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What are the changing political conditions that have been driving the legislative process on issues of crime and punishment in the United States in recent years? First, crime is a more important legislative issue than ever before at both State and Federal Government levels. Second, rather than following a cyclical pattern in which major new laws might relieve the need for further action in the immediate future, the pressure for punitive legislation is more persistent th an ever before. Finally, the politics of criminal punishment in the 1990s is characterized by hostility toward not only criminals but also government officials.

The changing politics of criminal punishment have had a major influence on the volume of new punishment laws and on their content since the mid-1980s.

Although scholars and practitioners are aware of the new political environment of criminal justice, it has rarely been a central topic of scholarly analysis.

I will discuss several major themes relating to the new politics of punishment, hoping that this introduction will tempt others to investigate these matters in greater depth.

A variety of punishment laws are emerging from State and Federal legislative bodies, fueled by a political environment that is more crime centered, more polymorphously punitive, and more distrustful of government than the traditional politics of American criminal justice. Products of this new climate include "three strikes and you're out" laws (enacted by 25 States and the Federal Government within a 2 1/2-year period), truth-in-sentencing reforms, Megan's Law disclosures, "10-20-life" mandatory minimum sentences for gun crimes, and chemical castration schemes. Rather than diminishing the pressure for further punitive changes, one punitive political success seems to pave the way for others.

My survey of this new politics comes in four installments. First, I cast doubt on two theories that explain the cause of this new political atmosphere: the "crime wave" and "mad as hell" explanations. Second, I describe three characteristics of the new politics that have helped shape penal legislation. Third, I offer my theory of the causes of recent political change. Finally, I suggest promising ways to limit the negative impact of the new politics on criminal justice.

Two Simple Explanations

According to two popular explanations, the intense new politics of punishment is (1) a result of rising crime rates or (2) the product of increasing citizen hostility toward criminals. Neither explanation fits well with recent American history. The bulk of the U.S. violent crime increase occurred between 1964

and 1974, when the homicide rate doubled. Between 1974 and 1980 homicide rates declined, then climbed up to the 1974 level in 1980, dropped through 1984, and climbed again through 1991.

This crime pattern does not follow the punitive policies pattern on either the upside or the downside. Despite the "crime in the streets" theme of the 1968 presidential election, the U.S. prison population declined through 1972, and there was little legislative activity on punishment at the State level. When sentencing reform heated up in the mid-1970s, there was little of the strident punitive emphasis that later characterized the new politics of punishment. By the time the punitive political setting had developed, the sharp increase in crime of the 1960s and early 1970s had been history for a decade.

The new political paradigm also was not closely linked to the crime rate on the downside. Crime has been declining in the United States since 1991, and the cumulative impact of that decline was more substantial by 1998 than in any earlier post-World War II period. Yet, the political pressure for new punitive responses has not let up significantly. Instead, the politics of punishment has become a version of "heads I win, tails you lose," in which decreases in crime are evidence that hard-line punishments work, whereas increases are evidence that they are needed. The sustained crime drops of the 1990s have not produced an era of good feeling. For example, the continued angry pressure for hard-line responses to juvenile offenders persisted in 1998 and 1999 in the face of the sharpest drop in juvenile crimes on record from 1994 to 1998. The juvenile crime pattern is typical.

The second popular theory of the origins of the harsh new politics of penal policy fits the historical record better than reaction to rising crime rates but still seems quite unsatisfactory. The driving force of this version is the hostility of the public to crime and criminals. In the famous phrase from the motion picture "*Network*," the man in the street is suddenly "mad as hell and not gonna take this anymore." This theory shifts attention from variations in crime

rates to variations in the public mood about crime, an important plus for the mad-as-hell approach. The timing is more flexible too, because it takes time for citizen anger to be aroused and more time for anger to be channeled into political action.

But this explanation for political change wrongly assumes that the man in the street 30 years ago did not think burglars and robbers should be locked up. We suspect that populist attitudes about most crime and most criminals always have been consistently negative in the United States. Yet if hostility and punitive preference are nearly constant over time, populist sentiments cannot explain the recent sharp change in the political climate. It seems more likely that citizen fear and anger are necessary conditions that have been present all along and have interacted with other changes in recent times to generate a distinctive new political climate. I will return to this matter.

Three Characteristics of the New Political Landscape

Before advancing my own theories of cause, I would like to single out three characteristics of the recent politics of punishment that deserve special attention: (1) the loose link between the symbolism and the implementation of punishment laws, (2) the zero-sum rhetoric supporting punishment proposals, and (3) the paradoxical politics of distrust in penal legislation.

Loose Linkage

Legislation concerning criminal punishment serves two very different public purposes. One is the symbolic denunciation of crime and criminals, a statement of condemnation that enables the political community to make its detestation of crime manifest in legal form. A second public purpose is to change the behavior of courts, prisons, or parole authorities. For most members of the public, symbolism is the most important aspect of penal legislation.

Therefore, no profound linkage is needed between symbolic legislation and major changes in the way the system punishes criminals.

This loose link between symbolic and operational impacts has traditionally allowed new criminal laws to bark much louder than they bite, to satisfy the need for symbols of denunciation without making much difference in the penalties meted out to most offenders. But recent events have shown that the loose connection between symbolic and operational impacts can work both ways. The U.S. Federal system and California enacted laws labeled "three strikes and you're out" in 1994. By late 1998 the U.S. Federal statute resulted in 35 special prison sentences, while the California law produced more than 40,000 special sentences. The difference is more than a thousand-fold. In other words, laws serving the same symbolic function can produce very different results in different settings.

The Federal law was traditional in that it barked louder than it bit. The California law, on the other hand, bit louder than it barked because 90 percent of California's enhanced prison sentences were given not to people who had two prior convictions (strikes) but to offenders who had only one prior conviction. The law was 10 times as broad as its label, "three strikes and you're out."

When citizens are concerned more with the symbolism of penal laws than with their results, the same rhetoric can lead to very different operational law reforms. In such cases, the practical impact of new penal laws is determined more by who controls the planning and drafting processes and what they want than by the level of public support for labels like three strikes. And those who wish to maximize impact can ride slogans a long way. The California version of three strikes has resulted in 9 times as many prison terms as all of the 25 other three-strikes laws combined. The chronically loose link between symbolic and operational impact will lead to high-stakes competition for control of legislative drafting as a recurrent phenomenon in the politics of modern criminal justice.

The Zero-Sum Fallacy

A second feature of the recent politics of punishment also concerns the relationship between the symbolic and the operational aspects of penal law. The rhetoric supporting new punishment proposals in current politics often seems to assume that criminals and crime victims are engaged in a zero-sum contest: Anything that hurts offenders *by definition* helps victims. If the competition between victims and offenders is like a football game, then any detriment to the offender team helps the victim's score.

The zero-sum assumption also conveniently avoids questions about exactly how (and to what extent) measures that hurt criminal offenders might also help their victims. The law of equivalent benefit in true zero-sum settings implies that anything that hurts the other team helps the competition in equal measure.

Therefore, to choose punishment policy in a true zero-sum setting, a citizen must simply decide whether she prefers victims or offenders. What makes this approach illogical is the fact that crime and criminal justice is not a zero-sum game. When victims of violent crime are given public funds to compensate them for their economic losses, does that benefit automatically hurt criminal offenders? Of course it does not, because there is no zero-sum relationship to government policy toward criminal punishment and crime victims. But assuming there is one generates a justification for endless cycles of increased suffering on false grounds. Perhaps some believe that the symbolic denunciation of offenders always supports the social standing of crime victims, but that does not mean that the pain of punishment creates equal and opposite reactions in victims.

The Paradoxical Politics of Government Distrust

The punishment of criminals is at root an exercise of government power. It might, therefore, seem reasonable that citizen support for harsh measures

against criminals would rise with increasing citizen trust in government and that citizen support for excessive punishments would decline when confidence in government falls off. In this interpretation, support for harsh punishment would be a disease of excess confidence in state authority. But the recent pattern is the opposite: Support for mandatory penalties and truth in sentencing laws increases with additional distrust of, for example, parole officials, judges, and other professionals meting out punishment.

Distrust in government can raise the stakes in criminal punishment policy. Citizens worry that judges will identify with offenders and treat them with inappropriate leniency. A bad judge in this view "coddles" criminals and thus acts against the interests of the ordinary citizen. The imposition of stern penal measures such as the mandatory punishment term guards against such governmental weakness. But the mandatory term is a huge expansion of punishment, rendering excessive outcomes in many cases to ensure sufficiency of punishment in a very few that might otherwise escape their just deserts. Such huge inefficiency is the hallmark of the three-strikes law in California and of truth-in-sentencing reforms generally. The politics of distrust links Megan's Law (which allows citizens rather than just police access to information on sex offenders' addresses) to three strikes and to truth in sentencing. Megan's Law reflects distrust of police, three-strikes and mandatory sentences reflect distrust of judges, and truth in sentencing reflects distrust of parole authorities.

The Punishment Lobby and Structural Shifts

If fear of crime and hostility toward criminals are persistent features of public opinion, what accounts for the intense new phase of the politics of punishment? I suggest two changes in political conditions relating to punishment policy that have interacted with broader changes in State and local politics to create an altered political climate. The first is the growth of single-issue lobbies dedicated to criminal punishment issues. The second is the reduced

distance between the symbolic politics of crime and the locations in government where punishments are set.

The single-issue punishment lobby is a new element in American State politics. Mothers Against Drunk Driving was one early example in the 1980s. Victims' rights organizations came on the scene in the late 1980s. In California, we have a prison guards' union with a strong pecuniary interest in expanding the scale of imprisonment and a large budget for political contributions.

Single issue lobbies have changed the politics of punishment in several ways. They have mobilized citizen fear and hostility, shaping these emotions into a hard-line consensus for additional punitive legislation. In addition, many of these groups—for example, the guards' union and the authors of the California three-strikes law—care about not only the symbols of punishment but also making punishment more severe. Truth-in-sentencing legislation, like mandatory minimum penalties, is another reform designed to create the maximum impact on prison populations. The job of the results-oriented lobby is to push the public consensus into legislative directions where big operational changes are produced.

Finally, single-issue lobbies keep the pot constantly boiling. For example, after the three-strikes law was enacted in California, prime mover Mike Reynolds was in danger of working himself out of a job. Without a pending issue, his political importance was in question. So within months, he had introduced a 10-20-life set of mandatory minimum penalties for crimes committed with firearms. When a version of this proposal passed in California, he worked for its enactment in other States. If he had not, he would have needed still another new proposal or been relegated to the sidelines.

I believe that the work of single-issue lobbies to keep the political pot boiling destabilizes the jurisprudence of criminal punishment. Layers of new law are

added on top of others like stalactites and stalagmites in limestone caves. By 1999 the layers of legislation that determine criminal punishment in California are as unintegrated and collectively unprincipled as any penal code in the developed world—and subject to change without notice.

Structural shifts in the governmental organization of punishments have multiplied the impact of lobbies in State legislatures. Such shifts rendered California vulnerable to a three-strikes revolution of maximum impact. The gap between largely symbolic legislation and the operational setting where punishments were determined was traditionally maintained by the power of expert bodies and legal actors to influence punishments. Sentencing was the province of judges, and power over prison release was in the hands of parole authorities.

Removing the authority of parole agencies in the 1970s and putting legislatures in charge of determining punishment for individual offenses and offenders drastically reduced the insulation between democratic politics and the governance of punishment. A key function was relocated from the professional to the political arena. Once that occurred in California in 1977, for three strikes to pass was only a matter of the right groups learning to exploit the vulnerabilities of the new governmental organization of punishment. The deprofessionalization of setting punishment started long before the single-issue lobbies grew powerful, but the two are interacting in some jurisdictions to destabilize punishment levels in a new way.

The mandatory minimum sentence is the nuclear weapon of the new politics of crime because it purports to remove any discretion from the sentencer in punishing individuals prosecuted for committing mandatory-term crimes. This disempowers judges and makes the identity of the offender irrelevant to the punishment imposed. In practice, the prosecutor simply assumes powers that prosecutors and judges had shared. In theory, however, choosing punishment becomes nonprofessional and entirely under the control

of democratic politics. Broad mandatory minimum laws patterned after California's three-strikes law are the ultimate extreme of politicized punishment. They can be mitigated by prosecutorial discretion, but they otherwise make the enterprise of criminal sentencing a nonprofessional act. Criminal sentencing becomes the province of politics, not professional expertise. There is no insulation between political sentiment and the principles of criminal sentencing.

Limiting the Negative Impact of the New Politics

What are the countermeasures to unitary and extreme political control of punishment? One focus ought to be on separating individual punishment decisions from general sentiments about crime. The legislature that enacts a penal code should rarely, if ever, decide what prison sentence a person convicted of an offense should serve prior to release. This blending of the general and the particular invites disaster. I have similar reservations about binding general rules promulgated by sentencing commissions. A second focus should be insulating the sentencing of offenders far from political sentiments by interposing expert institutions.

Sentencing commissions in several States can be seen as deliberate attempts to create new expert institutions as insulation between politics and punishment. But sentencing commissions are both a risk and a benefit as insulators because they often attempt to restrict discretion in individual cases.

The sentencing judge is a key expert in a defense against a populist politics of punishment. In any legal system based on proportionality in criminal punishments, individual decisions and individual discretions are necessary. Judicial discretion was one early casualty of the politics of governmental distrust back when distrust of government was a theme from the Left rather than the Right. Nothing could have been further from the intentions of those early critics than most of the laws and policies produced by the new politics of

the 1990s. But the unintended consequences of the shift to determinate sentences may greatly increase the operational impact of a punitive regime if it occurs.

It is my belief that structural remedies will be more effective than appeals to reason in the politics of crime. Damage control almost always is the first priority in the democratic politics of punishment. Creating distance between symbolic legislation and the determination of punishment in particular cases is the best hope currently available for a sustained program of damage control. These structural approaches are much more than just mechanical tinkering. Keeping the symbolic and operational spheres of criminal punishment separate confronts the duality of criminal punishment in an appropriate and fundamental way.

Question-and-Answer Session

Elizabeth Fraser, Institute for Law and Justice, Alexandria, Virginia: I learned recently that a couple of the Northwestern States have State legislation that moves sentencing decisions for revocations of parole into the correctional side, rather than requiring them to go back to the court. When there is revocation by sentenced offenders, they go back to the parole body that watches over them and have a hearing under that authority rather than going to the court. Do you think having sentencing decisions go to the correctional authorities is an improvement?

F.Z.: In general, if there is a principled rationale for it, I am greatly in favor of "back end" power in determining correctional stays and questions like revocation because of the "dual currency" phenomenon. When you are sentencing a criminal, you are doing two things at the same time: you are condemning crime, making it perfectly clear how terrible the offender is and

how innocent and worthy of community support the victim is; you are also deciding how you should allocate a scarce resource like prison time, how dangerous the offender is, and whether he rather than the next person you are going to judge should deserve an extra year in the State prison system. Those are an awful lot of agendas to juggle. The sentencing judge is making a "front end" decision, one that is closer to the crime and further removed from the time when a person gets out of prison. In traditional parole, a "time to be served" decision was made after the dust had settled and closer to the time that release might occur. The notion that you could maintain the focus on operational impact was an advantage of parole (particularly when people were sentenced to very long terms) that we never noticed until we started abolishing it.

There is another thing that we never noticed about our State systems: Who pays the bills for prisons? State governments. Who controls prison populations? Usually, local governments. Judges and prosecutors in most States are instrumentalities of local units of government, and sending people to prison is something like a free lunch for local government. If you ship them out of the county (as opposed to putting them in a county jail), the State pays the bills. When we abolished parole and adopted determinate sentencing, centralized State correctional authorities suddenly had no power over their own population. Parole was the one centralized power that States had. They could make those decisions at the back end of prison sentences and influence and respond to prison overcrowding. The most famous example of that in California came during the Reagan administration when, rather than the States' spending new money, a lot of people had the back ends of their prison terms snipped off in the interest of economy.

Having said that there is a great deal structurally to be argued for back-end controls, let me also say there are two things that must happen for the back-end control to have credibility in the new political environment. First, the agency should have a claim to expertise. It is not good enough that some

faceless bureaucrat does this. Second, there should be some rationale. The California Determinate Sentencing Act of 1976 appeared to have no rationale. The lawmakers thought parole was awful, so instead an oriental carpet sale replaced parole in California: every sentence issued by a judge was cut 50 percent through nearly automatic good time. This way symbolic sentences could be doubled without paying for the operational impact.

I think we learned from three strikes, 10-20-life sentences, and everything else that we're doing in California that without a credible rationale, that kind of mechanical discounting function is naked of principle and thus highly vulnerable. Under those circumstances we must create a structure of governance in which the back-end punishment adjustment agencies can say what it is they are supposed to be experts in and how they are doing a job that couldn't be done as well by a legislature.

What sorts of things might that be? Judges can look at the particular facts of a particular crime and a particular offender and measure proportionally how that offender compares with other robbers or burglars and to other claims on penal resources. Proportionality is one part of it. We have to remember that criminal sentences are legal decisions.

Anybody who tells me that the rehabilitative ideal is dead in the sense that rehabilitative considerations are irrelevant has never visited a drug court or a juvenile court. Considering alternatives to prison is a second claim to expertise—on either actuarial or treatment grounds—for people who are making decisions about individual offenders.

These kinds of structural accommodations are good ideas that can work only with credible rationales and claims to expertise. If there is a good final-exam question for a criminal law class on this, it is going to be, "What is the claim to expertise of a sentencing commission?" One thing is scarce resources—the allocation of scarce penal resources on a centralized, rationalized basis.

But I'm not sure that sentencing commissions are a good way (and I'm sure that sentencing guideline grids are *not* a good way) of measuring proportionality in individual cases. And I'm absolutely sure that, while you might want to add to actual punishment at the back end of the punishment system, the one indispensable actor in individual cases and the one indispensable discretion in the criminal justice system in sentencing is the judge. Any system without substantial judicial discretion will sooner or later be gratuitously and excessively punitive.

Charlie Sullivan, Citizens United for Rehabilitation (CURE), Washington, D.C.: I certainly agree with your analysis, but I'd like to point out that there are two areas in this prisoner and prison buildup. First, what you are talking about is scarcity of resources, and I don't think that we have looked at the role of the U.S. Department of Justice in this expansion of prisons and prison space. The Justice Department, since the 1994 Crime Act, has given close to $3 billion to States to build more prisons. And a condition of half of that money is that they move into truth-in-sentencing reforms. This is basically "seed money" to move in that direction.

Statistics have backed up the idea that, if a person is locked up, they will be able to divert many, many crimes. We almost were at cross purposes. The Justice Department just gave almost another half billion dollars in this last year's appropriations. General Barry McCaffrey, Director of the Office of National Drug Control Policy, talking about drug treatment, says 10 percent of that money could be used by States to provide drug treatment. A year ago, Minnesota Senator Paul Wellstone wanted to divert that money to drug treatment to help mentally ill prisoners, and the Justice Department went against that.

What you're saying in all of these areas is that the Democrats (going back to Lyndon Johnson, etc.)—the ones leading and talking about an enlightened policy—have joined the Republicans. I think it goes back to the Willy

Horton case. Politically, the Congressional Black Caucus is the only group that is continuing to talk about an enlightened criminal justice system and enlightened prison policy.

The second point, besides the role of the Justice Department in this prison and prisoner buildup (which I think has not been really researched), has to do with the role of the National Rifle Association (NRA). This gets back to the Democrats as well. The NRA was very close to them, particularly in rural areas where the Democrats have dominated. It has kind of been a "marriage" in which Democrats might have said, "Okay, NRA, we are going to listen to you and we are going to lock up the people who commit crimes for longer sentences."

I was in Texas when the first mandatory minimum started in the mid-1970s. It came out of the Democratic legislators, who felt this was the way to respond to the NRA. "If you do the crime, you will do the time." They were trying to avoid the gun control issue. (By the way, I think the Justice Department has done a wonderful job, at least on that issue). Because I am with a grassroots prison reform organization of families of prisoners (as you can tell from my question), I am on Capitol Hill a lot, talking about these issues.

F.Z.: Let me first take a little bit of the heat off the Department of Justice by saying that the 1994 Crime Act passed by Congress, with so-called truth-in-sentencing incentives (although incentives of a very peculiar kind) was a wonderful example of the new politics of punishment. It was passed in 1994 in an atmosphere of insatiable punitiveness. Despite that, the Republican majority was back 6 months later to try to amend it to make it more punitive—to take out, among other things, the famously labeled "midnight basketball" and to toughen up some policy programs they regarded as equivocal.

That $3 billion in grants that you're talking about is in pursuit of one version of truth in sentencing, which is wildly different from other versions, and I

want to use it as an example. It requires that prisoners convicted of violent crimes serve 85 percent of their sentences. This aim at violent offenders, if it had any impact at all, might have been a radical redistribution of prison resources. The creation of a double scale in which the State correctional facilities can without penalty "cycle out" their nonviolent drug offenders while keeping in their violent offenders (while that is problematic on some theoretical grounds) is very different, in a practical sense, from having legislatively imposed truth in sentencing for everybody.

Yet, truth in sentencing as a Federal law is totally mindless because there are three very different sentencing systems in the States, and the law has hugely different impacts on each. Where there are sentencing commissions with mandatory guidelines that were historically based, the 85 percent really means that people will go on serving sentences that historically had been determined by previous parole release patterns. That's very different from what is going to happen where there are active parole authorities at the State level and the standard sentence that Federal law requires is much longer because it is based on nominal preparole sentences. That's different again from systems that have become determinate through force of law without anybody doing anything—the automatic releases of the California system.

So I think that the Federal truth in sentencing incentive is, first of all, an example of the new politics. Second, it is a wonderful example of how having some control over the process of drafting a law can make for huge operational changes in a system if truth in sentencing was going to happen in some form. The violence-only form that the 1994 Federal law gave it was by no means the one that would have maximized the negative operational impact of truth in sentencing. Third, when you look at the money that Congress was trying to give the States and the pressure it was trying to put on the States, and you compare that with what the Federal Government has done in truth in sentencing—how much money has been spent and how stringent the Federal

effort has been for making sure that a lot of folks are getting locked up with that money—you see that there is a huge gap. There is no ideological sincerity on the part of the administration of the Department of Justice in the enforcement of those provisions.

If you use the Crime Act of 1994 as an example of the new politics, it is still "barking a lot louder than it bites," at least through the end of the year 2000. The political winds may change that, and the structural accommodations may still create a system in which the net effects of this kind of Federal policy are to increase prison populations and increase them substantially.

Jeremy Travis, National Institute of Justice, U.S. Department of Justice, Washington, D.C.: The only point I would make about the NRA is that their usual political incentive for tough mandatory penalties is simply to change the subject away from guns. Now, that's fine. The way they used to do that had zero operational impact on the prison system. They didn't care about impact on prisons because their primary ambitions were legislative negatives: to keep the attention off guns.

F.Z.: What happened is that, once the NRA started interacting with some of the other single-issue lobbies, they were the big money source (with the prison guards union behind three strikes in California). They also didn't care much if in fact these new laws had a high impact on prison population. So rather accidentally, they got co-opted into the operational impact business and are now supporting laws that "bite a lot harder than they bark" just as easily as they used to support the symbolic laws that had no operational impact. I don't think that theirs is a principled presence in the new politics. I think they have been "swept up" like the rest of us have.

Paul Hofer, U.S. Sentencing Commission, Washington, D.C.: In your concern that any sort of determinate rules, mandatory minimum statutes, or guidelines are going to be vulnerable to manipulation if your solution is going

to be to empower judges, what about the traditionalists' concern regarding disparity in the power of different judges?

F.Z.: The issue of disparity in outcomes was solved in two very different ways in the 1970s. Most of the State determinate sentencing regimes that tried to solve the problem of individual judicial disparity did so in a way that turned out to be unprincipled. That is, what they did (I will use Illinois and California as examples simply because those are systems I studied more thoroughly than Indiana and some of the other early determinate sentencing States) is to say that the judge still has unlimited discretion in deciding whether or not a convicted offender goes to prison. We're not touching that discretion. But, if a sentence of imprisonment is decided upon, we are going to force the judge, constrain him given what offense was committed, to a very narrow selection of terms of imprisonment.

From a standpoint of principle, that is a hilarious system. What it was responding to was the notion that two guys are cellmates and one says, "I'm a burglar, and I got 10 years." And the other says, "I got 2." So somebody like former corrections commissioner David Fogel writes a book called *We Are the Living Proof* and makes sure that no matter how many burglars are out on probation, if two of them end up in the Stateville Penitentiary (which he is running), they will have roughly analogous sentences. As a logical matter, that kind of a system had real flaws.

The Federal Sentencing Commission guidelines, the Criminal Justice Act of 1984, and the guidelines of 1987, instead, take a broad look at general disparity—because what could be more important, from the perspective of disparity, than whether offenders go to prison or not—and the way in which they deal with the issue is to create binding or near-binding general notions of an appropriate punishment. The problem is that the criminal justice system is now (and has been for most of the 20th century) muscle bound. For most marginal offenders, the choice in punishment is a choice between doing too

little and doing too much. The "too much" is prison, and the "too little" seems to be everything else. We have made some efforts in the intermediate punishment area lately, but we don't believe in the credibility of our efforts to create real punishments that aren't imprisonment, if we look at how our sentencing commissions behave.

What that meant with the Federal effort was that the way to constrain judicial discretion on the in-out decision was to create a presumption. What kind of presumption? In the Federal sentencing guidelines/standards, that is one of the world's easiest questions to answer: It was a presumption of penal confinement. With that, what you worry about is that discretions, when displaced, can be displaced with excess punitiveness because of the conservativeness of any decisionmaker. That is, the decisionmaker has to worry about two kinds of mistakes: punishing serious crimes not seriously enough and punishing not-serious crimes too seriously. When forced to a choice in a politically responsive environment, if they need a general rule, they are going to punish more seriously and more severely than they would if they had unconstrained discretion.

We have learned in 25 years that the choice of displacing in-out discretion is a tradeoff between allowing like cases to be treated in nonalike ways with high degrees of individual discretion, and a system that is excessively severe for many, if not most, of its cases. If the question then is, which of those two evils would I select? I think I'd go for the former.

Nick Turner, State Sentencing and Corrections Project, Vera Institute of Justice, New York, New York: You made reference to the fact that this new politics of criminal punishment and the shift of punishment determination from the professionals to the politicians was an unintended consequence. The push for determinate sentences was from people who were concerned about disparity, racial and otherwise, and the consequences were unintended and perhaps unwelcome as well. Do you think there is another unintended

consequence of this new politics the extreme fiscal burdens it has placed upon States? One example is California, where spending on prisons and corrections has outpaced or surpassed spending on secondary education. On the flip side, States like Georgia or Alabama are considering setting up sentencing commissions to address these cost expenditures. Can you comment on this as a consequence of the new politics?

F.Z.: Well, what I'd like to do is buy a postponement. I'd like to wait 10 years to answer the question of whether the costs of prison are an important restraint on excessive imprisonment. I think it's largely an untested notion—particularly in periods of great State and local prosperity.

I'm from California and I probably have the same conflict of interest that the prison guards union has. The reason they are rooting for mandatory minimum punishments is rather obvious. They get paid a lot more than school teachers, and the more prison sentences there are, the more members are going to be hired.

My obvious conflict of interest is that I'm an employee of the State university system (although lately we have become almost private). It's not true that California now spends more money on corrections than on secondary education. It does, however, now spend more money on its prison system than it spends on the University of California. And that happens to be the branch of government I work for. The reason I know that difference is because secondary education and junior colleges are protected by a State constitutional initiative and will always get their share of the budget. In times of scarcity, it turns out that the prison system and the university system are competing for the same very limited dollars, and so far, the prison system has done a lot better. It is a now $4 billion system in that single American State. I think we have about $2.6 billion in State support in the university system.

I'm not sure that California has now entered the biblical "7 fat years." It can't keep many fiscal reserves because the same initiative system that gave us three strikes makes the State issue refunds if it accidently happens to collect too much in taxes. The problem with prosperity is that it makes prison space seem a good deal more affordable than it would otherwise be and that is one reason I'd like to find out how great the fiscal bite is in the longer term. The other problem with assuming that fiscal factors will slow down prison growth is that we also are learning that there are many political shortcuts to make expenditures (particularly capital expenditures) seem pain free.

In California, because of the Proposition 13 and Proposition 9 reforms, it looked like bond measures would have to be approved by citizens. The problem was that even during the new politics of punishment, citizens would vote down bond measures. Do we say that will be the way to keep them from building prisons? Not quite. What we do instead is issue a lot of revenue bonds to build prisons. How can you build prisons on revenue bonds? How are you going to get the revenue? Are you going to charge the prisoners? Well, the same legalese that we taught my students to use for the government to justify school expenditures in the context of these constraints works just as well when you are justifying prisons.

I think good can flow from the fact that imprisonment is expensive. From the standpoint of worrying about "overimprisonment," one useful law reform strategy is to try to make imprisonment more expensive. It is a lot more expensive in California than in Texas. But I'm not sure that the decisive battles on imprisonment policy are going to be won on fiscal grounds. I think a couple of principles and some notion of limit in the punishment game would help the fiscal arguments a lot.

Michael Siegel, Federal Judicial Center, Washington, D.C.: I appreciate your comments about the difficulty of fighting on the symbolic front. However, one, if we cede this ground too easily, are we making the lives of the

operators very difficult? Two, are we sure we are going to get the right operators there, particularly in States where judges are elected rather than appointed? Three, I want to offer the possibility that one leverage area is the media. If you watch a week of television news, you do not know that crime is going down in this country.

F.Z.: Let me start with the last. That's right; crime hasn't gone down on television. Jeremy mentioned that I did a study for the MacArthur Foundation on American youth violence, and we found one of the great split-personality situations of all time. Homicide arrests have fallen by half among kids between ages 13 and 17 in the United States over the past 6 years. That's the fastest drop we have ever had for any age group that I have ever observed. On the other hand, I don't pick up any media or political coverage that suggests anything other than the notion that youth violence is going up. So, if we can defy gravity when the statistics show that American youth violence has dropped as fast all over the country as lethal violence has dropped in New York, and nobody is noticing, there is a lot to the notion that propaganda on crime rates and crime risks must be countered if the political pressure is to be resisted.

Do we risk leaving operating personnel undefended if we don't fight the good fight symbolically? Yes. Is there a problem if the wrong people then are put in charge? Yes. But again, the point I would make is that with whatever political energy and intellectual capital you have, it is very important to be extremely sophisticated about the structural nature of the operational impacts of legislation and to exploit the area between the symbolic and the actual. Because, you see, the symbolic gap and the punitiveness of populism are not American characteristics and not 1990s characteristics. Those are part of the basic operating principles of the governance of punishment in any modern democracy, and they probably always have been. Learning to play by the rules and play off those effects is going to be a lot more promising than trying to win the hearts and minds of the general population.