to decline ever since).¹¹⁶ At the beginning of the crack scare, there was no data distinguishing use of cocaine in its powder form from the crystalline form known as crack (despite widespread representations that crack use was skyrocketing).¹¹⁷ Once distinctions were introduced into the studies, the data disproved claims that crack was "instantly addicting." The vast majority of people who have tried crack did not continue using it.¹¹⁸ Far from being "instantly addicting," most of those interviewed in formal studies describe the crack rush as being "too intense" and "extremely unpleasant."¹¹⁹ Apparently, crack is to powder cocaine what moonshine is to liquor: typically only the poorest and most desperate can bring themselves to use it enough to get addicted to it.¹²⁰

113. Craig Reinerman & Harry Levine, *The Crack Attack: American's Latest Drug Scare, 1986-1992 in IMAGES OF ISSUES*, *supra* note 82.

114. *See id.* at 156-60.

115. *See id.* at 150.

116. *See id.* at 163-65.

117. *See id.* at 164.

118. Much has been made of the different type of "rush" or "high" which crack users experienced. Free-basing cocaine provides the same pharmacological effect as smoking crack, however, and free-basing preceded crack by a number of years. Crack was principally a marketing innovation, and smoking cocaine in its crystal form is nothing more than a "poor man's" method of freebasing. *See id.* at 151-52.

119. *Id.* at 149.

120. Reinerman and Levine refer to the framing of worst cases as typical cases in drug war discourse as an example of "routinization of caricature," a pattern where the episodic becomes "rhetorically recrafted into the epidemic." *Id.* at 160.

(3) *Juvenile Violence*

One of the on-again, off-again panics of the last two decades has related to juvenile violence. Perhaps, the most evocative variation on this theme was the "juvenile superpredator,"¹²¹ a construction which observers of juvenile justice have seen again and again.

With rising concern over urban violence in the 1980s and 1990s came the recycling of the familiar 'new breed' theory of young offenders—with the implicit focus on the young black male offender.... Politicians and human service professionals alike periodically call the public's attention to this ostensibly more unfeeling, cold, and dangerous young offender who now stalks our streets.¹²²

One of the more recent claims of this particular panic is that a demographic bulge in the juvenile age group will result in a "coming storm of juvenile violence."¹²³ Once again, however, empirical research tells a different story. A recent study concluded that "juvenile crime has been on the decline for the past four years" and that "over the past 20 years, there has been no sustained trend of either increases or decreases in juvenile violence."¹²⁴ Furthermore, the study debunked the coming explosion of juvenile violence as "science fiction rather than social science."

One much-trumpeted prediction, for example, claimed that there will be an additional 270,000 extremely violent young people by the year 2010. However, that statistic, which was widely reported in the national media, included all young people under 18—even babies. The major influences on the amount of serious youth violence in the United States over the next decade will not be an increase in the number of adolescents.¹²⁵

(4) *Child Kidnapping and the Sexual Abuse and Murder of Children*

In *Moral Panic*, Phillip Jenkins analyzed at length moral panics of the forties and eighties about the sexual abuse of children in American society.¹²⁶ "At these times, concern over sexual abuse provides a basis for extravagant claims-making by professionals, the media, and assorted interest groups, who argue that the problem is quantitatively and qualitatively far more severe than anyone could

121. WILLIAM J. BENNET ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 27 (1996).

122. Miller, *supra* note 5, at 37-38.

123. BENNET ET AL., *supra* note 121.

124. FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* (1999).

125. *Id.*

126. See JENKINS, *supra* note 4, at 7.

reasonably suppose.”¹²⁷ Jenkins reminds us of some of the more incredible beliefs that these panics involved, most of which involved monstrous offenders operating in unimaginable numbers.

It comes to be believed that legions of sex fiends and homicidal predators stalk the land, that the number of active pedophiles runs into the millions, that tens of thousands of children are abducted and killed each year, that sinister cults have infiltrated preschools and kindergartens across the country, that incest affects one-fourth or even one-half of young girls, that child pornography is an industry raking in billions of dollars and preying on hundreds of thousands of American youngsters every year.¹²⁸

Such beliefs have proven to be false. Jenkins contrasts “claims, frequently aired in the 1980s, that many thousands were killed each year by serial murderers, pornographers, or pedophile rings” with the fact that between 1980 and 1994, an average of five children under the age of twelve per year were murdered by strangers during a sexual assault.¹²⁹ Jenkins’s calculation, however, may understate the annual number of sexual murders of children because it does not deal with missing children, some of whom very well may have been victims of sexual murder. The number of children kidnapped, however, has been the subject of the most extreme exaggeration. In 1985, the director of the National Center for Missing and Exploited Children claimed that “at least twenty to fifty thousand kids are abducted each year in the United States and are never seen again.” Others claimed the figure was closer to 1.5 million *each year*.¹³⁰ It is widely agreed that these claims were gross exaggerations.¹³¹ One estimate places the number of abductions of children by strangers since the late seventies as ranging from 50 to 150 per year.¹³² Using a broad definition of the problem, the Justice Department’s National Incidence Study on Missing, Abducted, Runaway and Thrownaway Children estimated that there were approximately 200-300 abductions in 1988 “where the

127. *Id.*

128. *Id.* Perhaps the most pervasive symbol of the child abuse scare of the eighties was the appearance of missing children on milk cartons. A Pulitzer Prize winning investigation by *The Denver Post* revealed that 95 % of “missing children” were actually runaway teens, or children taken by parents during custody disputes. See NATIONAL CRIMINAL JUSTICE COMM’N, *supra* note 5, at 67.

129. JENKINS, *supra* note 4, at 10.

130. *See id.* at 132.

131. *See id.* at 133.

132. See NATIONAL CRIMINAL JUSTICE COMM’N, *supra* note 5, at 67 (stating that actual abductions by strangers since the late seventies have ranged from 50 to 150 per year).

child was gone overnight, killed, or transported fifty miles or there was evidence of intent to keep the child permanently” and that somewhere between 43 and 147 children are murdered each year as a result of stranger abductions.¹³³

It bears repeating the many of the crimes at the center of these panics do happen, they are just nowhere near as widespread—either geographically or in terms of frequency—as the frenzy surrounding them might suggest. During the freeway shooting scare of 1987, for example, approximately eight million people lived in Los Angeles county. The fact that three of them fired guns at someone while on the freeway during a two month period of time is certainly a little strange, but it should not have been interpreted as the dawn of a new age in urban violence either in Los Angeles or nationally. I also do not mean to minimize the enormous suffering that these crimes involve for the individuals affected. Crack cocaine use does enormous damage to the lives of the urban poor and to the communities in which they live: my point is that the “crack scare” of a monster drug addicting the previously unaddictable was a myth. Similarly, stranger abductions of children is a heart-stopping crime, a true story of violation of the sacred if there ever was one, and the idea that this crime may happen to one hundred and fifty families in a year is horrifying. Ironically, exaggerating the numbers of those afflicted by terrible crimes may ultimately desensitize us to the suffering involved, however. For example, Paula Fass has suggested that exaggeration of the frequency of stranger abductions of children ultimately generates not real concern but mere “alarm,” an emotion which actually obscures the nature of the loss for the individuals involved.

What kind of solace can it give to know that each year “only” 200 to 300 children disappear into the worst horror imaginable, beyond mere taboo, into the land of the lost? The figures only seem small when compared to the initial inflation used to fan the campaign in the 1980s. We need to cut away the inflation to be properly stunned by the real numbers. . . . Americans love huge numbers because they are a portend of a plague, but once we think of these children as individuals . . . rather than just the changing faces on Advo cards, then each child is a serious wound. The numbers are a cheat; only the children are real. To each parent, the loss is incalculable. . . . The campaign of numbers may well obscure the most important meaning of “missing,” the one that brings people

133. FASS, *supra* note 4, at 244.

out to volunteer: a profound sense of loss for a particular child.¹³⁴

D. The Role of Claimsmaking and the Media

During these panics, battles were often waged between activist groups over how the problem of child abuse would be framed or constructed for the rest of society.¹³⁵ For example, arguments over whether the danger of sexual exploitation of children came from within or without the family, for example, were attempts by different activist groups to frame the problem in a way that advanced different agendas. "The rival approaches differ vastly in their appeal and in the policy solutions implied: if the incest view lent support to far-reaching critiques of current social organization and gender roles, the stranger-molester concept was compatible with a conservative rhetoric of law and order, public decency, and moral reintegration."¹³⁶ "In the 1880s as in the 1980s, publicizing threats to children enabled feminists to draw attention to pervasive male violence and exploitation and thus identify problems that could be resolved only by structural changes in gender relations."¹³⁷ Focusing on children as victims of male violence in the household also undermined a "blame-the-victim" mentality which had allowed the portrayal of spousal rape and battery as "consensual."¹³⁸ The ultimate "ascendancy of the predator theme" was, in Jenkin's view, a major victory for moral conservatives and a major compromise by child-protection advocates. The larger point, however, is that the construction of the problem of child sexual abuse was the product of a process between groups with competing worldviews that nonetheless shared an interest in promoting a particular social phenomenon as a "crime problem."¹³⁹

134. *Id.* at 254.

135. Katherine Beckett has provided one of the most comprehensive and persuasive accounts of the severity revolution as a product of masterful rhetorical inflections by political elites with a vested political interest in depicting the underclass as irredeemably deviant. See generally KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY POLITICS* (1997). Rejecting accounts of the severity revolution as "democracy in action," Beckett describes the development of a discourse in which "the criminality, addiction, and delinquency of the impoverished—as well as their dependence of public assistance—symbolize their immorality, dangerousness, and preference for the 'easy way out'." *Id.* at 107.

136. *Id.* at 13.

137. *Id.* at 217.

138. See *id.*

139. See JENKINS, *supra* note 4. Jenkins noted that the campaign against sexual abuse of children also permitted conservative groups to covertly attack certain groups and issues. For example, the campaign against sex offenders in the 1940's heavily targeted homosexuals because of an association of homosexuality with the victimization of

It is tempting to blame these panics solely on the efforts of such activist groups, the media, or politicians to spread crime fear. To do so, however, might be "scapegoating the scapegoaters," in the sense that it would divert attention away from our own eagerness to believe the fears which are being packaged.

The best argument against seeing claimsmakers and the media as the cause of moral panics, however, is the variability of our susceptibility to moral panics over time.¹⁴⁰ Not every age lends itself to moral panics. Crime panics about the sexual abuse and murder of children are clearly not "created" by notorious crimes against children for example. The protection of children would seem to be a sacrosanct theme in any age, but Jenkins notes that not every age lends itself to such exaggerated fears about the abuse of children. Crime panics are not created by notorious crimes. Every decade provides a number of lurid crimes that command national attention and revulsion, but these narratives do not always trigger movements

children. "Stigmatization of this sort was a common phenomenon in the framing of sexual offenses, as claims-makers drew attention to one issue because it symbolized another that could not be attacked directly." *Id.*, at 17. This pattern extended also to attacks on pornography and to attacks on fringe religious groups. Involving children in the activity attacked changed the moral climate around the issue and permitted the same targets to be attacked under the guise of child protection. *See id.*

The success of these covert attacks reveals an interesting rhetorical strategy for overcoming constitutional protections. In each case, a core constitutional right was implicated and in each case the involvement of children was used to raise the stakes in a way that put invocation of the right at odds with the sacred interest of child protection: privacy in the case of gay rights; freedom of speech in the case of pornography; and freedom of religion in the case of religious cults. What emerges is a strategy for delegitimizing statutory and constitutional protections by focusing public attention on extreme and unlikely contexts where those rights might conceivably shelter someone who intends to violate a sacred core value.

140. It is important to concede that the more vivid form of modern media such as television and the perhaps unprecedented degree to which they saturate popular culture and daily life may have enlarged the responsibility which the media bears for moral panics. Still, the literature exploring the connection between the media and attitudes towards crime and criminal justice does not lend itself to unambiguous conclusions about cause and effect. See generally WILLIAM HALTON, REPORTING ON THE COURTS: HOW THE MASS MEDIA COVER JUDICIAL ACTIONS (1998); DENNIS HOWITT, CRIME, THE MEDIA AND THE LAW (1998); NANCY SIGNORIELLI & GEORGE GERBNER, VIOLENCE AND TERROR IN THE MASS MEDIA: AN ANNOTATED BIBLIOGRAPHY (1988); RICHARD SPARKS, TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE (1992). For a more focused discussion of the ways in which media-treatment of crime has shaped the political environment of crime debates on sentencing policy, see Robert Mosteller, *The United States Perspective on the Judicial Role in Sentencing: A Story of Small Victories and a Call for Partial Solutions in a Difficult Environment* 260-64, in *THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS* (John Doran & Sean Doran eds.) (forthcoming 2000).

to reform the criminal justice system. For example, one offender in California in the late nineteen-twenties murdered twenty children; in the early seventies roughly thirty sex murders were committed by a single man in Texas; and in the late fifties, a man committed a series of sensational sexual murders which inspired the widely seen movie *Psycho*.¹⁴¹ In each case, the crimes attracted enormous national attention, but the crimes were not fit into a larger story about sexual deviance or the victimization of children. In the case of the Texas murders, an ongoing liberalization of laws regulating sexual conduct proceeded apace.¹⁴² In our present mind set, it is hard to imagine how a case involving the murder of twenty or thirty children could fail to result in some sort of ratcheting-up of criminal sentences. Clearly, the soil must be fertile for a moral panic to take hold.

Furthermore, the recent panic about school shootings makes it clear that some crimes need no packaging to trigger a disproportionate public panic. During the previous year, there were three occasions on which high school students have gone to school armed with guns and shot a number of their classmates and teachers. Nobody could exaggerate the frequency of this sort of crime because each and every incident receives enormous media coverage instantly, and no exaggeration of the monstrosity of what happened was necessary to shock and horrify the public. One incident in particular—the shootings at Columbine High School by two teenage boys who planned their attack long in advance and who killed not just remorselessly but exultantly—has captured the public's imagination in a way that no other single crime has in recent memory. Parents all over the country have kept their children home from school, and countless schools are tightening security and developing contingency plans for a similar attack.

No one had to nourish public fears that a Columbine-type shooting could happen again and again. That fear was born full grown. Yet the widespread fear of school shootings created by the Columbine shootings deserves the same sort of skeptical appraisal which has exposed the moral panics which have gone before it. The United States is a nation with a population of over a quarter of a billion people. Millions of teenagers go to school each day. Within one year, three groups of them did something that was terrible. The probability of falling victim to such an attack is far less than thousands of other much more mundane risks which American

141. See JENKINS, *supra* note 4, at 221-22.

142. See *id.*

teenagers already live with. More high school students probably die in an average week of motor vehicle accidents than have died in the past year in all school shootings of any description—not just the multiple shootings of recent note.¹⁴³ Even granting the possibility that there may have been a copycat relationship among the crimes, a possibility which might make future school attacks slightly more probable, why do so many Americans expect this sort of attack to happen at their local school? Why don't they just see it as a bizarre anomaly like the year in the mid-eighties during which four times as many people died in commercial airliner crashes as in the previous year?¹⁴⁴ The school shootings of the last year are most probably a series of freak occurrences which say little about future probabilities in a country as populous as our own, but they don't feel that way to many American parents.

(1) *The "Marketplace of Fears"*

The reason why crimes such as school shootings, serial killings, and other monstrous offenses terrify us so is because they tap into deep seated anxieties about the changing nature of social life. People put down their newspaper and wonder "what sort of society are we becoming that breeds children such as these?" The crime is not seen as an aberration: it is seen as expressing something fundamental about social life in America. You are only prone to see in monstrous crimes some deeper indictment of contemporary society if you were already deeply anxious about society to begin with.

Phillips Jenkins has offered an arresting metaphor to explain why

143. Nationally, the number of students killed in all types of violent incidents at schools has remained constant, staying at about 55 each year over the last decade. See Hanna Rosin & Claudia Deane, *Teens Report Seeing Signs of Violence; One-Third in Poll Say They've Had Threats*, DALLAS MORNING NEWS, April 27, 1999, at 9A. On the other hand, motor vehicle crashes are the leading cause of death for people in the 15 to 20 year-old age group. In 1997, 7,885 such drivers were involved in fatal crashes. See NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., YOUNG DRIVER TRAFFIC SAFETY FACTS (1997). This fatality figure includes only the deaths of teenagers who were driving at the time of the accident (and not the deaths of teenage passengers), yet if one assumes that only half of the yearly figure were school age (15-18), then three times as many high school students die behind the wheel of a car each week on average than die all year in all manner of violent incidents at all schools in the county. Similarly, 365,000 individuals in the 15 to 20 age group were injured in motor-vehicle crashes in 1997, and the overall economic cost of these crashes is estimated at slightly over \$30 billion. See *id.*

144. Nineteen eighty-four was the safest year since 1970 for commercial aviation in terms of fatalities and 1985 was one of the deadliest. Two thousand three hundred and sixty-two people died in such plane crashes in 1985 whereas only 624 had died during the previous year. See Aviation Safety Network, *Statistics*, (visited Aug. 25, 1999) <<http://aviation-safety.net/statistics/index.html>>.

certain anxieties capture the public imagination at some times but not at others: a "market place for fears."

The lesson seems to be the one so often found in studies of social problems: that claims about danger are rather like commodities in a competitive marketplace, items that gain or lose a following depending on how well retailers strike a chord among the consumers whom they wish to attract. The products themselves, although they may be packaged with greater or less sophistication, remain fairly constant: their success in gaining market share depends on the composition and tastes of the consumers, which change over time. Problems rise and fall, evolve and mutate, depending on such intertwined factors as demographic changes, shifting gender expectations, economic strains, and racial conflicts as well as the social, political, and religious ideologies built upon these underlying realities.¹⁴⁵

Under this view, crime fear competes for attention with other types of social danger. The ascendancy of crime as a social problem commanding disproportionate public attention and resources cannot be attributed merely to "packaging" by activist groups because other activist groups are packaging competing products. Furthermore, the cyclical nature of some of the crime panics demonstrates that the success of the packaging efforts varies over time. Ultimately, the success of crime as a product in the competitive market of social fear turns upon "the composition and tastes of the consumer."¹⁴⁶

The radical increase of crime's "market share" of social concern can be linked with the sorts of anxieties about change and flux in society which have been discussed above. For example, stories of random violence in general may tap into concerns about the growing anonymity of our increasingly mobile society. Jenkins linked the revival of fears about "sex offenders," from the mid-nineteen thirties through the mid-nineteen fifties to larger concerns about the tremendous changes American society underwent during those years. "Claims struck a powerful chord among large sections of the

145. JENKINS, *supra* note 4, at 216 (citations omitted).

146. *Id.* Michael Tonry has offered an interesting explanation of the role of moral panics in the severity of our punishment. He suggests first that as a historical matter moral panics seem to occur cyclically. He further argues that we happen to have experienced such a cycle during a period of time when crime rates happened to be moving upward. "The misfortune of our time is that long-term deviance cycles during which intolerance and excessive severity are to be expected have coincided with a series of moral panics, and the long-term cycles and the short-term panics have each exacerbated the other's effects." Tonry, *Rethinking*, *supra* note 43, at 1771-86. My argument in this section can be understood as an attempt to portray our susceptibility to moral panics as not merely cyclical but as rooted in a specific social context.

population: the sexual menace focused ill-defined fears resulting from social upheavals at this time, which were causing a radical redefinition of gender roles and family obligations.”¹⁴⁷ With respect to contemporary concerns, Jenkins argues that “panics about sex offenders are closely related to other fears, from anxieties about youth crime to worries about drug abuse, a link that partly explains why concerns about sex crimes have so frequently acquired similar ideological directions, emphasizing external monster figures, psychopaths, and predators.” Fears about child abuse by strangers probably also express a more general fear of modern life: the fear that in the free-for-all of contemporary society children will come under the influence of some drug, some rock group, some “wrong crowd,” or “wrong idea” that will harm or alienate them.

Stories about crime involving children in particular tap into a complex of concerns about modern life. Indeed, it is noteworthy that so many of the moral panics of the nineties involved children in either a victim or an offender role (or in the case of drug use, both victim and offender). Anxieties about the direction of changes in modern life are felt perhaps most acutely by those confronted with the task of preparing children to cope with those changes.

The parents in Alan Wolfe’s comprehensive study of middle class attitudes expressed these sorts of anxieties in strong terms. “[T]he subject of children tended to bring out a language of doom-and-gloom: stress, despair, pressure, exposure—these are the words middle-class Americans use when they talk about the lives of their children.”¹⁴⁸ The source of this anxiety was the choices which modern society confronted children. “Kids . . . respondents believed, deserve a safe haven, but arrayed against them are all those forces of modern life that make it hard to raise children the way most parents think children should be raised.”¹⁴⁹ Middle-class parents expected to find such safe havens in the suburbs and have not.

As they watch stories on television about the conditions of inner-city life, what bothers them most is how poor kids are introduced to sex, violence, and drugs long before they have the emotional and physical capacity to understand their attractions and dangers. Now, to their astonishment, they find their own children facing these same choices.¹⁵⁰

147. JENKINS, *supra* note 4, at 16.

148. WOLFE, *supra* note 48, at 116.

149. *Id.*

150. *Id.* at 199.

Clearly stated among the middle-class parents Wolfe interviewed was an anxiety that they were unable to inculcate the values their children would need to make good choices.

Middle-class moral pessimism stems not from the fact that raising children is difficult. . . . but from the powerlessness of parents to instill middle-class values. When such values work, our respondents believe, they can protect kids against their own temptations, delaying the moment of choice until children are mature enough to face them. But middle class values, they also believe, rarely work. The citadel has been invaded, and the lure of pleasure is impossible to resist.¹⁵¹

(2) *The Violent Sexual Predator as an Archetypal Scapegoat*

Concerns about sexual predators of children offer an archetypal example of the ways in which a monstrous offender can serve as a vessel into which society can pour far ranging concerns about the difficulties of protecting children in contemporary society. During the ongoing child abuse panic of the eighties and nineties, the sexual predator served as scapegoat for problems that are both subtler and far more difficult to deal with. The essence of scapegoating lies in the attribution of an internal problem to an external source. In the contemporary child abuse scare, the violent sexual predator of children, whose sexual appetites and violent tendencies are so deviant from social norms as to place them outside of normal society, is that external source. The violent sexual predator becomes a scapegoat, however, when the scope of social suffering laid at his feet is far greater than the facts merit, when a problem that is actually internal to society is projected on to someone who is clearly outside of society in an important sense of the word. For example, focusing our attention on the violent sexual predator diverts our attention from the difficult and often divisive issues raised by issues of child abuse within

151. *Id.* at 120-21. Many of the choices which middle-class parents feared were the products of wealth, not of poverty. Materialism provided a challenge at least as corrosive as the challenge of sex and drugs.

Modern parents with young children worry not that their kids will lack choices, but that they will have too many; reluctant choosers when it comes to their own lives, they are unambiguously upset about the number of options their kids have. Personal telephone lines, answering machines, expensive clothes, cars—these are the things kids want. For some parents, the question is not whether they can afford them—they can—but whether they ought to satisfy the cravings of their children for material things. . . . If they say yes, they worry about spoiling their children. If they say no, they worry that they will lose control over their children.

Id. at 118.

the family. How does the state monitor what goes on within a household's walls? How should the credibility of children be assessed and when do therapeutic techniques for eliciting stories of abuse from children become dangerously suggestive? What role should the cultural background of a family play in drawing the line between reasonable corporal punishment and a criminal assault against a child? Instead of dwelling on these potentially divisive issues, society draws comfort from the feeling of oneness which results when we contemplate the truly horrible deeds of someone like Richard Allen Davis, the man convicted of kidnapping twelve year old Polly Klaas out of her living room during a slumber party and subsequently strangling her to death in a vacant field.¹⁵²

The somewhat apocryphal—apocryphal in the sense that there are not anywhere near as many of them as we are apparently willing to believe—specter of the violent sexual predator becomes a vessel into which society pours even more inchoate anxieties about children and childbearing. Society's eagerness to obsess about the dangers of strangers stalking their children probably owes much to the increasing anonymity of our urban and suburban neighborhoods whose members are nowhere near as well known to one another as a result of the general social flux described above. Within the home, family and work arrangements which have increased the number of "latchkey" children who are either unsupervised or who must be entrusted to day care centers or some other non-family member create guilt and worry which coalesce around any threat to children which can be personified and then attacked.¹⁵³

152. Others have seen our society's obsession with child predators as an attempt to divert attention from society's general neglect of more widespread threats to child welfare.

As a society, we seem to be alarmed for our children and our neighbors' children only when the danger is of the most extreme kind. But the dangers are much more pervasive—bad health, bad schools, unsafe streets, unsafe environments of all kinds threaten all our children. When we protect our children amidst the alarm created by stories of kidnappings, do we turn our backs on the welfare of other children or even on knowledge of their condition? Kidnap stories have always haunted middle-class families, whose obsessive concerns for their children's future were illuminated by the stories of loss and endangerment. In a society in which we are supposed to love our children, does it really require that we feel threatened with their abduction to attend to their needs and the needs of their schoolmates?

FASS, *supra* note 4, at 263.

153. See *id.* at 255 ("It is surely not accidental that so much of the most recent fear of kidnapping has come at a time when women have left their children in larger and larger numbers to the care of others. The lurking (often sexual) suspicion of child-care centers and child-care providers is part of this same deep sense of missing one's own children, of

Overall, the social construction of the problem of the sexual abuse of children illustrates perfectly the scapegoating of monstrous offenders as a way of dealing with deeply felt social anxieties. "In the familiar anthropomorphic process that shapes our response to other problems, the issue of sex offenses is personalized, and once identified, monsters can be defeated, captured, and killed."¹⁵⁴ The sexual predator of children provides "a vision of crime that lawmakers fervently want to believe: a place where sexual violence can be isolated and treated, where the evil lurking in the land can be corralled and eliminated . . . a symbol of the deepest evil."¹⁵⁵

A grave problem with the child sex abuse panics in Jenkins' view was that they distorted the nature of the actual problem. The abuse of children in American society is in fact widespread, but frantic beliefs about monstrous strangers diverted attention away from the real sources of danger to children. The majority of child murders that do occur are committed by parents or family members.¹⁵⁶ Jenkins juxtaposes the low figures for sex killings "alongside the hundreds of child murders caused each year by physical maltreatment, neglect, and torture, usually at the hands of parents or other family members or intimates" and concludes that the exclusive framing of child abuse in sexual terms diverts reform efforts from the "true problem."¹⁵⁷ As a result, "lawmakers misdiagnosed the problem, wasted resources on ineffective solutions and caused problems which had nothing to do with child abuse."¹⁵⁸ Unfortunately, with respect to the interests of children, society had opted for easy instead of true targets.

(3) *Hunting for Monsters with a Drag-Net*

Ahab hunted Moby Dick with a harpoon, but the moral panics of

fear for their identities and their safety over which parents seem to have less and less control.").

154. JENKINS, *supra* note 4 at 237.

155. Matthew Stadler, *Stalking the Predator*, N.Y. TIMES, Nov. 7, 1995, at A23, quoted in JENKINS, *supra* note 4, at 237.

156. See JENKINS, *supra* note 4, at 237.

157. *Id.* at 11. Jenkins noted another way in which these panics distorted the problem: any term used to describe someone who committed a sexual offense against a child quickly took on the worst possible meaning. "When technical terms enter general discourse and the mass media, their meanings become vastly aggravated through frequent retellings and come to imply compulsive violence and monstrous perversion directed against the youngest and most vulnerable." *Id.* Jenkins described efforts by experts to "introduce new and more objective words to describe sexual criminals, only to find that later the terms acquire the worst connotations; this is the fate that has befallen in succession, sex offender, molester, and pedophile." See *id.* at 8.

158. *Id.* at 7.

the eighties and nineties have engendered policies that capture far too many small fish. Like a giant drag-net stretched across leagues of ocean, three-strikes laws and other mandatory minimum laws have scooped up far too many minor offenders. Each of the moral panics of the eighties and nineties has contributed to the indiscriminate nature of the severity revolution. "During the crack scare, the prison population more than doubled, largely because of the arrests of drug users and small dealers."¹⁵⁹ The juvenile crime scare has resulted in widespread reforms aimed at treating many juveniles as adults and incarcerating them earlier and for longer periods of time.¹⁶⁰ Concerns about random violence have manifested themselves in various "get tough" measures that have fallen predominantly on minor offenders, such as "Three Strikes" laws.¹⁶¹

Sometimes the indiscriminate nature of these policies develops under a theory that minor offenses lead to major ones. For example, Jenkins describes how nonviolent sexual offenses frequently became the focal point of the energies unleashed by concern about sexual abuse of children: concern about sexual violence was transformed into concern about sexual deviancy.

Because child murder and forcible rape are already treated with the utmost gravity, claims-makers must turn their attention to behaviors that, while not obviously harmful in themselves, are cited as precursors of violence. Activists present minor sexual offenses as stepping-stones culminating in unacceptable violence and therefore deserving our condemnation. Outrage at random violence is transformed into a largely symbolic crusade against the nonviolent and thus squanders resources on the mildly deviant.¹⁶²

Under this particular "stepping-stone" theory of conduct, "there is no such thing as a minor sexual offense, in that acts like exhibitionism, voyeurism, and sexual interference with children are potentially all symptoms of damaging pathological violence."¹⁶³

Zimring and Hawkins have described a more direct connection between minor and major offenders which they term "categorical contagion," a concept which they have illustrated in the context of the Three Strikes initiative in California. The inclusion of residential

159. Reinerman & Levine, *supra* note 113, at 174.

160. See ZIMRING, *supra* note 124, at 13.

161. FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 182-83 (1997) (stating that two-thirds of offenders affected by the Three Strikes law in California are non-violent offenders).

162. JENKINS, *supra* note 4, at 9.

163. *Id.*

burglary as a "strike" tripled the cost of the initiative for the state of California, yet public support for including residential burglary was high. Zimring and Hawkins argue that the fear generated by the kidnap-murder of Polly Klaas from her living room spilled over onto the scenario of a residential burglary. "The fear generated by the kidnap and murder of Polly Klaas in California provokes long sentences for residential burglars because the burglar in the citizen's scenario has acquired the characteristics of Polly Klaas' killer."¹⁶⁴ The contamination of the public's response to one category of crime by fears generated by another is *categorical contagion*. The result is that "citizens come to fear many forms of criminal behavior because they imagine them all committed by extremely violent protagonists."¹⁶⁵

(4) *Monstrous Conceptions and Determinate Sentencing*

The pervasive tendency to interpret abstract categories of crime in terms of the worst case influences the formation of sentencing policy at a very fundamental level. Consider the following newspaper story:

CHILD-ABUSE MEASURE APPROVED BY HOUSE

Child abusers who cause severe, long-term injuries would face more than three years in prison for a first-time offense under a bill *unanimously* approved by the House.

House members . . . approved a change in the bill that would apply the same punishment to anyone who intentionally allows severe abuse to occur. . . . Rep. Wayne Goodwin . . . said state law now allows people to avoid prison for their first conviction for severe child abuse.¹⁶⁶

In the abstract, such a bill might sound reasonable to the average American. Intentional infliction of severe, long-term injuries to children is a serious crime and the statute does include those words. Indeed, it would be a brave political figure who would vote against such a bill. He or she would always be vulnerable to the simple charge that he or she had voted against a bill that would have made sure that a child abuser who severely injures a child goes to prison—he or she would always be vulnerable to the charge of being "soft on crime." Yet, a close reading of the statute and case law which would

164. *Id.* at 12-13.

165. *Id.* at 13.

166. *Child-Abuse Measure Approved by House*, THE NEWS & OBSERVER (Raleigh, N.C.), March 23, 1999, at 3A (from wire service reports) (emphasis added).

be used to interpret the statute reveals that "child" includes someone who is fifteen years old and "severe injury" could mean a knocked out tooth, or a lump on the head.¹⁶⁷ While striking a teenager and raising a lump or knocking out a tooth is inexcusable, that same average American would probably not want the judge to have no choice but to sentence a parent committing such an offense to three years in prison—even if the crime were his first offense of any kind. The same average American who might have bought the "soft on crime" argument would probably want the judge in such a case to at least *have the option* of sentencing the defendant to probation with mandatory counseling and close supervision.¹⁶⁸

IV. Willie Horton and the Rhetoric of Risk Assessment

I think when you're dealing with people that are this dangerous and this violent, anything short of 100 percent is not successful. I mean, you can't get any guarantees that they're not going to harm somebody else.

—Cliff Barnes, a victim of Willie Horton¹⁶⁹

Perhaps the single most politically influential crime story of recent years was the Willie Horton controversy of the late eighties. Horton was a convicted first-degree murderer who raped, robbed, and terrorized a white suburban couple after being released from a Massachusetts prison pursuant to a furlough program. What made his case especially noteworthy for many was that at the time of this offense he was serving a sentence of life imprisonment without the possibility of parole for first degree murder. This furlough program became a national issue during the presidential campaign of the governor of the state that furloughed him, Michael Dukakis. At one point during the campaign, anti-Dukakis commercials flashing Horton's mug shot were broadcast nationally to portray Dukakis as "soft on crime." The commercials were controversial because of the appeal to racial fear many thought implicit in flashing a mug shot of an African-American man in connection with a crime story. Many believed that this commercial played a role in Dukakis' defeat in the

167. See INSTITUTE OF GOVERNMENT, NORTH CAROLINA CRIMES 78 (1996).

168. The change approved in the bill which mandates a three-year state prison sentence for anyone who "intentionally allows severe abuse to occur" makes the scope of the bill even more alarming. *Child-Abuse Measure Approved by the House*, *supra* note 166, at 3A. Standing idly by while a child got a tooth knocked out is also inexcusable, but an automatic prison sentence for the watcher seems even less appropriate than for the batterer.

169. DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA 173 (1995).

national election.

Regardless of what role the Horton controversy played in the outcome of the '88 presidential election, the case has shaped crime policy in a way that is worth understanding. The lesson drawn by most from Dukakis' difficulty defending his early support of the furlough program was that a public official who sanctioned the release of a potentially violent offender would never be able to justify that decision in the event of a subsequent violent offense. In this sense, the case established a mind set into which the subsequent crime stories of Polly Klaas and Megan Kanka would be incorporated: everything must be done to reduce the chances that violent offenders will reoffend. The realization of this mind-set in sentencing policy has emphasized long, mandatory sentences and the elimination of parole.¹⁷⁰

My purpose in this Part is to reveal the ways in which this mind-set is intimately connected to our sense of punishment as a site for the celebration of sacrosanct themes. Specifically, I will describe two connections. First, the tendency to frame the release decision primarily in terms of the risks of reoffense is a direct result of the previously discussed tendency to conceive of abstract categories of offense and offender in the worst possible terms. Second, our sense of crime stories as sacred stories manifests itself in the rhetorical supremacy of individual narratives about the suffering of crime victims over statistical arguments about the probabilities of reoffense. I will illustrate these connections through an analysis of the circumstances and rhetoric of the Horton controversy, an analysis that focuses on the ways in which prevailing rhetoric about criminal justice policy obscures whose interests are really being served.

A. The Crimes of Willie Horton as a Sacred Story

The facts of Horton's crimes were terrible. While furloughed, he raped, beat, robbed, and terrorized a Maryland couple named Angela and Cliff Barnes.¹⁷¹ His original murder involved the stabbing death

170. See NATIONAL CRIMINAL JUSTICE COMM'N, *supra* note 5, at 23-24. For example, the 1994 Federal Crime Bill tied federal monies to requirements that states require all or almost all (85%) of their inmates to complete their full sentence. Actually, only 4% of the most serious violent crimes known to police each year are committed by people on parole or probation. See *id.*

171. I might not ordinarily identify by name the victims of such a lurid crime in a law review article out of concerns about privacy, but the Barnes's became energetic public campaigners during the furlough controversy, and an analysis of their advocacy forms a central part of my argument in this Part.

of an eighteen year old boy who was working at a gas station and who offered no resistance during a robbery. Yet during the controversy over the furlough issue, his original offense was grossly exaggerated, and even his already terrible furlough offense was embellished considerably. Furthermore, these offenses were exaggerated in ways which touched on sacrosanct themes. A false rumor that Angela Barnes was pregnant at the time of the assault was widely repeated.¹⁷² The most outrageous rumors concerned what Horton had done to the murder victim in his original case, eighteen-year old Michael Fournier. On the night of the murder, police witnesses had observed that Fournier seemed to have fallen onto a waste paper basket as he fell. "Yet by 1987 furlough opponents would declare with great authority that Fournier's murderer had stuffed the body into an oil drum or heaved it into a Dumpster,"¹⁷³ and one variation of this rumor had his assailants hacking off the corpse's arms and legs before its disposal. A second even more horrible rumor that was reported widely by multiple public officials and media sources was that Horton himself had sexually mutilated the eighteen year old boy. "Horton cut off the boy's genitals, put them in his mouth and then spit them out" stated one legislator at a committee hearing.¹⁷⁴ This charge was subsequently repeated over and over again by a variety of authoritative sources and acquired the stature of an unquestioned truth immediately.¹⁷⁵

Whereas Fournier's fall onto the wastepaper basket provides at least some morsel of fact which might have served as a starting point for the false rumors about his body's disposal, the sexual mutilation rumor had no basis of any kind that anyone has ever been able to identify. "It never happened, but for some reason it came up somewhere along the line," according to one of the legislators active in the campaign against the furlough program.¹⁷⁶ In fact, autopsy photographs established conclusively that Fournier was not even stabbed in the lower part of his body; all of his injuries were above the waist.¹⁷⁷

The exaggerations of Horton's prior crime extended to less lurid, but more legally significant, distortions as well. Newspapers in Massachusetts routinely reported that Horton had been convicted of

172. See ANDERSON, *supra* note 169, at 184.

173. *Id.*

174. *Id.*

175. See *id.* at 184-87.

176. *Id.* at 187.

177. See *id.* at 187-88.

murder for stabbing Fournier.¹⁷⁸ In fact, Horton was convicted on a felony murder theory based on his participation in the robbery, and according to the prosecutor who tried the case, "Three participated but there was no way the jurors could determine which one of them did the stabbing There was no evidence, no proof coming out of the trial."¹⁷⁹ If one looks beyond what was admitted into evidence, it seems unlikely that Horton was even present when the stabbing took place. The case was originally broken when family members of one of Horton's accomplices, A.A. Wideman, reported to police that Wideman told them that while Horton and the other accomplice waited in the car, Wideman had gone inside the gas station alone, where he subsequently robbed and killed Fournier.¹⁸⁰

David Anderson, a journalist who followed the Horton case as it unfolded and who subsequently wrote a comprehensive account of the controversy explained these exaggerations in terms that Social Constructionists would find familiar. "[T]he story promoted by furlough opponents required Horton as monster, a criminal larger than life whose horrible deeds should have barred him from furloughs forever."¹⁸¹ Despite the fact that Horton didn't really exist, victims rights groups, media, and politicians that were pushing the issue "seemed eager to create him."¹⁸² Even more interesting, however, was that "a fearful public just as eagerly believed in their creation."¹⁸³ Anderson attributed this eagerness to the need to project general fear about crime and frustration with criminal justice onto something. "Lacking a real point of focus, the general fear had brought forth its own, an ugly hologram that hung in the air whenever the subject came up, an image with the power finally to liberate bottled-up rage."¹⁸⁴

B. The Furlough Program

From the outset, the most controversial aspect of Horton's latter crimes was the fact that he had been serving a sentence of life imprisonment *without the possibility of parole*. In this sense, Horton was a poster child for all those who argued that criminal justice

178. *See id.* at 188.

179. *Id.* at 189. The prosecutor did believe that Horton did the stabbing because he believed that the owner of the car stayed with the car and Horton and the other accomplice went inside the gas station.

180. *See id.* at 71-75.

181. ANDERSON, *supra* note 169, at 183.

182. *Id.*

183. *Id.*

184. *Id.*

system was a rigged game for insiders where nothing could be taken at face value. The idea that such an inmate was walking around in society reinforced people's suspicions that the harsh prison sentences handed down by judges were merely "for show" while offenders were being let out the back door of the prison while no one was looking. Indeed, this was one of the charges leveled against indeterminate sentencing: the highly visible sentences pronounced by judges in open court were rendered meaningless by the relatively low-visibility decisions of parole officials who determined the actual sentence. Horton's furlough suggested sentencing was still far less determinate than what met the eye.¹⁸⁵ Horton's furlough also seemed on its face to defy the logic of a rehabilitative approach to punishment. What was to be gained by weekend passes for someone who would never be released back into society?

Breaking open the abstract category of "convicted first degree murderer sentenced to prison for life without the possibility of parole" and examining the type of offenders included within that category clarifies the basic rationale for the furlough program under which Horton was released. At a hearing before the Massachusetts legislature conducted in the wake of Horton's furlough crimes, one legislator who supported the program described the inmates furloughed in the following way.

[O]ver 60 percent of the lifers are first-time offenders. They have committed no other crimes. This was their first offense. Many lifers are felony murderers. They didn't do the killing. The lifers in an institution are not the guys you hear about who are cutting up all over the street. The typical offender in prison is between the ages of nineteen and twenty-six. He has got a history of crime, a history of drug abuse to a great extent. He is a bad actor. He doesn't get too many rehab programs The lifer is about ten years older than that. They live in the prison. It is theirs. That is where they are for life, unless they get commuted They are the best-behaved inmates in the prison.¹⁸⁶

The legislator also testified that many of the lifers had rehabilitated

185. This sense of justice as impermanent was expressed by many who spoke out after Horton's crimes brought the furlough program into the public eye. Family members of some of the original victims of the furloughed inmate's murders testified in compelling terms. The mother of a slain son complained "[m]y son can never be alive again, not for eight hours or even one second. If punishment is not for life, then where is justice?" The mother of the teenager slain in Horton's original case told the committee "we felt that we had been served by the judicial system . . . what a shame it would be that he had to die for nothing, because justice has not been served." *Id.* at 171-72.

186. *Id.* at 169-70.

while in prison as a result both of programs they had completed and as a result of the passage of time. "He is not the same person at age thirty-eight or forty as he was when he was nineteen."¹⁸⁷

The same committee also heard testimony about the positive things which many lifers did while on furlough: they spent time with their families, did community service work, and in some cases had even worked on construction crews that had been remodeling the statehouse.¹⁸⁸ One lifer, in particular, Omar Haamid Abjur-Rahim, exemplified many of the most appealing aspects of the program: he did not seem to belong in prison for life, and he used his furlough time to the benefit of the community.

He said that in addition to visiting his family, he had spent furlough time speaking to high school groups and to addicts in drug-rehabilitation programs. He also made an instructive revelation: He had participated in a robbery with another man who actually did the shooting. Even so, Abdur-Rahim was charged with first-degree murder under the felony murder law. Prosecutors offered both men the chance to plead guilty to second-degree murder. Abdur-Rahim refused the deal and went to trial, where the jury found him guilty of murder in the first degree and therefore subject to life without parole. But his accomplice accepted the deal and he was sentenced to second-degree murder. Even though it was he, not Abdul-Rahim, who had done the killing, he was already eligible for parole.¹⁸⁹

Abdur-Rahim's case portrayed the furlough program as an opportunity to allow the system to mitigate some unintended—and perhaps unavoidable—consequences of the adversary system. A defendant's recalcitrance in plea bargaining should obviously not determine whether he someday is eligible for parole, and Abjur-Rahim appeared manifestly to be a person who deserved parole.

Officials from the Governor's office also sought to place the Horton offense in context. The furlough program had a success rate of 99.5%. Furthermore, it played an important role in commutation decisions in a state where commutation had a long tradition. "The governor feels that the only way he can make a decision as to whether or not a sentence should be commuted is if the person has some kind of track record that he can look to."¹⁹⁰ One official described an example where a furlough had enabled the Governor to commute the

187. *Id.* at 170.

188. *See id.*

189. *Id.* at 170-71.

190. *Id.* at 168-69.

sentence of a deserving inmate.

A young man . . . was eighteen years old when he was involved as an accessory in a holdup of a restaurant He came from a very good family, came from a family where in fact two of his brothers were leading law-enforcement professionals. He had gone joyriding with some friends who decided to hold up a restaurant. When police arrived, another member of the group shot and killed an officer This particular young person, although involved in the holdup, didn't pull a trigger. . . . He was convicted and served many years In prison he earned high school and college degrees, learned trade skills.¹⁹¹

The Governor's staff pointed out that parole of lifers in Massachusetts was not a new experiment and provided a study showing that seventeen of thirty-seven prisoners whose death sentences had been commuted between 1898 and 1971 had been paroled.¹⁹²

C. Framing the Release Decision in Terms of the Risks of Reoffense

The most vocal and most active opponents of the furlough program were Cliff and Angela Barnes, the Maryland couple victimized by Horton after he broke his furlough and fled Massachusetts. They spoke about the risks of reoffense by furloughed inmates. Angela Barnes, the woman who had been raped by Horton, spoke of the committee's responsibility for future harms to victims. "The next person that's hurt or killed [by a furloughed lifer]—it's going to be on your blood, it's going to be on your soul, every single one of you that let it happen."¹⁹³ Cliff Barnes addressed the use of statistics to justify the risk of furloughing the lifers: he was enraged by the use of the 99.5% success rate statistic.

Are you saying that some people on this committee think if you use figures and numbers, . . . it's acceptable? . . . That's acceptable, so we're By that system, we're expendable—is that what they're saying that there's an acceptable statistic, an acceptable ratio, for how many lives can be destroyed or damaged by these first-degree convicted murderers?¹⁹⁴

In a revealing exchange, Barnes framed the committee's decision in terms of an unsustainable burden of proof.

I think when you're dealing with people that are this dangerous and

191. *Id.* at 168-69.

192. *See id.* at 168-69.

193. *Id.* at 173.

194. *Id.* at 173.

this violent, anything short of 100 percent is not successful. I mean, you can't get any guarantees that they're not going to harm somebody else. They've already given up their rights when they kill someone.¹⁹⁵

This single quote contained the two themes that subsequently defined the debate and largely determined the outcome (the ultimate cancellation of the program): first, risk of reoffense must be reduced to zero; second, offenders interests were not to be weighed because they had "given up their rights."

The rhetorical power of both of these themes bears examination. The argument that offenders have "given up their rights" is the final step of a three step move. First, you create a capacious category—one that is loosely defined—such as first degree murderer. It is loosely defined because it can include people who did not actually kill. Second, our superheated crime talk assigns that category the worst possible value in the abstract. Third, anyone who comes within that category now can be presumed to have given up their rights. "You have given up your rights when you kill someone."¹⁹⁶

The use of the word "rights" in the preceding statement also bears scrutiny. I believe that "rights" is used here in a pejorative sense—in the sense of a legal demand for an entitlement of some sort, something which must be granted. With this sense of rights in mind, it becomes easy to consider the idea of a "right" of a life-sentenced first degree murderer to be a contradiction in terms: they have no "rights."

This rhetorical inflection of the word "rights" masks the interests which are actually being denied consideration. There is no question of there being a "legal right" in the colloquial sense of a constitutional or legal right to release from a life sentence for any period of time. Furlough and parole decisions are matters of largely unreviewable discretion. What is really being said here is that the interests of the lifer are worth nothing. They have been "given up." Society should not consider anything that would benefit them once they have come within the category of lifer.

This hidden calculus of interests makes the first demand for a guarantee of the furloughed lifers' good conduct irresistible. Implicit in the idea that we should only accept zero risk of offense by furloughed inmates is the assumption that no legitimate countervailing interests exist, that the lifer has essentially lost his or

195. *Id.*

196. *Id.* at 173.

her value as a human being. Risk assessment in any other context always involves balancing some such countervailing interest. For example, we could eliminate thousands of road deaths each year if we unilaterally reduced highway speed limits in all areas by twenty miles per hour, but we value the convenience and efficiency of speed as well as the autonomy of those who would like to drive that fast. We could reduce drunk driving fatalities if we made it a strict liability offense to drive with *any* amount of alcohol in your bloodstream, but we attach some value to drinking alcohol and to the autonomy of individuals who wish to do so. Life is not of infinite importance to us as a society. The demand for a hundred percent guarantee of safety for released offenders resonates only because the interests of inmates has been reduced to zero. They have been dehumanized. Since, there is nothing to balance against the "risk of reoffense," that risk must be reduced to zero, a reduction accomplished only by incarcerating everyone as often as possible for as long as possible.

D. Statistics as a Denial of the Sacred

"Statistics" became a dirty word during the Horton controversy. David Anderson said that "statistics" came to serve as a "code word for softness on crime and callousness toward its victims" during this time.¹⁹⁷ In fact, "statistics" was used as a label to tarnish any who sought to widen the frame from the individual case of Willie Horton to the larger group of furloughed lifers. In an exchange on a television program between the Barnes's and a woman who had been a furlough sponsor for an inmate, for example, Barnes repeatedly characterized the sponsor's concerns with the larger group of inmates in the furlough program as being the product of some sort of statistical or quantitative reasoning process.

If the purpose of the correctional system is to promote public safety, she argued, then it makes no sense to get "rid of the entire program because of one bad person."

Cliff Barnes immediately rose to the challenge: "So you use statistics."

"Excuse me," the sponsor continued evenly. "The recidivism rate for men who have been out on furlough is much lower—"

"So you use rates and ratios?" Cliff interjected. And Angela chimed in: "Thank you. I'm a dispensable person. Thank you very much."

197. *Id.* at 201.

"Absolutely not," the sponsor responded.

"That's what you're saying," Cliff shot back.

"Statistics only work in finances," Angela added.

The sponsor tried again: "It's very unfortunate that I find myself arguing against your pain, which I really feel for. . . . And I don't think anyone is arguing that what happened with William Horton shouldn't have been prevented, and we all wish that it had been prevented."

But Cliff was adamant. "How do you use statistics and ratios when you're dealing with human lives? You're not talking about how much your CDs yield. If he had killed us, would that have been proof enough?"¹⁹⁸

Those characterizations resonated without further explanation because they tapped into a deeper—yet seldom articulated—sentiment about the role which statistical arguments play in criminal justice debates. The irony of Cliff Barnes's claim that any use of statistical reasoning made him and his wife "dispensable people" is that the true "dispensable" people of the prevailing sentencing mindset are not the Barnes or any other members of the public who might some day come into contact with a furloughed lifer. The interests of these people are weighed into the release decision in all sorts of ways beginning with the guidelines determining eligibility of release and continuing with the screening procedures which determine who gets a furlough. The true "dispensable" people are the lifers, a group which includes people now in their forties who in their teens drove getaway cars at gas station holdups that turned violent: they are dispensable because their interests receive no consideration of any kind. In our contemporary discourse about punishment, they became "dispensable people" when they became included within the category "first degree murderer."

The hostility to statistical arguments in our crime talk reveals something important about our attitudes toward punishment. Statistics are virtually the only linguistic tool available for capturing patterns in large and complex bodies of information. In rejecting statistics, the American public is essentially rejecting information about the criminal justice system. This rejection of aggregative reasoning expresses more than just a colloquial distrust of the complexities of statistical reasoning: "you can always lie with statistics." The rejection of statistics as a justification for releasing

198. *Id.* at 203.

offenders is really a rejection of instrumental reasoning in matters of punishment that touch upon our sense of the sacred. Statistical arguments ultimately seek to place the crime narrative at issue into a larger picture about how society works in order to resist the temptation to distill a principle from what may be an isolated or unrepresentative story. What gets weakened, however, is the meaning of the original story. Telling the Barnes that their safety and well-being was in fact traded off against the interests of hundreds of lifers and their families does violate some sense of the sacred. It may make sense, but it still seems wrong. That same tradeoff, however, goes on in hundreds of civil courtrooms across the country when product liability suits turn upon the costs of the extra repair which might have prevented this particular accident. The use of cost-benefit analyses in these contexts to defend design decisions often work with juries. Punishment is different, however, because we look to punishment to transcend costs and benefits, and when decisions are framed in terms of tragic stories, we show our respect for the story in the way we talk about—and thereby think about—the issues involved.

In the Horton controversy, we observe a specific rhetorical pattern which allows the interests of offenders to be removed completely from society's decisions about punishment: offenders of widely ranging degrees of culpability are categorized in terms of abstract offenses; those abstract categories are interpreted in the worst terms possible in the public discourse; the interests of the offenders are then valued at zero when decisions about release are considered, permitting victim-advocates to insist upon absolute (and thereby impossible to give) guarantees that the released offender will never reoffend again. By eclipsing the interests of the offender completely, this pattern of discourse generates the maximal amount of solidarity possible around a philosophy of punishment which ultimately frustrates society's deeper need for a system of punishment which stands for something more than self-protection. It also portrays the offender only in the monodimensional light of his potential dangerousness to society and, in so doing, makes him society's ultimate scapegoat. The rhetorical appeal of this strategy is that it frames all attempts to look beyond the suffering of the crime victim at the heart of the special crime story as instrumental forms of reasoning which frustrate our search for transcendence through punishment.

V. The Challenges of Expressive Punishment in Durkheimian Times

Nothing happened to me, Agent Starling. I happened. You can't reduce me to a set of influences. You've given up good and evil for behaviorism, Agent Starling. You've got everybody in moral dignity pants—nothing is ever anybody's fault. Look at me, Officer Starling. Can you stand to say I'm evil?¹⁹⁹

If I am correct in arguing that we are living through what might be termed a long “Durkheimian Moment,” a period of social history when our punishment policies are greatly affected by our anxieties about social solidarity, what does this Durkheimian perspective tell us about how our society might best negotiate a course toward less severe practices of punishment? In this Part I will offer some preliminary observations. First, I will provide a summary and critique of *Expressive Punishment*, a school of thought which touches upon some of the same communicative dimensions of punishment as my Durkheimian account. Second, I will argue that contemporary hostility to indeterminate sentencing can best be understood as being expressive of an anxiety about the lack of a determinate concept of evil during a time of change and flux. The challenge of Expressive Punishment is to find not just penalties but *sentencing processes* which are themselves expressive of a vision of good and evil which is sufficiently determinate to assuage anxieties about solidarity, yet sufficiently flexible to facilitate the reintegration of the offender into the society at the right time and in the right way.

A. Expressive Punishment

The principal author of Expressive Punishment as a school of legal scholarship is Dan Kahan. He inaugurated Expressive Punishment in an article arguing that alternative sanctions such as probation had failed to dislodge incarceration as the punishment of choice in contemporary times because alternative sanctions did not express sufficient condemnation of certain types of behavior.²⁰⁰ Kahan argued that one virtue of certain types of “shaming penalties” which were coming into vogue was that they directly expressed such condemnation. Shaming penalties are in this sense *speaking penalties*: for example, the DWI offender who wears the sign around his neck is

199. Thomas Harris, *THE SILENCE OF THE LAMBS* 21 (1989), *quoted in* DELBANCO, *supra* note 90, at 19.

200. See Kahan, *Alternative Sanctions*, *supra* note 43, at 63.

allowing society to literally advertise its disapproval of his crimes. In Kahan's view, a society which felt its values were being expressed through the nature of the penalty would not feel as great a need to express itself through the more severe penalty of incarceration.

This view of expressive punishment can be interpreted as a form of what the novelist Tom Wolfe might call "steam control." In Tom Wolfe's novel *The Bonfire of the Vanities*, a Harlem preacher compares the inner city community where he works to a closed system in which steam builds up to great pressures. He describes a process of "steam control" whereby some of that pressure is allowed to escape in order to avoid the explosion of the community into violence and unrest. I am using steam control in this context to refer to the build up of punitive pressures within society as a whole, and the "explosion" which Kahan is seeking to avoid or reduce is the explosive growth in incarceration. Kahan's project is to minimize the mindless severity of contemporary punishment. He seems to see alternative sanctions involving shaming punishment as playing the role of a safety-valve role which releases the steam of society's moral outrage. Shaming releases the pressure for prison that has built up in a society which feels its values are not being sufficiently articulated through punishment.

Expressive Punishment has attracted its share of criticism. First, it has been criticized on theoretical grounds. Michael Tonry has argued that shaming penalties treat the offender as an expendable means to an illegitimate end, a sacrificial offering to the altar of punitive public opinion.²⁰¹ Second, Tonry and others have attacked shaming on more pragmatic grounds. They have argued that shaming penalties degrade the offender in ways which will make him more deviant, ways which are not necessary to satisfy public opinion, and ways which run the risk of coarsening public sensibilities about punishment and thereby exacerbating—not alleviating—punitive social pressures.²⁰²

To be sure, shaming penalties carry these risks. To the degree that shaming penalties degrade the moral worth of offenders in the public's eyes, they may lead to more incarceration, not less. Along these lines it is worth remembering that executions in this country were once public affairs. They were discontinued in part because of the effect that they produced upon their audiences. Rather than sacred rituals with an air of solemnity, public hangings in nineteenth

201. See Tonry, *Rethinking*, *supra* note 43.

202. See *id.*; Whitman, *supra* note 43.

century America were rowdy, mobbish affairs where communal blood lust seemed to be stirred up—not cathartically released.²⁰³ Indeed, to the degree that society already seems predisposed to see crime and criminals in the worst possible terms, penalties which convey a lack of respect for the dignity of the offenders would seem to exacerbate a dynamic which I have argued is fundamental to the current severity of our punishments.

Shaming practices need not be interpreted primarily as a symbol of degradation, however. Stephen Garvey has distinguished between shaming penalties which perform an educative function—penalties which focus attention on the shameful nature of the act committed—and shaming penalties which merely insult and degrade the person who committed the act.²⁰⁴ Garvey argues that educative shaming can perform a valuable role while minimizing the degradation of the individual in the eyes of the community. John Braithwaite has also developed a concept of “Reintegrative Shaming,”²⁰⁵ a process which Tonry has characterized in terms of the proper relationship between parent and child.

Braithwaite’s notion is that reactions to crime should simultaneously express disapprobation and support, in much the same way parents communicate to children that they have misbehaved but that they are still loved. The “shaming” communicates through disapproval the importance of the norms or expectations that were violated but in a way that conveys respect for the individual and concern for his or her well-being, and is therefore “reintegrative.” Reintegrative shaming proponents contrast their approach with the destructive shaming of traditional Western criminal justice systems that ostracize, alienate, and often breed defiance or lead to rejection of prosocial norms and attachment to antisocial ones.²⁰⁶

Nothing in Kahan’s writings is inconsistent on a theoretical level with either Garvey’s approach or Braithwaite’s. Whether some of the practices which Kahan has described in his writings constitute the “disintegrative shaming” which Tonry condemns is a dispute which I will not attempt to resolve. Kahan, himself, has pointed out that incarceration is a far more degrading penalty than the shaming penalties which Tonry is criticizing.²⁰⁷ Rather than sacrificing the

203. See FRIEDMAN, *supra* note 97.

204. See Garvey, *supra* note 43.

205. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

206. Tonry, *Rethinking*, *supra* note 43, at 1766.

207. See Kahan, *Unthinkable Misrepresentations*, *supra* note 43, at 1935.

offender on the altar of opinion, Kahan is best understood as exploring strategies for sparing him. The central point of his work has clearly been to find ways to minimize incarceration that are consonant with the political and social realities of public opinion, an opinion which Kahan believes ultimately demands not *severe* penalties but ones that are *expressive* of condemnation.²⁰⁸ Ultimately, Kahan thinks that shaming penalties may throw water on the fires of irrational severity; his critics fear that they throw kerosene on those flames.

There is a deeper tension in this debate, however, which needs to be revealed, one which can be usefully explored through the anthropomorphic allusions which Tonry uses to describe functional punishment policy making processes. Ultimately, Tonry sees punitive pressures as emotions which policymakers need to meet with a measure of detachment. He describes this detached approach in terms of folk aphorisms. “‘Don’t take out your frustrations on your child,’ ‘Sit down and count to ten,’ and ‘Write the angry letter today but wait ‘til tomorrow to send it.’”²⁰⁹ Tonry wants society to master its punitive emotions, not to simply express them unmediated by an intervening period of cool reflection. Just as Kahan’s earlier writings²¹⁰ may not have fully acknowledged the degree to which condemnation can become addicting and lead not to a cathartic release but to a desire for even greater condemnation—“the more I yell the angrier I get”—Tonry may not be fully acknowledging the difficulties and dangers of a “detached” approach to punishment. First, to the degree that Durkheim is right about punishment’s spontaneous nature as an authentic reaction to violations of the sacred, a punishment process which expresses detachment unavoidably challenges the quality of the sacred as something that cannot be reduced, weighed, or balanced but something which simply demands its due. Indeed, the failure of criminologists and other criminal justice experts to master the sacred stories of victim suffering with their dispassionate statistical analyses suggests that detachment may be the wrong posture to adopt in the face of passion. In folk terms, passion—even irrational passion—is sometimes best tamed by facilitating expression. When you tell someone who is agitated or upset to simply “calm down,” this often makes them more agitated

208. See *id.* at 1934; see also Kahan, *Alternative Sanctions*, *supra* note 43, at 653.

209. Tonry, *Rethinking*, *supra* note 43, at 1756.

210. In a recent article, Kahan has articulated fully his view of the dangers of “moral zealotry” in punishment discourse. See Kahan, *Secret Ambition*, *supra* note 16.

because your detachment signals to them that you fail to comprehend the enormity of that which is upsetting them. Asking a distraught person to tell you what is the matter—to *express* what ails them—can be a more productive way of getting them to calm down.

Ultimately, Tonry is right in saying that we want our punishment to be a product of both emotion and reflection, but too much detachment risks exacerbating punitive social pressures just as much as does too much passion. Similarly, “Reintegrative Shaming” has its own liabilities, ones which serve as mirror opposites of the ones which have been identified with Disintegrative Shaming. Punishment that reintegrates too quickly or too completely may not be “shaming enough” to be expressive of society’s condemnation. You don’t want to punish a child too quickly—before you have gotten your anger under control—but you also don’t want to forgive a child too quickly—lest you undermine the message that what he did was wrong.

These observations are not offered to settle the debate, but to establish that it is an important one that illuminates unavoidable tensions in our approach to punishment. Indeed, in the sections which follow I will argue that the indeterminate sentencing practices of the sixties and seventies were rejected out of fear that they would not express clearly the offender’s responsibility for his wrongful acts. In this sense, indeterminate sentencing practices expressed a view of morality—and of evil—which was too indeterminate for a society anxious about its solidarity.

Finally, an important caveat needs to be raised about Expressive Punishment. To speak too readily about the expressiveness of punishment is to run the risk of embracing too completely the dichotomy between expression and thought, to unconsciously accept the idea that society’s moral values exist independently of their expression and are not themselves shaped or, at the very least, inflected by the process of their expression. It is to the nature of those inflections, that I now turn.

B. The Difficulty of Expressive Punishment in Contemporary Times

Punishment speaks to society at many points during the criminal justice process: the nature of the penalty chosen is not the only expressive aspect of our punishment practices. The decision-making process that leads up to the choice of a sentence has significant expressive dimensions to it. For example, a sentencing process in which victims are heard and given an opportunity to confront their aggressors expresses something about the importance of the victim’s

loss. Furthermore, the nature of the sentencing process determines in what sort of context the expressive meaning of the penalty chosen will be interpreted. A full exposition of the nature of the offense and the nature of the charge will provide a context that can moderate or increase the need for condemnation in a particular case. In contrast, a sentencing process which classifies offenses broadly in terms of abstract legal categories and which characterizes offenders solely in terms of prior criminal records robs the given sentence of a specific context. In the absence of such a context, default conceptions of offense and offender kick in, and I have argued at length that the exaggerated nature of those default conceptions are born in anxieties about social solidarity and have increased the severity of punishment. A virtue of indeterminate sentencing practices was that they provided some specific context; a vice of more determinate sentencing is that it provides little or none.

The turn from indeterminate to determinate sentencing practices can best be understood as a fear of context in sentencing. Previously, I have argued that this move toward determinacy can be understood in terms of an anxiety about the contestability of sentencing decisions in terms of race. A parallel and mutually reinforcing explanation frames that anxiety in terms of a more generalized concern about the nature of our shared concepts of good and evil. Andrew Delbanco has argued that Americans have traditionally relied heavily on very determinate concepts of evil in order to negotiate moral issues within their society.²¹¹ In early American culture "evil had a name, a face, and an explanation."²¹² The explanation of evil was the Fall of Man and Original Sin: The personification of evil was the Devil. "When American culture began, this devil was an incandescent presence in most people's lives, a symbol and explanation for both the cruelties one received and those perpetrated upon others."²¹³ Over time, however, Delbanco argues that we lost not just a belief in the devil but our confidence in a determinate concept of evil itself, and "despite the shriveling of the old words and concepts, we cannot do without some conceptual means for thinking about the sorts of experiences that used to go under the name of evil."²¹⁴ Bereft of shared words and symbols for evil, we have arrived at "an

211. See DELBANCO, *supra* note 90.

212. *Id.* at 4.

213. *Id.*

214. *Id.* at 9.

unprecedented condition of inarticulate dread.”²¹⁵ When we witness terrible acts of inhumanity, we don’t have a word we can comfortably use for their cause. “So the work of the devil is everywhere, but no one knows where to find him.”²¹⁶

Delbanco sees our desire for the simplifying power of a pure conception of evil as expressing itself in popular culture’s fascination with the most terrible figures of evil. “As we lose touch with the idea of evil, we seem to need more and more vivid representations of it—as if it were a drug whose potency diminishes with each use.”²¹⁷ Delbanco elaborates this theme by describing a recurring plot in many contemporary crime novels. A sociopathic killer is hunted by a liberal detective, psychiatrist, or other type of investigator. Initially, the investigator struggles to understand the roots of the killer’s lack of empathy for human life. These roots usually lie in some sort of gruesome childhood abuse. The real story of such novels is the liberal investigator’s journey from a sympathetic, reformist, or therapeutic perspective to one that permits him to slay the monster before him irrespective of the killer’s origins. “The hunter is at first reluctant to condemn this pathetic victim of someone else’s cruelty but by the end he rises to a murderous rage of his own.”²¹⁸ Delbanco contrasts this version of the liberal investigator with the “egghead scientist” of the fifties science fiction movies who, in the name of science, foolishly begs the military not to attack the alien monster.

In the old movies, this credulous fool is usually, after a perplexed pause from the creature, vaporized or bludgeoned to death. But in the new genre of horror fiction the good guy is more likely to conclude after a struggle with himself that the police mentality is right, that it is either the creature’s life or his own.²¹⁹

I believe that at the root of the stories which Delbanco discusses is a fear that knowledge of the world will disable us from protecting ourselves from it, that the more nuanced one’s view of humanity and human behavior, the more likely one is to flinch from the acts necessary for one’s own survival. The liberal investigator in these novels represents liberal society, and the fear is that our understanding of the roots of criminal behavior in social inequalities or in the pathological conditions of abuse which those conditions

215. *Id.*

216. *Id.*

217. *Id.* at 17.

218. *Id.* at 18 (“[I]n an act of almost sexual relief he summons up his suppressed anger and blows the bastard away.”).

219. *Id.*

sometimes engender will rob us of the will or the judgment to act in our collective self-defense. In reliving over and over again a story about a sensitive humane person who nonetheless brings himself to kill, we are reassuring ourselves that we won't be killed ourselves.

The determinant turn in sentencing can be understood in similar terms. The public has cast judges in criminal cases as "the liberal investigator," and public support for more determinate forms of sentencing can be understood as the expression of a fear that judges were unable to identify evil when they saw it because of the moral flux of contemporary times.²²⁰ This fear—and the more determinate sentencing process which it has spawned—unfortunately forces the judge to err on the side of seeing every defendant almost exclusively in terms of the harm he has caused or might cause—to opt for *the hard reaction to evil* in every case.

In a very real sense, the softhearted judge of the public's imagination is the necessary counterpart to the monstrous offender. The public needed an easy, reassuring explanation for why monsters remain loose amongst us. The public did not want to believe that there are no foolproof ways to detect and selectively incapacitate monstrous offenders before they commit a monstrous crime. So, they have invented a complement to the monstrous offender—the softhearted judge. The softhearted judge is the well-meaning scientist of the science fiction movies of the fifties. In the standard script, the soft-hearted judge ignores the clear warning signs of future dangerousness evident in the monstrous offenders past behavior and pins society's hopes on the efforts of soft-hearted therapeutic programs to transform a being who is plainly evil at his core.²²¹

The mythical softhearted judge of the public's imagination was in part a product of the indeterminate sentencing practices of the sixties

220. An interesting analogue to Delbanco's observations about popular fiction is the controversy surrounding many of the recent nonfiction accounts of Hitler's life and early influences. Each attempt to identify a set of influences which explain Hitler's murderous hatreds is criticized on the ground that "understanding" Hitler brings us too close to excusing him in some sense. Hitler clearly stands supreme as a transcendent symbol of evil in the modern Western consciousness, and part of the hostility to attempts to "reduce" him to a set of influences may flow from the same sorts of epistemological fears which drive the American stories which Delbanco describes. See generally Ron Rosenbaum, *Explaining Hitler: The Search for the Origins of His Evil*, N.Y. TIMES, July 19, 1998, at 8 (book review); John Lukacs, *The Hitler of History*, N.Y. TIMES, Nov. 9, 1997, at 26 (book review).

221. For the difficulties in assessing which minor offender will go on to commit the next major offense, see generally Mark H. Moore et al., *Book Review: Dangerous Offenders and Endangered Justice*, 7 CRIM. JUST. ETHICS 81 (1988) (reviewing ROBERT PANZARELLA, *DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE* (1988)).

and seventies. Such practices made it easy for the public to believe that judges were ignoring their values and needs. The greatest—and most important—challenge for contemporary practices of punishment is to find sentencing processes which develop an individualized context for punishment decisions without reinforcing this myth and the anxieties about social normlessness which correspond to it.

Conclusion

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the center cannot hold;
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

—W.B. Yeats, *The Second Coming*²²²

Yeats wrote this poem during revolutionary times. This stanza has long been interpreted both as a reflection on the Russian Revolution just past and an unconscious prophecy of the rise of fascism to come,²²³ but it speaks powerfully to both the anxieties about dissolution which any series of radical changes often produce as well as to the extreme passions which often result. I believe that jeremiads about the “Disuniting of America” are overstated: we have never believed in a single falconer, and we don’t need one now. Radical changes are not the same thing as societal dissolution, but in the midst of such changes many things do fall apart—old ways of seeing gender roles, race relations, the history of the nation, the definition of common values—and as a result it may seem “the center cannot hold.” The arresting trope of a disintegrating center speaks directly to the inchoate fear that a society will fail to cohere, that it will fail to enjoy the core of common values and outlooks around which society’s differing segments can coalesce. What is happening is that the “center” of our society is moving. The inclusion of historically subordinated groups and perspectives in the ongoing civic debates of our day is shifting society’s center, and to those attached to the old ways, a shifting center feels very much like a disintegrating

222. William Butler Yeats, *The Second Coming* (1920), reprinted in *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE* 1973 (4th ed. 1979).

223. See *id.* at n.1.

one.

Anxieties about our shifting center have fueled and shaped the severity revolution. Just as some have confused change with anarchy and normlessness, many have confused anxieties about change with a longing for the old ways. In the context of criminal justice, we have confused a desire to make punishment more expressive of social values with a desire to make punishment expressive of a harsh view of humanity which subordinates morality to social control. The severity revolution does not reflect the rejection of morally meaningful practices of punishment by the public; it reflects anxiety about flux and about social cohesion. The results of these anxieties, however, have been sentences tied to monstrous conceptions of crime, a sentencing process which attempts to measure only harm and not moral worth, and a mentality of risk assessment which holds our judges and prosecutors hostage to our worst fears. These are the three intertwined strands of the severity revolution. If our ceremonies of innocence have not drowned in a blood-dimmed tide, they are bobbing dangerously in an ocean of fear. If they slip under the surface, our anxieties about solidarity will enjoy more of a basis in fact than they currently do.

Unraveling the strands of the severity revolution is a difficult process to begin. The "passionate intensity" of those who advocate longer sentences and more frequent incarceration, and demand impossible guarantees of safety seems unchallengeable within the context of the prevailing conceptions of crime as the work of monsters. Some of these advocates speak with a sense of certainty about human affairs which is as absolute as it is misconceived. We are imprisoning legions of people who do not deserve or need to be imprisoned and keeping others incarcerated for far longer than we should. Unfortunately, we do not know, and no one ever can predict, which ones should *not* be released. Moral punishment is always a gamble. We can't know which of the thousands of minor offenders will go on to commit the next headline-grabbing crime. People who pretend that all of those minor offenders deserve a level of incarceration appropriate only for the most blameworthy and most dangerous are pretending to have a knowledge of things which are not knowable. They can minimize the gamble of punishment only by minimizing punishment's moral dimension as well, and all the denunciatory measures and symbolic statements of the new severity cannot mask that loss.

How can the "best" regain their "conviction" in times such as

these? Modern punishment requires of society what Keats called Negative Capability, the state of being "capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact and reason."²²⁴ Negative Capability in the context of modern punishment means accepting that we cannot know the important things with certainty: which offender will reoffend, who is truly dangerous, who is capable of rehabilitation, and who really deserves severe punishment. These decisions of course will not go away, and adopting a formula of dogmatic lenience would be as futile and as morally bankrupt as the present dogma of severity in all things, for all people, at all times. But Negative Capability in punishment means recognizing the "best" as those who do not pretend to know with certainty. Lacking a measure of conviction about punishment is a healthy emotional state for society, even if it is a slightly less comfortable one during changing times.

Nietzsche once said that when you look into the abyss, the abyss looks into you. In staring into the abyss of crime and the suffering it causes, society has seen a reflection of its own anxieties, a picture of itself distorted by the rippling effects of great changes during recent times. This abysmal vision has reached deep into our psyche and has changed punishment in ways that divide us even more. We may not be able to slay our monstrous conceptions of crime until the anxieties that gave them birth have themselves abated. Undoing the work of the severity revolution might begin only when our sense of society's center stabilizes once again. In this sense, the solution to the severity revolution may lie outside of law and punishment itself. It is also possible, however, that efforts to develop legal practices which make punishment more expressive of moral values without conjuring up self-deceptive scapegoats might help an insecure society to edge its way back from an abyss of its own imagination. The development of such practices is, perhaps, the most important work to be done in contemporary punishment.²²⁵

224. Letter from John Keats to George and Tom Keats (Dec. 21, 1817), in *LETTERS OF JOHN KEATS*, at 43 (Robert Gittings ed., Oxford University Press 1979).

225. See, e.g., John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian*, 46 *UCLA L. REV.* 1727 (1999) (arguing that Restorative Justice holds the greatest prospect of a less punitive criminal justice regime); Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801 (1999) (offering a vision of punishment as a forum for "secular penance" and reconciliation with the victim and community).