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CAPITALISM, SOCIAL MARGINALITY, AND THE RULE OF LAW'S UNCERTAIN FATE IN MODERN SOCIETY

Ahmed A. White[†]

ABSTRACT: *The rule of law is liberalism's key juridical aspiration. Yet its norms, centered on the principles of legality and legal generality, are being compromised all over the political and legal landscape. For decades, the dominant explanation of this worrying condition has focused mainly on the rise of the welfare state and its apparent incompatibility with the rule of law. But this approach, though shared by a politically diverse range of scholars, is outdated and misconceives the problem. A central function of the modern state has always been to prevent capitalism's inherent tendencies toward social marginalization from devolving into general social crisis. This involves prosecuting an agenda of social control aimed at the socially marginalized. For much of the twentieth century, the welfare state represented the dominant means by which the American state advanced this agenda. While not unproblematic, the welfare state's reign in this regard proved at least relatively compatible with the rule of law. Over the last three decades, though, the state's primary means of responding to the problem of marginality has shifted substantially, away from the welfare state toward a reliance on the criminal justice system and its institutions to advance this agenda. This shift in the dynamics of social control, originating in both ideology and political economy, is evident in the retrenchment of the welfare state and in concurrent changes in the nature of criminal justice that reflect its growing concern with regulating social marginality. This process is central to understanding the rule of law's fate in modern society, as it has accorded to the criminal justice system functions that render adherence to rule of law norms increasingly untenable in this most important of contexts. This argument not only refocuses the debate about the rule of law's fate; it also challenges the entrenched view of the relationship between the rule of law and the welfare state and, ironically, given the rule of law's origins in capitalism, it recasts capitalism itself as the more fundamental problem for the rule of law in modern*

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society. For it is in capitalism that both social marginality and the state's underlying impulse to control this phenomenon are based.

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I. INTRODUCTION

The rule of law, which consists fundamentally of the aspiration to limit and rationalize sovereignty by aligning it with the principles of legal generality and legality, is the key juridical aspiration of liberalism. Conceived in such terms, which go beyond its often trivialized construction in popular rhetoric, the rule of law has never reigned supreme in American life. At some points its agenda has advanced impressively and can be found

ingrained in law and practice. But just as often, the rule of law's history is marked by the retreat of its norms and the rights that give them meaning or by the failure to realize its aspirations in the first place.

The rule of law's uncertain fate in modern society is an important concern of legal scholars, as it carries with it the threat of illiberalism and even authoritarianism. For almost all scholars who concern themselves with the question, the construct's precarious condition reflects the corrosive influence of the welfare state. Scholars of the rule of law across the political spectrum, from F.A. Hayek to Roberto Unger, invariably point to the welfare state's expansion of state sovereignty, its intervention in private relationships, and its tendency for individualized and discretionary decision-making, as undermining rule of law norms and even threatening to banish the rule of law entirely from the political and legal landscape.¹

This Article challenges this dominant perspective as outdated and fundamentally wrong. It argues not only that the relationship between the rule of law and the welfare state is more complicated than the adherents to this "welfare thesis" acknowledge, but indeed that the *retrenchment* of the welfare state does more to account for the rule of law's erosion than its rather brief prominence ever did. This Article argues more broadly that the rule of law's problematic condition in modern society reflects the fundamental incompatibility of its claims with the realities of state power and the ubiquity of social marginality in the context of contemporary capitalism.

I build this argument around several central claims. Elaborating on the insights of radical critics of the welfare state, I present the welfare state—and in particular its constituent, the social welfare system—as fundamentally concerned with the social control of endemic poverty, chronic unemployment, and other expressions of social marginality in modern, capitalist society. Its retrenchment, I then argue, has not entailed the state's abandonment of this mission of asserting social control over the socially marginalized, but rather the transfer of this function to the criminal justice system as well as the incorporation into the vestiges of the social welfare system of increasingly coercive and punitive criminal justice-like motifs. In this context, the welfare state itself has become even more offensive to rule of law norms than it was at its height; and more palpably, the criminal justice system has taken on obligations increasingly incompatible with the rule of law. Indeed, I argue that the steady deterioration of rule of law norms in the criminal justice context, including

1. For a summary of this thesis, which will be explored in greater detail later in this Article, see Bill Scheuerman, *The Rule of Law and the Welfare State: Toward a New Synthesis*, 22 POL. & SOC'Y 195, 199–203 (1994).

the relentless erosion of civil liberties and the entrenchment of structural inequalities and illegal practices, cannot be understood apart from the demise of the welfare state.

This change in the dominant mode of social control has not unfolded in a vacuum. It reflects several important developments in ideology and political economy of the last several decades: the consolidation of neo-liberalism, the onset of chronic fiscal crisis, and the persistence of deep social inequalities. These developments, I argue, have both spurred the demise of the welfare state and the transfer of its functions to the criminal justice system. They have also exacerbated the conditions of social marginality and the accompanying threats of criminality and social disorder that inform the state's assertion of its agenda of social control in the first place. In the course of developing this thesis, I also broach more basic and troubling questions about the rule of law and its place in modern society. I attempt to expose the limits that social structure and capitalism in particular impose on the rule of law in modern society. Ironically, though essential to the development of the rule of law, capitalism also emerges as an impediment to its full realization.

This Article draws on the work of a number of scholars. Foremost among these is the critical theorist Franz Neumann, who in the Mid-twentieth century articulated a creative and very useful view of the rule of law's condition in modern society. Elaborating on the likes of Marx and Weber, Neumann developed a perspective on the rule of law that is sensitive to the construct's historicity, its political connotations, and its often contradictory relationship to capitalism. Unlike many rule of law scholars, Neumann sensed that the rule of law's tenuous condition in modern society reflects not so much the corrosive effects of the welfare state or some other deviation from a "true" capitalism, but rather the problematic nature of capitalism itself. On the dynamics of social control under capitalism, I am indebted to an array of critical scholars. Regarding the welfare state, these include James O'Connor, Claus Offe, and Frances Fox Piven and Richard Cloward. Regarding social control and the criminal justice system, I draw particularly on leftist critics like Dario Melossi, Loïc Wacquant, and David Garland.

I develop this Article in several parts. With the construct's notorious ambiguity in mind, Part II offers a coherent and meaningful definition of the rule of law. It also describes the relationship between the rule of law and the dynamics of class conflict and social marginality. It shows, in a preliminary way, how this relationship colors the rule of law's connection to the welfare state, to the criminal justice system, and to capitalism generally. Part III proceeds in two sections. First, it describes the inherency of the state's

social control function, in particular as an institution for managing the inevitable tendencies toward social crises in modern, capitalist society. Second, this Part describes the social welfare system and the criminal justice system as alternative modes of prosecuting this social control function vis-à-vis the lower classes, on which the burdens of social marginality fall. Part IV then describes the shift from the social welfare system to the criminal justice system as the dominant mode of social control in contemporary society and the forces that account for this shift. This Part also demonstrates how this shift in social control has compelled the retreat from rule of law norms of the last three decades. Part V is a conclusion in which I discuss the troubling implications of this argument for the way we understand the rule of law and the possibility of realizing its norms in modern, capitalist society.

II. THE RULE OF LAW IN MODERN SOCIETY

Although an indispensable construct for comprehending the interrelationship of state and society and the law's role in mediating this relationship, the rule of law is saddled with a tendency to be construed in sometimes simplistic, sometimes ambiguous, and typically uncritical terms. This Part aims to transcend these habits, to set out a coherent and critical definition of the rule of law, and to develop at least a preliminary understanding of the construct's relationship to capitalism generally and to the welfare state more specifically. In each of these undertakings, Neumann's work figures prominently. While not unproblematic, Neumann's critique features a rare tendency to grasp the rule of law's conceptual meanings, its normative structure, as well as its complex, contradictory trajectory within the political economy of capitalist society.

A. Defining the Rule of Law

Contemporary references to the rule of law, both scholarly and practical, have a decidedly unhelpful habit of identifying the rule of law with the mere existence of a legal order,² with a regime of "free market" capitalism,³ or

2. On this approach to the rule of law and its limitations, see GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 11–14 (1988).

3. Among many possible examples of this use of the rule of law, see, for example, Thomas Carothers, *The Rule of Law Revival*, 77 *FOREIGN AFF.* 95, 97–103 (1998); O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 *AM. BUS. L.J.* 441, 450–66 (2001); Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 *SUP. CT. ECON. REV.* 1, 21–23 (2003).

even with imperialist adventures of a patently illegal sort.⁴ The problem with these constructions is that they reify the construct, making it simply synonymous with existing political and economic formations and anathema to others. Such constructions are fundamentally justificatory, not critical, and offer little to illuminate the complexities of the rule of law's condition in modern society.

The rule of law, as we shall see shortly, certainly has an ideological component. But this ideological component is embedded in a larger project of circumscribing the sovereignty of the modern state. Understood in this, its classical orientation—for example, as by the likes of Locke, Rousseau, and Montesquieu—the rule of law consists of a number of norms: that the law define the limits of state sovereignty, and in so doing differentiate state from civil society; that the law apply only prospectively, and not retroactively; that the law be administered within a legal and political system characterized by separation of powers and judicial independence; and that the law assume a general form.⁵

For Neumann, legal generality, which he identifies with “an abstract rule which does not mention particular cases or individually nominated persons, but which is issued in advance to apply to all cases and all persons in the abstract,” is the most fundamental of the rule of law's constituent norms.⁶ This is true in a number of ways. In the most basic sense, the demand for generality both valorizes and formalizes law. It tends to separate law institutionally from sovereignty and thereby to facilitate the rule of law's most basic element: the principle of “legality,” which entails the idea that the law autonomously governs all, including the state itself. Only those acts of the sovereign that are couched in law are valid, and only those laws that are general in form are truly lawful. In this fashion, legal generality goes

4. For an account of this tendency, see generally Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275 (2003).

5. See JOHN LOCKE, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 265, 355–63, 374–80 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 80–83 (Maurice Cranston trans., Penguin Books 1968) (1762); 1 CHARLES DE SECONDAT, B. DE MONTESQUIEU, *THE SPIRIT OF LAWS* 160–96 (Thomas Nugent trans., Fred B. Rothman & Co. 1991) (1748); see also Franz L. Neumann, *The Change in the Function of Law in Modern Society*, in THE RULE OF LAW UNDER SIEGE 101, 102–04 (William E. Scheuerman ed., 1996) [hereinafter Neumann, *The Change in the Function of Law*].

6. FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 213 (1986) [hereinafter NEUMANN, *THE RULE OF LAW*]. For this reason, legal generality is the conceptual centerpiece of the rule of law's classical doctrinal iterations. *Id.* at 212–22; Franz L. Neumann, *The Concept of Political Freedom*, in THE RULE OF LAW UNDER SIEGE 195, 199 (William E. Scheuerman ed., 1996) [hereinafter Neumann, *The Concept of Political Freedom*]. But cf. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 212–13 (1979) (arguing that both general and particular laws are necessary).

quite a distance in setting limits to both the extent and the form of sovereignty.⁷

Other important implications follow from legal generality. A regime of general law implies judicial independence and with this, the separation of powers. This is true in that a system of general laws “guarantees to the judge a minimum of independence because it does not subordinate him to the individual measures of the sovereign”—meaning it is logically difficult for the sovereign to over-dictate to the judge where the judge’s role consists of enforcing general laws.⁸ Separation of powers also follows from legal generality in that, if the law is to retain its generality, neither the law’s adjudication nor its administration can be in the hands of those who make the laws in the first place; for this would allow the state to rule by individual measures disguised as general laws.⁹ Similarly, legal generality requires that the law be administered by judges and executive officials alike whose discretion is itself limited by law; for excessive discretion inevitably reduces formal, general rules to informal, individual measures.¹⁰ Finally, legal generality also precludes retroactive laws. Neumann’s argument is very straightforward: a “law which provides for retroactivity contains particular commands inasmuch as the facts to which the law refers already exist.”¹¹

For Neumann these implications of legal generality follow only from a particular kind of generality, one that couches the law in specific, formal statements. Only laws that are general in two convergent senses of the word are truly consistent with the effective limitation of sovereignty: “[F]irst, law must be a rule that does not mention particular cases or individual persons but which is issued in advance to apply to all cases and all persons in the abstract, and second, it must be specific, as specific as possible in view of its general formulation.”¹² Such a definition of legal generality is essential to distinguishing the rule of law from rule by “general principles,”

7. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 212.

8. Neumann, *The Change in the Function of Law*, *supra* note 5, at 107–08; *cf.* NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 217–18.

9. *See* Neumann, *The Change in the Function of Law*, *supra* note 5, at 118; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 200; *cf.* CARL SCHMITT, *LEGALITY AND LEGITIMACY* 70–71 (Jeffrey Seitzer ed. & trans., Univ. Press 2004) (1932).

10. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 257; Neumann, *The Change in the Function of Law*, *supra* note 5, at 113–15; *cf.* Guido Pincione, *Market Rights and the Rule of Law: A Case for Procedural Constitutionalism*, 26 HARV. J.L. & PUB. POL’Y 397, 400 (2003).

11. Neumann, *The Change in the Function of Law*, *supra* note 5, at 107; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 200. Carl Schmitt makes a similar argument in his account of the features of the “legislative state.” SCHMITT, *supra* note 9, at 3–4.

12. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 199.

“standards of conduct,” or other constructs that can easily conceal individualized, discretionary, or retroactive acts of the sovereign.¹³

Understood in this way, the rule of law is not normatively neutral; it necessarily features a substantive juridical content.¹⁴ This is true in the broad sense that the very point of the rule of law and its most essential implication is to limit the power of the state to that which it is allowed by the law. In this fashion, the rule of law preserves to citizens or other subjects a sphere of liberties from the state.¹⁵ Because the state is constrained to act only by law, it follows that “only behavior that is expressly forbidden by law is punishable.”¹⁶ The state must, moreover, refrain from subjecting its citizens to measures that are individualized, excessively discretionary, or retroactive. As Neumann argues, by denying the state such prerogatives, generality presupposes a range of “negative” freedoms “from the state” in the personal and economic spheres, political freedom both within and from the state, and minimum freedoms of association.¹⁷

General legal rules presuppose as well formal equality under the law, in both a personal and a political sense. For where the state is constrained to articulate sovereignty in the form of general legal rules, the content of

13. What Neumann means is that laws lacking adequate specificity reserve so much discretion to the state that they can only be “a mask under which individual measures are hidden.” Neumann, *The Change in the Function of Law*, *supra* note 5, at 107. In order to maintain true generality, “all essential facts” to which the law refers must be “clearly defined.” *Id.* at 107–08, 116.

14. See NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 8–9.

15. *Id.* at 32.

16. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 199–201.

17. See NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 212–14. Or to make this point slightly differently, the general freedom from state interference that the rule of law secures manifests itself in these four distinct contexts, and in these contexts, the principle of generality prevents the state interfering except in a necessarily limited fashion. Neumann, *The Change in the Function of Law*, *supra* note 5, at 107–08. Notably, these substantive normative implications of the rule of law were also evident to Schmitt, who saw them as evidence of the rule of law’s contradictory and incoherent nature. In Schmitt’s words, “[t]here is no middle road between the principled value neutrality of the functionalist system of legality and the principled value emphasis of the [Weimer Constitution’s] substantive constitutional guarantees.” SCHMITT, *supra* note 9, at 47. Personal freedoms entail privacy, freedom from arrest without process, freedom from bills of attainder, and the like; political freedoms include freedom of association and assembly, freedom of the press, and freedom from state interference with the content of political views; economic freedoms involve freedom of private property, trade, and private investment; and freedom of association in the labor context revolves around the right to organize labor unions and to engage in collective bargaining and labor protests. These freedoms are not absolute, but rather protected from interference outside the framework of law or in contravention of the principle of generality. Neumann, *The Change in the Function of Law*, *supra* note 5, at 108; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 197–200.

sovereignty itself is limited to anonymous, abstract forms. In like fashion, generality precludes the state denominating particular individuals (or groups) for special treatment.¹⁸ In Neumann's words, "[a] minimum of equality is guaranteed, for if the lawmaker must deal with persons and situations in the abstract he thereby treats persons and situations as equals and is precluded from discriminating against any one specific person."¹⁹

Neumann, whose inclinations occupied the uncertain ground between reformism and radicalism, is careful to acknowledge the limited nature of this normative agenda vis-à-vis the quest for true human emancipation, which depends on much more than freedom from the state or formal equality. In fact, as we shall see, Neumann appreciates that the rule of law not only leaves intact class rule and exploitation, but it also lends support to these institutions. But Neumann is quick to affirm that the rule of law's negative freedoms and formal equality are significant all the same to the cause of human emancipation. They are genuine, as far as they go, and they perform the important "moral" or "ethical" function of validating the demand for more meaningful changes.²⁰ In these respects, the rule of law offers real benefits to the "working class and the poor" in the form of limited securities from official persecution and an authentic, if quite incomplete, form of equality.²¹

This essentially dialectical view of the rule of law represents a perspective not unlike that of Marx himself, who, while recognizing the limits of freedom under the modern legal system, was equally quick to acknowledge this development as a "big step forward," one that constitutes "the last form of human emancipation *within* the prevailing scheme of things."²² Whether associated with Neumann or Marx, such a view has great value to any radical critique of the rule of law, in that it recognizes the construct's positive aspects, both functionally and ideologically, while not exaggerating these aspects or remaining blind to the rule of law's problematic real-life consequences. And it sees these opposed tendencies not as a reflection of the construct's conceptual incoherence, but rather as reflective of its natural fate within a contradictory social structure. From such a perspective, the rule of law is important to the question of human emancipation in modern society, but in a historically contingent and not

18. Neumann, *The Change in the Function of Law*, *supra* note 5, at 117–18; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 201, 206.

19. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 201.

20. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 33–37; Neumann, *The Change in the Function of Law*, *supra* note 5, at 117–18.

21. Neumann, *The Change in the Function of Law*, *supra* note 5, at 121.

22. KARL MARX, *On the Jewish Question*, in KARL MARX: *EARLY WRITINGS* 211, 217–21 (Rodney Livingstone & Gregor Benton trans., Vintage Books 1975) (1843).

unproblematic way. It is, to turn E.P. Thompson's familiar expression on this matter, a distinctly *qualified* "good," but a good all the same.²³

This contingency can be seen in another dimension of the rule of law. At the same time that it limits sovereignty, the rule of law is also a partly authoritarian construct. For in limiting sovereignty, the construct demarcates a range of circumstances in which the exercise of sovereignty is presumptively legitimate and in which freedom and equality must yield. Indeed, Neumann is very clear that by embracing the rule of law, the liberal state does not surrender so much as rationalize and validate its authority. In accordance with this, "[t]he liberal state has always been as strong as the political and social situation and the interests of society demanded. . . . It has been a strong state precisely in those spheres in which it had to be strong and in which it wanted to be strong."²⁴ These observations on the rule of law's authoritarian dimensions are all the more significant given that the rule of law also endorses the state's monopoly on coercion and tends to abrogate any right of resistance to its properly constituted and articulated sovereignty.²⁵

B. *The Welfare State and the Rule of Law*

For a diverse array of scholars, including not only Hayek and Unger, but also the likes of Max Weber, Carl Schmitt, and Jurgen Habermas, the rule of law's relationship to capitalism is defined by two things: a unique compatibility with liberal, competitive capitalism; and a fundamental incompatibility with the welfare state, as well as with social democracy and socialism.²⁶ The reasoning behind this "welfare thesis" entails several key contentions. The initial claim is for a functional and historical symbiosis between the rule of law and competitive, pre-welfare, capitalism. Competitive capitalism requires the institutions of formal equality and economic freedom as well as the overall limitation of state sovereignty that

23. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

24. Neumann, *The Change in the Function of Law*, *supra* note 5, at 101-03; cf. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 198, 214.

25. This authoritarian feature is central to the rule of law's normative integrity, as it prevents circumvention of the construct's stated normative ambitions. On this aspect of the rule of law, see SCHMITT, *supra* note 9, at 18-19; Otto Kirchheimer, *Legality and Legitimacy*, in *SOCIAL DEMOCRACY AND THE RULE OF LAW* 130, 132 (Keith Tribe ed., Leena Tanner & Keith Tribe trans., 1987).

26. By the "welfare state," I mean an array of institutions of which the social welfare system is an important, but not exclusive constituent. Along with the social welfare system, the welfare state consists also of various direct supports for corporations, including for example: farm subsidies, research and development support, military contracts, and the like.

the rule of law—and in particular its norm of legal generality—tends to mandate. And the rule of law is said to prosper in such a context, realizing its full potential as a check on state sovereignty without incurring much conflict between its norms and the realities of political economy. The advent of the welfare state, however, is said to upset this relationship. The welfare state generally expands state sovereignty. More importantly, its many interventions in civil society are typically premised upon individual or “exceptional” decision-making on the basis of informal, *ad hoc*, vague, sometimes retroactive, or otherwise non-general rules. Similarly, the welfare state takes it upon itself to intervene in private affairs, redistributing property, regulating contracts, and so forth. In other cases, the welfare state entails the state itself acting as a privileged party in business or other affairs. In all these habits, the welfare state runs afoul of the rule of law’s basic normative structure.²⁷

For many neo-liberals, Hayek foremost among them, the charge that the rule of law cannot prevail in the context of the welfare state counsels the rejection of the welfare state and resurrection of competitive capitalism.²⁸ Indeed, in Hayek’s view, the logic of the welfare state, which is reflected in its incompatibility with the rule of law, leads “straight to the totalitarian state.”²⁹ For many modern liberals and leftists, though, a different position follows from this conflict. The rule of law’s incompatibility with the welfare state is said to expose the rule of law’s reactionary character and to show that the construct must be sacrificed to the interests of social justice.³⁰ In this vein, Unger, for example, concludes that:

[t]he rule of law is the liberal state’s most emphatic response to the problems of power and freedom. But we have seen that, whatever its efficacy in preventing immediate government oppression of the individual, the strategy of legalism fails to deal with these issues in the basic relationships of work and everyday life.³¹

27. Hayek is perhaps the most aggressive in laying out this critique of the welfare state. For Hayek, the welfare state is fundamentally incompatible with a regime of formal, *a priori* laws, in that it is built around informal, *ad hoc* decision making; it is inconsistent with formal equality too, in that it involves the state intervening on the basis of individual need into the domain of economic and civil affairs. F.A. HAYEK, *THE ROAD TO SERFDOM*, xxiii, 80–96 (Univ. Chicago Press 1994) (1944). This informs Hayek’s opposition to the welfare state as an indefensible affront to freedom, equality, and liberalism generally. *Id.* at 91; *see also* Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 150–52 (1958).

28. *See, e.g.*, Pincione, *supra* note 10, at 401.

29. HAYEK, *supra* note 27, at 95–96.

30. *See, e.g.*, MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 59–61 (1987).

31. ROBERTO M. UNGER, *LAW IN MODERN SOCIETY* 238–42 (1976); *cf.* BOB FINE, *DEMOCRACY AND THE RULE OF LAW: LIBERAL IDEALS AND MARXIST CRITIQUES* 111–21 (1984).

Notably, it is not just leftists for whom conflict with the welfare state demands the rule of law's repudiation. Another view, embodied in the work of Schmitt, sees in the contradiction between the rule of law and the welfare state an unveiling of the rule of law's fundamental incoherence.³² In Schmitt's view, the rule of law is an immensely problematic construct. Its legalism, which invokes the sovereignty of law, is an affront to what Schmitt regards as the only true foundation of state legitimacy: an identity of the state with "the people."³³ Moreover, by displacing the issue of legitimacy from politics to law, and by concealing sovereignty behind a veil of neutrality, the rule of law abets the subversion of the state's legitimacy, leaving it vulnerable to usurpation by its "enemies," and allowing the state's capture by groups unconcerned with maintaining the integrity of the political order (for Schmitt, a Nazi, this meant socialists and communists).³⁴ And while these dynamics are endemic to the rule of law, they are exacerbated by the discretionary, individualized, and altogether greater exercises of sovereignty by the welfare state. All of this creates an untenable condition that can only be cured by the rule of law's forceful abandonment and its replacement with an authoritarian structure grounded in "decisionism," "exceptionalism," and "general principles."³⁵ The law must exchange any pretense to restrain sovereignty by general rules for a more straightforward mission of embracing the nature of sovereignty as it exists.³⁶ The essence of Schmitt's position, if not its convoluted and

32. See generally SCHMITT, *supra* note 9.

33. *Id.* at 23–25.

34. *Id.* at 28–35.

35. Schmitt's view of the rule of law bears a bit more elaboration. Schmitt essentially identified in the rule of law an inherent function in concealing individualist, concrete features—in his words, "decisionist" elements. These features prevailed even in the liberal state reigning over competitive capitalism. But for Schmitt, such features are exacerbated by the rise of the welfare state. In this context, the rule of law's norms create an aura of predictability and rule-bound determinacy, which conceal a very different reality characterized more and more by decisionist elements. For Schmitt, this condition invalidates the very construct of the rule of law and requires its outright abandonment—if only, he argues, to preserve the integrity of the political and legal order and to salvage legitimacy and determinacy. *Id.* at 20–24, 28–35, 70–71. In this respect, Schmitt's approach reflects a tendency to normalize the rule of law's concrete, empirical realities. It led him, infamously, to embrace Nazism. See DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* 38–101 (1997); WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION* 10, 13–15 (1994).

36. Neumann, *The Change in the Function of Law*, *supra* note 5, at 104–05.

reactionary precepts, is held by other scholars for whom the rule of law is simply unable to actually restrain sovereignty.³⁷

Neumann's views on the rule of law's relationship to capitalism are defined by his approach to the welfare thesis. For Neumann, the rule of law's place in modern society is significantly more complex than this thesis suggests. The construct's relationship to capitalism is not straightforward, but fundamentally contradictory. Throughout their history together, capitalism has been at times both consistent with and antithetical to rule of law norms. In fact, Neumann is explicit in his view that the rule of law has never been either stable or secure in capitalist society, and that the cause of this inheres in the nature of capitalism.³⁸ This perspective emerges alongside—and in contrast to—his view of its “ethical” functions.³⁹ Neumann acknowledges that the rule of law bears a close functional relationship to capitalism. He endorses Marx's and Weber's insights that capitalism demands a legal system that renders the state's behavior predictable and economic conduct under the law, whether public or private, calculable; for only under these conditions, which the rule of law provides, is the efficient investment of capital possible. Likewise, a system of free competition, which is a mainspring of capitalism's ideological agenda, and which actually prevailed (more or less) during its early stages, broadly requires economic freedoms guaranteed by the rule of law.⁴⁰ In particular, capitalist transactions benefit from the calculability and predictability entailed in the rule of law's prohibition of retroactivity, its minimization of discretion, its mandate of judicial independence, and its general tendency to clarify the law's meaning.⁴¹

For Neumann though, the connection between capitalism and the rule of law is also affected by class conflict. Again in line with Marx and Weber, Neumann argues that the rule of law was a significant weapon in the bourgeoisie's struggle to depose feudal and aristocratic rule. According to this narrative, the rule of law's value to the bourgeoisie lay in its condemnation of the typical forms of feudal and aristocratic rule—the

37. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). See also various articles in 72 *TELOS* (1987) (special issue on Carl Schmitt).

38. Neumann, *The Change in the Function of Law*, *supra* note 5, at 116–17.

39. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 201–05.

40. Neumann, *The Change in the Function of Law*, *supra* note 5, at 116–17; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 201–05.

41. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 255–56; Neumann, *Change in the Function of Law*, *supra* note 5, at 106, 109–12. A very similar claim is developed at some length in MAX WEBER, *2 ECONOMY AND SOCIETY* 839–59 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968).

individual measure and the general principle. Likewise, the constellation of personal, economic, and political freedoms that the rule of law emerged to protect inured to the benefit of this then-insurgent class. Such freedoms gave the bourgeoisie a degree of autonomy essential to the consolidation of its social, political, and economic power. Similarly, the rule of law's mandate for separation of powers not only diffused state power but also redistributed power to the legislature, an institution in which the bourgeoisie quickly attained great influence.⁴² With this power, the bourgeoisie could not only protect its freedoms, but also begin an enduring practice of retarding those social reforms with which it did not agree.⁴³

For Neumann, these are not the rule of law's only functional supports for capitalism or the bourgeoisie. The rule of law also performs what Neumann variously calls a political or ideological function in obscuring the nature, and at the same time legitimating the exercise, of state power in capitalist society.⁴⁴ Generality reifies the authority of the individuals and the classes that actually dominate the state and wield hegemonic power in capitalist society. In Neumann's words, the rule of law "veils the unwillingness of the ruling classes to give way to social reforms," and it "disguis[es] the real holders of power in the state."⁴⁵ Likewise, the rule of law tends to articulate questions of freedom and equality in the language of state, as opposed to private, sovereignty. "The invocation of the law as the sole sovereign and the dictum that sovereignty is 'a government of laws and not of men' make it superfluous to mention that, in reality, men do rule, even when they rule within the framework of the law."⁴⁶ This dynamic displaces from civil society to the state modern society's failures to fully realize the enlightenment ideals of freedom and equality on which its overall legitimacy is ostensibly based—at the same time that it insulates private actors from responsibility on this question, and further impedes the quest for human emancipation.

42. NEUMANN, THE RULE OF LAW, *supra* note 6, at 213; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 201–02.

43. Neumann, *The Change in the Function of Law*, *supra* note 5, at 115, 122–32.

44. On this point, Neumann's position is in line with that of Weber and Neumann's colleague, Otto Kirchheimer, for whom the principle of legality and the rule of law construct are fundamental to the legitimation of the modern, post-feudal state. Kirchheimer, *supra* note 25, at 130.

45. Neumann, *The Change in the Function of Law*, *supra* note 5, at 115; *see also* NEUMANN, THE RULE OF LAW, *supra* note 6, at 213, 254–55; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 202–03; *cf.* JURGEN HABERMAS, LEGITIMATION CRISIS 21–24 (Thomas McCarthy trans., Beacon Press 1975) (1973).

46. Neumann, *The Change in the Function of Law*, *supra* note 5, at 115.

For Neumann, consistency between capitalism and the rule of law was indeed particularly evident during the reign of competitive, liberal capitalism. This economic system, which featured many relatively equal competitors, placed relatively little pressure on the rule of law to yield to individual measures that worked to the direct advantage of individual capitalists.⁴⁷ It was likewise free of much in the way of direct state interventions of the kind that expand the domain of sovereignty and challenge the law's generality and its commitment to formal equality.⁴⁸ At the same time, the sphere of economic freedom created by the rule of law was especially consistent with the realities of competitive capitalism and the (relatively) non-interventionist state.⁴⁹

Unlike most rule of law scholars, though (Schmitt perhaps excepted),⁵⁰ Neumann acknowledges a number of more fundamental tensions between capitalism and the rule of law that transcend the distinction between the liberal and the welfare state. These tensions take several forms. In its ideological functions, the rule of law conceals real conflicts. Formal equality belies real social inequality; and the negative freedoms that are conveyed by the rule of law obscure the lack of genuine freedom in society.⁵¹ Moreover, the rule of law conceals the political function of law in society—at the same time that it restrains this function.⁵² The power that the rule of law veils is not only that of the state, but that of capital, which is protected by the veiling function of the rule of law from consideration as an impediment to freedom and equality.⁵³ Even more problematically, the rule of law's support for capitalism perpetuates the very social realities that create these inconsistencies between rule of law norms and social reality. Neumann recognizes these features even within liberal, competitive capitalism.

It is precisely because of these endemic inconsistencies between the rule of law and capitalism that Neumann rejects the view of the welfare state—

47. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 205.

48. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 217, 255–57.

49. Neumann notes that such freedoms are not protected by the rule of law “for their own sake,” but rather because they essentially represent the inherent meaning of economic liberty at this point in history. Neumann, *The Change in the Function of Law*, *supra* note 5, at 109.

50. Schmitt's critique of the rule of law simultaneously (and somewhat confusingly) draws on both the construct's practical, historical incoherence in the context of the welfare state and the sense that social conflict of a more endemic sort threatens the coherence of rule of law norms. SCHMITT, *supra* note 9, at 27–30. In the latter regard, Schmitt is especially concerned that the rule of law might facilitate the ascendance of a working class majority over minority interests. *Id.* at 31.

51. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 197.

52. *Id.* at 202–03.

53. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 213.

especially the social welfare system as a distinct component of the welfare state—as fundamentally antithetical to the rule of law. Neumann does not quarrel with the view of the welfare state as inconsistent with legal generality—at least on a superficial level. But unlike adherents to the welfare thesis, Neumann also sees in the welfare state the potential to *better realize* the rule of law.⁵⁴ And he does not, in any case, think it either possible or desirable to go back to a system of liberal, competitive capitalism.⁵⁵

This unorthodox view of the relationship between the welfare state and the rule of law follows from several other contentions. At its base is a simple recognition that increases in government regulation are not necessarily corrosive of the rule of law's norms. What determines the nature of the relationship is "each concrete situation," as the exercise of sovereignty is fully capable of either advancing or compromising the rule of law's normative structures.⁵⁶ Indeed, Neumann clearly qualifies his view of the rule of law as a benefit to the poor and working class by recognizing that lack of access to the machinery of law and the state—a deficiency that the (social) welfare state alone among legal regimes has substantially mitigated—compromises the realization of rule of law norms.⁵⁷ Moreover, the state does not constitute the only enemy of freedom: "private social power can be even more dangerous to liberty than public power. The intervention of the state with respect to private power positions may be vital to secure liberty."⁵⁸ For, "[t]he nonintervention of the state in a capitalist society means, in truth, intervention in favour of the ruling class."⁵⁹ In other words, Neumann sees in the welfare state not just juridical conflict with the rule of law, but a parallel potential to remedy gross social inequalities that

54. This aspect of Neumann's philosophy is very well described by William Scheuerman. See SCHEUERMAN, *supra* note 35, at 43–55. Neumann appears to have believed more strongly in the positive features of the welfare state in his younger years than he did later in life. Claus Offe, *The Problem of Social Power in Franz L. Neumann's Thought*, 10 CONSTELLATIONS 211, 211, 222–23 (2003) [hereinafter Offe, *The Problem of Social Power*]. Neumann's view of the relationship between the rule of law and the welfare state differs as well from that of Hans Kelsen, who is more interested in denying any logical inconsistency between the welfare state and the rule of law. See, e.g., Hans Kelsen, *Foundations of Democracy*, ETHICS, Oct. 1955, at 1, 77–80.

55. On this aspect of Neumann's thought, see Offe, *The Problem of Social Power*, *supra* note 54, at 219.

56. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 209.

57. Neumann, *The Change in the Function of Law*, *supra* note 5, at 121.

58. Neumann, *The Concept of Political Freedom*, *supra* note 6, at 210.

59. Franz L. Neumann, *The Social Significance of the Basic Laws of the Weimar Constitution*, in SOCIAL DEMOCRACY AND THE RULE OF LAW 27, 40 (Keith Tribe ed., Leena Tanner & Keith Tribe trans., 1987).

themselves can pose a greater threat than the welfare state to the coherence of a system of general laws.⁶⁰

Not only is Neumann skeptical of the view that the welfare state spells the death of the rule of law, but for him this is not even the most significant threat. Neumann regards the rise of business monopolies as a development that renders the rule of law least tenable in the long run.⁶¹ This development opposes the rule of law in two ways. First, “[i]n a monopolistically organized system the general law cannot be supreme. If the state is confronted only by a monopoly, it is pointless to regulate this monopoly by a general law. In such a case the individual measure is the only appropriate expression of the sovereign power”—the only way to regulate monopolies.⁶² Neumann sees in the relationship between the rule of law and monopolization another contradiction; the economic freedoms that the rule of law guarantees, which are invariably transformed into a “formal, juridical concept,” facilitate the very trends towards monopolization that render the rule of law itself irrelevant.⁶³ Second, monopolists themselves have no use for the rule of law; for them, the rule of law tends to protect competitors and to limit the ability of the state to render to the monopolists individualized support. In this vein, Neumann sees the rise of monopoly capitalism as the force behind the rise of fascism, with its characteristic repudiation of the rule of law, as well as the intellectual critique of the rule of law (as epitomized by Schmitt).⁶⁴

60. See Neumann, *The Concept of Political Freedom*, *supra* note 6, at 204–05; see also SCHEUERMANN, *supra* note 35, at 50–55, 127–28.

61. NEUMANN, THE RULE OF LAW, *supra* note 6, at 266–85; Neumann, *The Concept of Political Freedom*, *supra* note 6, at 205.

62. Neumann, *The Change in the Function of Law*, *supra* note 5, at 126.

63. *Id.* at 117.

64. While this dimension of the relationship between capitalism and the rule of law remains largely outside the scope of this Article, we can venture two observations: first, that monopoly capitalism did not destroy the rule of law in the United States (in part because of welfare state regulations); and second, that the logic of Neumann’s critique nonetheless suggests a continued danger from this dynamic. For Neumann, the eventual result of the encounter between the rule of law and monopoly capitalism is the descent of the rule of law into conceptual crisis and its real-world disintegration into a regime of “reasonable” rules, “standards of conduct,” and “general principles.” NEUMANN, THE RULE OF LAW, *supra* note 6, at 278–85; Neumann, *The Change in the Function of Law*, *supra* note 5, at 122–33. In other words, the rule of law is displaced by a sham that can no longer advance its normative agenda. *Id.* at 129–34. And while this regime is basically consistent with the use of law to expand social freedoms and to mitigate social inequalities, it is also more fundamentally political than the rule of law. This ensures that the law lends itself more to the perpetuation of capitalist interests and the erosion of social freedoms and equality. In the antithesis of the rule of law and monopoly capitalism, Neumann discerns the foundations of a fundamental intellectual dilemma: The rule of law can be invoked, as Neumann accuses Schmitt of doing, to frustrate (as inconsistent with legal generality) any attempts to regulate capitalism. But at the same time, the overall

Neumann's view of the welfare state, and even more so the rise of social democracy, as more supportive of the rule of law than the alternative—the mere abdication to the structural transformations inherent in the demise of liberal capitalism—remains somewhat controversial. As William Scheuerman, Neumann's sympathetic critic, points out, bureaucratization and de-formalization inherent in social democracy and the welfare state have indeed forced the compromise of rule of law norms.⁶⁵ On the other hand, Neumann's more optimistic view is also at least partly vindicated to the extent that the heyday of the social welfare system, roughly from the early 1960s through the mid 1970s, also marked the period of perhaps the greatest and most rapid realization of rule of law norms in the United States—this despite the social welfare system's pernicious social control functions, which are explored in the next Part. And the relationship hardly seems a spurious one. The reforms brought about by the social welfare system made rule of law norms, for the first time, accessible and relatively meaningful to millions of minorities, women, and members of the working class.⁶⁶ Nevertheless, Scheuerman's point is also well taken, which is why this Article is concerned with significant but ultimately *relative* differences in the fate of the rule of law under a mode of social control dominated by the social welfare system versus one dominated by the criminal justice system.

incompatibility of the rule of law with monopoly capitalism (and the welfare state) can be drawn on—and again Neumann accuses Schmitt—to critique as obsolescent the very concept of the rule of law. NEUMANN, *THE RULE OF LAW*, *supra* note 6, at 275–76; Neumann, *The Change in the Function of Law*, *supra* note 5, at 127–28. Eventually, these tendencies may result in the total and explicit repudiation of the rule of law. Again, it is Schmitt who provides Neumann with an apt example. For in the rule of law's place Schmitt proposes a regime of based in “decisionism,” “exceptionalism,” and “general principles,” which allows the state to intervene on behalf of monopolies without the law either encumbering the interests of monopolies or dramatically expanding its fraudulence. *Id.* at 129–34. *See generally* SCHMITT, *supra* note 9. But while these moves may preserve the law's logical and formal coherence, and perhaps maintain some kind of legitimacy, they do so only by abdicating to those social forces that rendered the rule of law problematic in the first place. The eventual result of this process, according to Neumann, is the advent of totalitarianism, the juridical structure of which is characterized by the complete repudiation of the rule of law. Neumann, *The Change in the Function of Law*, *supra* note 5, at 133–38.

65. SCHEUERMAN, *supra* note 35, at 51–52.

66. The attack on the welfare state as incompatible with the rule of law is very much a political campaign, encompassing both functional critiques and moral critiques aimed at exposing the incompatibility of the rule of law—and liberal democracy more generally—with the welfare state. Claus Offe, *Democracy Against the Welfare State?: Structural Foundations of Neoconservative Political Opportunities*, 15 *POL. THEORY* 501, 503–08 (1987) [hereinafter Offe, *Democracy Against the Welfare State*].

For its part, monopolization did not culminate in a fascist destruction of the rule of law—or at least, this did not happen in the United States.⁶⁷ Again, the period of greatest gains in the realization of rule of law norms overlapped considerably with the era of monopoly capitalism. This may reflect the fact that, in that period, the dominant mode of social control of the lower classes was the social welfare system, and not the more problematic criminal justice system, as well as the relatively limited extent to which concentration actually resulted in outright monopolization.⁶⁸ In any case, the effective regulation of monopolies remains an elusive goal; this project is limited by precisely the kind of non-general rules that Neumann anticipated.⁶⁹ Needless to say as well, the corrupt, rapacious influence that large businesses, many of them monopolistic, wield over law and politics is an inescapable feature of contemporary life. While dated in its particulars—and not a key concern of this Article—Neumann's explanation of the rise of fascism and its attendant destruction of the rule of law as outgrowths of monopoly capitalism is still an ominous reminder of the rule of law's difficult position amidst the political realities of modern capitalism.

The value of Neumann's work for us clearly encompasses both his critical definition of the rule of law and his unconventional view on the relationship between the welfare state and the rule of law. But Neumann is also quite valuable for having drawn out the contradictory nature of the relationship between capitalism and the rule of law and in having shown how threats to the rule of law tend to emerge, not from outside of capitalist society or by its perversion, but rather from within its normal functions. This provides us with quite a useful template for understanding the rule of law's fate in relation to the changing dynamics of social control in modern society, and later for appreciating the worrying normalcy of *this* condition.

67. Neumann was the first to stress the role of monopoly capital in the development of National Socialism in Germany. See generally FRANZ L. NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933–1944* (2d ed. 1944).

68. On the argument that the monopolization played a key role in encouraging the expansion of the welfare state—and its eventual demise, see JAMES O'CONNOR, *THE FISCAL CRISIS OF THE STATE* 40–58 (1973) [hereinafter O'CONNOR, *THE FISCAL CRISIS*].

69. An obvious example of this dynamic is the “rule of reason” in antitrust law. On the evolution and contours of this doctrine, see, for example, PHILLIP AREEDA, *THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES* (1981).

III. THE STATE AND THE SOCIAL CONTROL OF MARGINALITY IN MODERN SOCIETY

A major function of the modern, capitalist state⁷⁰ is to perform functions that are essential to the maintenance of capitalist production, but which are not within the competency of the economy itself, or “civil society,” to provide. Several such tasks are especially significant: the provision of a monetary system and a civil legal system for resolving inter-capitalist disputes,⁷¹ the amelioration of the business cycle,⁷² the ideological legitimation of capitalist production,⁷³ and the commodification of non-natural commodities (labor foremost among them).⁷⁴ Most important to us is a role in mitigating capitalism’s many social dysfunctions, including poverty, unemployment, and marginality, and redressing their tendencies to generate social disorder, threats of social disorder, and a repudiation of dominant social norms among the lower classes.⁷⁵

The danger that inheres in the state not intervening to manage these tendencies is that they devolve into various kinds of crises: economic, political, and social. The state’s ultimate obligation is to prevent social dysfunctions from developing into crises which might then pose generalized threats to economic and social structures or to the state itself.⁷⁶ As Claus

70. By the state I mean a complex of institutions that includes the government as such, the police and security apparatus, the judiciary and legislative authorities, and the administrative and bureaucratic structures that serve these institutions. *See, e.g.*, RALPH MILIBAND, *THE STATE IN CAPITALIST SOCIETY* 49–55 (1969).

71. HABERMAS, *supra* note 45, at 53.

72. This may be described as the tendency towards periodic “disequilibrium” in the relationship between production and consumption. Rooted in the fundamental anarchy of capitalist production—which leaves uncoordinated the relationship between investment and output as well as labor compensation and consumption—this type of crisis features a cycle of overproduction and underconsumption, followed by underproduction and overconsumption. Taking the familiar form of the “business cycle,” it generates periodic episodes of unemployment, business failures, monetary shocks, and diminished rates of return on investment. DAVID HARVEY, *THE LIMITS TO CAPITAL* 190–203 (Verso 1999).

73. *See, e.g.*, HABERMAS, *supra* note 45, at 36–37.

74. This theme of state supervision of the commodification of things essential to capitalist production is perhaps best displayed in the work of economic historian Karl Polanyi. *See generally* KARL POLANYI, *THE GREAT TRANSFORMATION* (1944). On this and the state’s role in constructing the ideology of capitalism, see also MICHAEL PERELMAN, *THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION* (2000).

75. *See, e.g.*, HABERMAS, *supra* note 45, at 21, 35–37; HARVEY, *supra* note 72, at 82–85, 179–95; BOB JESSOP, *THE FUTURE OF THE CAPITALIST STATE* 18–22, 42–44 (2002).

76. Capitalism is defined by the generalization of several economic structures; these include the production of commodities by wage labor, private ownership of the means of production, and the logic of production and consumption centered on the accumulation of wealth as capital. Like every social system, one based in the dominance of capitalism is fraught

Offe describes it, the modern, capitalist state is permanently and fundamentally devoted in this guise to a mission of "crisis management."⁷⁷

The performance of crisis management by the state cannot be a neutral or genuinely pluralistic enterprise. Rather, it is an inherently political undertaking steeped in class and other social conflicts. This follows from the fact that the social order that is defended in this process is not itself normatively neutral or pluralistically governed, but instead is premised on an unequal allocation of property, political power, control of the production process, and on systematic exploitation; and it is governed accordingly.⁷⁸ Further, the modern state functions within an overarching ideological structure that itself imprisons politics (and jurisprudence) to the hegemony of capitalism and an agenda focused on "different conceptions of how to run the *same* economic and social system, and not about radically different social systems."⁷⁹

The class agenda that inheres in the state's crisis management functions is nowhere more evident than where the state undertakes to mitigate the effects of poverty, unemployment, and other forms of social marginality. Even where the state's actions strike a benign tone, as with social welfare,

with tendencies towards crisis. What sets capitalism apart as a social system in this regard is the nature of its crises, which are primarily economic and only secondarily political or legal. In other words, a unique feature of capitalist society is the persistent development of economic crises, which are then articulated politically and displaced onto the state and, eventually, the legal system. This theme is particularly well developed by Jurgen Habermas in his *LEGITIMATION CRISIS*, *supra* note 45. The appreciation of capitalism as a system mired in crisis tendencies owes much to Marx, for whom this matter was an obvious preoccupation. For Marx, the root of crisis in capitalism is class conflict, which generated competing interests, ideologies, and social roles, which in turn reflect themselves in an institutional structure that is anarchical and unstable. More narrowly, the source of crisis in capitalism inheres in the effort to sustain the process of capital accumulation—which basically entails the successful investment of capital—in a manner that is both economically viable and politically legitimate. HARVEY, *supra* note 72, at 82–85.

77. Indeed, for Offe, the characteristic function of the modern, capitalist state is actually a permanent state of "crisis of crisis management." CLAUS OFFE, "*Crisis of Crisis Management*": *Elements of a Political Crisis Theory*, in *CONTRADICTIONS OF THE WELFARE STATE* 35–36 (John Keane ed., 1984) [hereinafter OFFE, *Crisis of Crisis Management*].

78. MILIBAND, *supra* note 70, at 77–80, 147–55. This is not to suggest that capitalism destroys every distinction among formal political groups; or that under its reign the state is reduced, as Marx rather intemperately suggested, to an "executive committee" of the bourgeoisie. KARL MARX, *THE COMMUNIST MANIFESTO* 57 (Frederic L. Bender ed., Norton 1988) (1848). Rather, the state is dominated, not strictly owned, by economic elites who wield hegemonic control over its machinery. MILIBAND, *supra* note 70, at 23–48, 55. Ralph Miliband describes a number of factors that facilitate elite control of the state: the proliferation of business representatives and their middle-class allies in government, the "colonization" of the administrative state, and the ideological definition of "national interests" in terms of business interests. *Id.* at 57–67.

79. *Id.* at 68–76.

they inevitably involve a strong element of repressive socialization, or social control.⁸⁰ This is because social marginality and attendant threats to social order and the reign of functional social norms are natural outcomes of the class structure of capitalism. In seeking to mitigate these dysfunctions and their effects, the state essentially supports the dynamics of class exploitation that create them in the first place—and makes clear its expectation that the lower classes resign themselves to this reality. In other words, the order that is secured by social control is an order that supports exploitation, injustice, and inequality.

While the social welfare system and the criminal justice system are not the exclusive modes of social control of the lower classes, they are the most important—especially among those modes that are sponsored by the state—and most directly implicate rule of law concerns about the limits of sovereignty.⁸¹ As this Part reveals, this project of exerting social control over the lower classes can be in varying degrees “hard” or “soft”; it can be more or less repressive, and more or less governed by rule of law norms. The representative model of soft intervention is the social welfare system, and the representative model of hard intervention is the criminal justice system. As the following discussion demonstrates, the last several decades have seen a solid shift in American society from the social welfare system to the criminal justice system as the dominant mode of social control of the lower classes.⁸² This Part reviews the main features of each of these modes of social control.

80. Social control is, in this sense, a “mechanism to insure compliance with [social] norms” in a context of conflict. Robert F. Meier, *Perspectives on the Concept of Social Control*, 8 ANN. REV. SOC. 35, 37–38 (1982). See generally Allen E. Liska, *Social Structure and Social Control: Building Theory*, 27 LAW & SOC’Y REV. 345 (1993). On the evolution of the concept of social control, see generally Morris Janowitz, *Sociological Theory and Social Control*, 81 AM. J. SOC. 82 (1975). The concept of social control is susceptible to misconstruction and abuse. Much of this involves appeals to its rhetorical power to add weight to otherwise unwarranted claims. This can only be avoided by a serious concern for empirical and analytical rigor. Another misuse of the concept of social control involves confusion of functionality with essentiality. Just because the social welfare system or criminal justice system can be shown to contribute to the maintenance of class hierarchy, for example, does not make them either indispensable or invariably committed to that agenda.

81. Schools, government controlled health care, and the military, for example, represent other state sponsored institutions of social control. On the parameters of the social control phenomenon, see, for example, Peter Conrad, *Medicalization and Social Control*, 18 ANN. REV. SOC. 209 (1992). See generally Eugene Litwak, *Three Ways in Which Law Acts as a Means of Social Control: Punishment, Therapy, and Education: Divorce Law a Case in Point*, 34 SOC. FORCES 217 (1956). For a critical review of literature on various dynamics of social control, see Allen E. Liska, *Modeling the Relationships Between Macro Forms of Social Control*, 23 ANN. REV. SOC. 39, 39–53 (1997).

82. The state faces enormous difficulties in carrying out its crisis-mitigating functions, particularly in regards to social control. An acknowledgment of these difficulties and of the way

A. *Social Control and the Social Welfare System*

The idea of the social welfare state as an institution of social control has perhaps its most important intellectual roots in the work of the economic historian Karl Polanyi, who in the 1930s argued that the stability and legitimacy of the capitalist system depend on an ability to tame self interests and to alleviate the inherent tendencies of its market functions to generate immoral and politically and socially unstable outcomes.⁸³ To be sure, the modern social welfare system was shaped by a number of factors, including Keynesian economic policy as well as humane and enlightened efforts on the part of political elites to alleviate the suffering of the lower classes.⁸⁴ But Polanyi's rather more critical view of its origins is compelling. And more contemporary scholars than he, including Frances Fox Piven and Richard Cloward, have elaborated his thesis to argue that the social welfare system arose to advance an agenda of social control directed at mitigating the social dysfunctions that tend to follow from social marginality—protests, riots, and general criminality, as well as the breakdown of labor market participation and labor discipline. Articulated politically as palpable threats to social order, dysfunctions of class society are redressed by the social welfare system in several ways: by the direct alleviation of conditions of privation and alienation that engender such disorder; by the mobilization of the lower classes to participate in the capitalist labor market, even under undesirable working conditions; and by the affirmation of an ideology of labor discipline and general compliance with capitalist norms among the lower classes.⁸⁵

they coexist alongside the state's successes in crisis-mitigation represents an important development in contemporary discourse on the nature of the state. While the modern state has maintained the overall integrity of capitalism notwithstanding its crisis tendencies, this has been achieved at significant cost. In other words, the state, like the rule of law, can be seen as having a contradictory, and not merely complementary, relationship to capitalism. See, e.g., Boris Frankel, *On the State of the State: Marxist Theories of the State After Leninism*, 7 THEORY & SOC'Y 199 (1979).

83. See generally POLANYI, *supra* note 74.

84. On the many different ways of understating the origins and functions of the welfare state, see, for example, Jill Quadagno, *Theories of the Welfare State*, 13 ANN. REV. SOC. 109 (1987). It is important to stress the inadequacy of simple humanitarian concerns in explaining the origins and functions of the social welfare system. Such "Whig" notions can offer only a partial explanation of the nature of welfare. For perhaps the class example of such a view of the social welfare system, see T.H. Marshall, *Citizenship and Social Class*, in SOCIOLOGY AT THE CROSSROADS 67 (T.H. Marshall ed., Heinemann 1963).

85. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 8–32 (1971) [hereinafter PIVEN & CLOWARD, REGULATING THE POOR].

The direct mitigation of unemployment and poverty is the social welfare system's most straightforward (and, on the surface at least, benign) social control function. Since its inception, the social welfare system has offered to the poor and the unemployed a number of benefits in times of structural economic crisis or demonstrated personal need—cash public assistance, food aid, subsidized housing and health insurance, unemployment insurance, and the like. This is partly a humanitarian function, consistent with the role of the lower classes themselves in demanding some protections from the harsh realities of life in capitalist society. And such benefits have been important to raising the standard of living of the lower classes. But in the same fashion, welfare benefits also work to prevent social marginality from generating widespread disorder and noncompliance with social norms, including riots and criminal attacks on institutions of property and authority, or from leading to a normalization of “deviant” modes of life. Welfare benefits serve as both a means of bribing the poor into maintaining their faith in the existing social and political order, and as a way of reducing the level of material deprivation out of which disorder and noncompliance with mainstream social norms grow. Consistent with this view, the expansion of the welfare state corresponds not simply to objective increases in social distress among the lower classes, but instead to episodes of protest, riot, and unrest that often accompany such conditions.⁸⁶

86. This is a major theme of Piven and Cloward's signature work, *Regulating the Poor*. *Id.* at 17–22, 61–76, 100–11, 228–45; cf. CLAUS OFFE, *Some Contradictions of the Modern Welfare State*, in CONTRADICTIONS OF THE WELFARE STATE 147, 157–61 (John Keane ed., 1984) [hereinafter OFFE, *Contradictions of the Welfare State*]. According to this view, the social welfare system was directly shaped by the political agitation of the lower classes demanding the support of the state and by the broad threat to social order inherent not only in such agitation, but also in the unchecked pervasion of mass poverty, unemployment and underemployment, and other dysfunctions that are in many ways all normal parts of the lower class experience under capitalism. While not uncontroversial, Piven and Cloward's thesis can draw on considerable anecdotal support. President Johnson, for example, viewed the war on poverty as, in large part, an anti-crime program. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 36–37 (1997). And President Nixon's apparent willingness to expand the welfare state to include a guaranteed income component was based in his view that this was necessary to stave off social disorder. *See* DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* 110 (Random House 1973). The thesis is bolstered by subsequent empirical research as well. *See generally* Larry Isaac & William R. Kelly, *Racial Insurgency, the State, and Welfare Expansion: Local and National Level Evidence from the Postwar United States*, 86 AM. J. SOC. 1348 (1981); Stanford F. Schram & J. Patrick Turbett, *Civil Disorder and the Welfare Explosion: A Two-Step Process*, 48 AM. SOC. REV. 408 (1983). *But see generally* Eugene Durman, *Have the Poor Been Regulated? Toward a Multivariate Understanding of Welfare Growth*, 47 SOC. SERV. REV. 339 (1973). Strong support can also be found for the thesis that the welfare state evolved in response to agitation from the left. *See generally* David Brady,

Augmenting this dimension of social control, the provision of welfare benefits also performs what might be called a displacing function: inserting the state (and its legal and administrative apparatus) as an intermediary in what would otherwise be a direct—and from the standpoint of the legitimacy of capital, a more costly—conflict between the lower classes and the economic elite. To put this another way, the social welfare system refocuses class discontent away from capital and its beneficiaries, to the state. By developing a social welfare system, the state not only socializes, but also politicizes and legalizes structural deficiencies of the capitalist system and the dynamics of class conflict that accompany these deficiencies.⁸⁷

Other dimensions of the social welfare system's social control function are both less overt and more coercive. This is evident in its encouragement of labor market participation. Through the modern history of the welfare state, this has been advanced by several interlocking strategies: by limiting the amount of support offered to eligible recipients to a level below the average prevailing wage, thus preserving an incentive to work; by limiting eligibility for welfare programs based on some combination of substantial need and a demonstrated inability to work;⁸⁸ and by actual work requirements as a condition of welfare eligibility (the wages of which are then subsidized by the welfare system).⁸⁹ Each of these strategies reflects a different way of advancing the "principle of 'less eligibility'"—the concept of maintaining levels of social support that by their designed inadequacy

The Politics of Poverty: Left Political Institutions, the Welfare State, and Poverty, 82 SOC. FORCES 557 (2003).

87. See O'CONNOR, *THE FISCAL CRISIS*, *supra* note 68, at 6–9. In this same light, such benefits may be seen as part of what Offe calls a "peace formula" that purchases a "truce" in the domain of class conflict. OFFE, *Contradictions of the Welfare State*, *supra* note 86, at 147. Such benefits serve both to ameliorate social conditions that tend to cause social unrest and to reward those individuals who eschew insurrection or criminality as responses to their experience of social problems. *Id.*

88. For a description of this agenda as it worked in the late 1960s and early 1970s, see JOEL F. HANDLER, *REFORMING THE POOR: WELFARE POLICY, FEDERALISM, AND MORALITY* 25–46 (1972). In fact, "work relief" has been a persistent feature of modern social welfare. PIVEN & CLOWARD, *REGULATING THE POOR*, *supra* note 85, at 33–36, 81–117. For the most part, the American welfare state has advanced this logic by the very practice of limiting traditional welfare benefits to the "deserving" poor: women, children, and the disabled.

89. Although associated with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 1305 et. seq.), which expanded it dramatically, "workfare" has been a feature of the modern welfare system since the 1960s. Eileen Boris, *When Work is Slavery*, 25 SOC. JUST., Spring 1998, at 28, 29–32. See generally Frances Fox Piven, *Welfare and Work*, 25 SOC. JUST., Spring 1998, at 67.

encourage people to remain in the private labor market.⁹⁰ By this logic, the lower classes may be guaranteed some level of insurance against utter destitution, but only if they submit to the labor market and accept levels of support that are no more beneficial than available market wages.

Another dimension of the welfare system's social control function involves its articulation of an ideology of labor discipline and of overall compliance with the norms and structures of capitalist society. This program, which is the adjunct to more direct means of encouraging labor market participation, is accomplished by draconian means including work requirements for receiving public assistance, job search requirements for unemployment, the use of surveillance and interrogation regimes to ensure compliance, and a pervasive tendency to humiliate and dehumanize beneficiaries. These features of the social welfare system advance the idea that labor market participation is normal and is expected by the state, even where such work is deeply alienating and exploitative, and the added idea that the receipt of state support in lieu of work is not only exceptional and practically difficult to obtain but also socially deviant.⁹¹ As Piven and Cloward write, "[t]o demean and punish those who do not work is to exalt by contrast even the meanest labor at the meanest wages."⁹² The disciplinary effect of these aspects of social welfare is genuinely ideological, they argue, in that it extends beyond the recipient herself, who often cannot work anyway, to serve as a lesson to the able-bodied as well.⁹³

Although especially evident in recent welfare reforms, the articulation of this ideological program of labor discipline has always been a feature of the modern social welfare system, functioning alongside the social welfare system's somewhat better recognized program of "moral" training.⁹⁴ And

90. PIVEN & CLOWARD, REGULATING THE POOR, *supra* note 85, at 35, 130–31; Piven, *supra* note 89, at 68.

91. Such measures, couched in terms of distinguishing the deserving from the underdeserving, characterize the entire history of welfare. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA *passim* (10th anniversary ed. 1996). They were very much in place at the inception of the modern system in the 1930s. *Id.* at 231–42. For documentation of their use, see generally JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY (2001).

92. PIVEN & CLOWARD, REGULATING THE POOR, *supra* note 85, at 3–4.

93. In their words, "[t]he main target of these [humiliating administrative] rituals is not the recipient who ordinarily is not of much use as a worker, but the able-bodied poor who remain in the labor market. It is for these people that the spectacle of the degraded pauper is intended." *Id.* at 173.

94. Predictably, such moral training is particularly directed at controlling—and condemning—the lives and values of poor women. See generally MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT (1988). This agenda, which is uniquely relevant to the welfare state's special tendency to control the lives of women, is imposed by various eligibility requirements, which may

the prosecution of this ideology of labor discipline has not been limited to traditional forms of welfare, like public assistance, food aid, and unemployment insurance, but also describes more ancillary aspects of the social welfare system, for example child welfare services.⁹⁵

Among Piven and Cloward's more interesting observations is that these various social control functions respond to different kinds of social dysfunction. The provision of benefits to mute tendencies toward social unrest is more relevant under conditions of labor surplus—for example, mass unemployment in times of recession; while labor discipline by the restriction of eligibility and other devices may be more relevant in times of relative labor shortage and prosperity. For Piven and Cloward, this logic has imported to social welfare policy a broadly cyclical character, modulated by the business cycle and its interaction with the dynamics of social protest.⁹⁶ In this they see the social welfare system's social control function as truly regulatory in its response to the contradictory nature of the state's role in capitalist society—its need both to mitigate capitalism's dysfunctions and, simultaneously, to preserve the essential integrity of the very institutions that generate these dysfunctions.

As this overview demonstrates, the social welfare system is neither fundamentally benign nor devoid of coercive elements. Indeed, *within* the institutional structures and the history of the social welfare system is an internal spectrum of both soft and hard, both more and less coercive, approaches to the problem of social control of the lower classes. And that problem itself is as rooted in maintaining the stability of the social order and its normative structures as it is in redressing the plight of the lower classes for their own sakes. At the same time, however, the prosecution of social control via the social welfare system is relatively benign in comparison to the criminal justice system. For this reason, it is also much less problematic in its relationship to the rule of law than this successor means of social control.

include, ineligibility where would-be recipients give birth to "illegitimate" children, engage in extramarital sexual behavior, or otherwise maintain an "unsuitable home"—and accompanying systems surveillance, interrogation, and other forms of verification. See HANDLER, *supra* note 88, at 33–37; PIVEN & CLOWARD, *REGULATING THE POOR*, *supra* note 85, at 138–41, 166, 173–75. On the way this agenda is expressed under recent reform statutes, see generally Susan L. Thomas, *Race, Gender, and Welfare Reform: The Antinatalist Response*, 28 J. BLACK STUD. 419 (1998).

95. Several important works describe labor discipline as a function of child welfare services. See generally CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977); ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977).

96. For their outline of this thesis, see PIVEN & CLOWARD, *REGULATING THE POOR*, *supra* note 85, at 3–41.

B. Social Control and the Criminal Justice System

The modern criminal justice system accommodates an agenda of social control strikingly similar in its key functions to that of the social welfare system—and strikingly different in the strength of its commitment to punitive means of articulating these functions. Conventional accounts of the criminal justice system tend to obscure its social control agenda behind the idea that its origins and functions lie with the prevention and punishment of crime or even the humanitarian reform of offenders. Such purported bases of criminal justice, which are ideologized *ad nauseam* in “justification theories,” are not always inaccurate characterizations of what the system actually does and how it arose. But like humanitarian interpretations of the social welfare system, they conceal a more dominant project of social control that is only obliquely concerned with protecting people, or with punishing or reforming the guilty, and is at least as concerned with constructing and maintaining social order in the face of threats of conflict and crisis.⁹⁷ Behind the façade of justifications, the criminal justice system is an institution of social control oriented to the management of dysfunctions inherent in capitalist society—unemployment, poverty, and the like—that, if left unchecked, tend to produce untenable levels of social disorder and deviance.⁹⁸

97. While this effort to see the criminal law as an implement of social control draws its inspiration from the most identifiable critics of modern state and society, in particular Marx and Foucault, it is important to see the concept's more distant roots in Western thought. In their concern either to justify or to restrain the emergent modern state, for example, figures from Hobbes and Locke to Rousseau and Hegel were all implicitly inclined to see the state as enjoying broad influences over society. It was as a way of laying out the limits of social control—consistent, of course, with certain political agendas—that critics like these developed the doctrines of “rule of law” and “social contract.” What is the law itself, and what are rights in particular, if not means of describing the parameters of the state's social control prerogative? See generally DARIO MELOSSI, *THE STATE OF SOCIAL CONTROL: A SOCIOLOGICAL STUDY OF CONCEPTS OF STATE AND SOCIAL CONTROL IN THE MAKING OF DEMOCRACY* (1990). See also ALLAN V. HORWITZ, *THE LOGIC OF SOCIAL CONTROL* 1–5 (1990).

98. From this perspective, the criminal justice system is in large part an institution of class repression. For an overview of this perspective, see, for example, RICHARD QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* 51–55 (1974). In line with the similar perspective on welfare, the view of the criminal justice system as an institution of social control rests on a “conflict model” of criminal law, one that sees the criminal law as a reflection, not of consensual values, but of conflicts between social groups. For a review of the conflict model, see, for example, Allen E. Liska, *A Critical Examination of Macro Perspectives on Crime Control*, 13 ANN. REV. SOC. 67, 77–84 (1987). Moreover, for those who conceptualize institutions in terms of the modern concept of social control, neither the doctrines of the criminal law, nor its justifications are sufficient, or even very important to understanding its real nature. Instead, social control approaches to the criminal law are typically critical, empirical, and historical. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 3–22 (1990) [hereinafter GARLAND, *PUNISHMENT AND MODERN SOCIETY*]; see also

Even from a distance, this view of the criminal justice system is consistent in the broadest sense with its overwhelmingly disproportionate impact on the lower classes. The likelihood of being arrested or tried for, convicted of, or punished for a crime is almost entirely reserved to the lower classes—in particular younger males who straddle the boundary between the working class and the chronically unemployed, underemployed, or illegally employed.⁹⁹ Embedded within this dynamic is an equally impressive overrepresentation of racial minorities, and especially blacks, in the criminal justice system. While race is surely to some degree an independent axis of social control, the salience of race in the criminal justice system seems primarily to reflect a demographic entanglement with class as well as the broader sweep of the criminal justice system's hand over the socially marginalized.¹⁰⁰ To put this another way, in the contemporary criminal justice system race and class are substantially interconnected dimensions of social marginality; both signal the kinds of threats to social order and normative stability that tend to activate coercive forms of social control.

The consistent overrepresentation of the lower classes in the criminal justice system leads to the obvious conclusion that such people simply commit more crimes than middle and upper class people. As far as it goes,

WILLIAM CHAMBLISS & ROBERT SEIDMAN, *LAW, ORDER, AND POWER* 172–202 (2d ed. 1982). See generally Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34 (1983).

99. For example, a 1991 nationwide survey of state prison inmates found that the vast majority earned less than \$15,000 in the year before their confinement, with more than half earning less than \$10,000. ALLEN BECK ET AL., U.S. DEP'T OF JUSTICE, NCJ 136949, *SURVEY OF STATE PRISON INMATES*, 1991, at 3 (1993). Along similar lines, a 1996 nationwide survey of jail inmates found that thirty-six percent were unemployed before incarceration and that almost half of inmates reported making less than \$600 a month before being jailed. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 164620, *PROFILE OF JAIL INMATES*, 1996, at 3–4 (1998). Studies of criminal defendants in New York City in the early 1990s revealed that a majority were unemployed; among the employed, most earned only a few hundred dollars a week; only a very few possessed any real assets or even banking accounts. Andrew Karmen, *Property, Crime, and Criminal Justice*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 25, 27 (William C. Heffernan & John Kleinig eds., 2000). Another report from that same year found that over eighty percent of all felony defendants in the largest county jurisdictions nationwide required state-funded, indigent representation. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 179023, *DEFENSE COUNSEL IN CRIMINAL CASES* 1, 5 (2000). Likewise, most prison inmates have never completed high school. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 177613, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 1997, at 48, tbl.4.1 (2000).

100. On the complex intersection of class and race in the criminal justice system, see generally MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995). For a review of the theoretical linkages of class, race, and gender, see generally Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender, . . . and, of Course, Class*, 22 ANN. REV. SOC. 187 (1996).

this is clearly true. For many scholars this fact has inspired a sympathetic (if also sometimes patronizing) search for "criminogenic" forces in lower class life. This is a major concern of both liberal and radical criminology, which often see the roots of lower class criminality in its members' greater alienation from conventional, middle and upper class rules of social order, in their frequent dependency on crime for material support, and in the fact that they incur much higher costs complying with these rules in any case.¹⁰¹

There are other ways of confronting the relationship between crime and class. One is to recognize that the formal definition of crimes and their punishments do not reflect any natural, innate ordering of wrongfulness or socially harmful behavior. Instead, notions of what is wrong, what is socially harmful, and what is proper punishment reflect political choices that disfavor lower class people—who of course have less access to the political power and influence over the legal system necessary to define the boundaries of criminality in the first place. The way this process simultaneously criminalizes whole populations of lower class, urban males, usually racial minorities, while discounting the socially destructive behavior of more powerful groups is aptly described in the literature.¹⁰²

The bias inherent in substantive definitions of crimes and punishments in modern society accords with a deeper logic. The substance of the criminal law reflects that of the dominant social institutions in society. This dynamic is nowhere more clearly evident than in changing notions of property and theft, a subject of classic discourses on the social history of crime and punishment. The young Marx, for example, famously explored this theme relative to the transformation of common property and common right into

101. This perspective takes several related forms. Some scholars emphasize how capitalism's tendency to generate "egoism," results in higher levels of criminality among the lower classes. *See generally* WILLIAM A. BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* (Henry P. Horton trans., 1916). For others, the "social strain" of capitalism—its tendency to create disjuncture of means and ends—is at fault. *See generally* RICHARD A. CLOWARD & LLOYD E. OHLIN, *DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENCY GANGS* (1960); ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (enlarged ed. 1968). For still others, the causal relationship between capitalism and lower class criminality inheres in "ecological" conditions of social disorder. *See generally* CLIFFORD SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (1942). For a description of more contemporary approaches, see generally Theodore G. Chiricos, *Rates of Crime and Unemployment: An Analysis of Aggregate Research Evidence*, 34 *SOC. PROBS.* 187 (1987) (reviewing the research in this area). *See also* Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, 30 *CRIMINOLOGY* 47 (1992).

102. *See generally* STEVEN BOX, *POWER, CRIME, AND MYSTIFICATION* (1983); Andrew Hopkins, *Class Bias in the Criminal Law*, 5 *CONTEMP. CRISES* 385 (1981); AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971).

private property and theft in the rise of capitalism.¹⁰³ A similar concern motivated E. P. Thompson in his analysis of eighteenth century game laws as a mechanism for protecting emerging forms of property and abetting the reconstruction of class relations along more modern, capitalist lines.¹⁰⁴

This view of the substance of the criminal law as both reflecting and advancing the institutional and ideological interests of economic elites, and so extending the criminal law's bias against the lower classes, remains very much relevant today. In one respect, this thesis is borne out by the criminal law's continued commitment to protecting private property and other key institutions of market exchange from violence, theft, and other kinds of disorder, as well as from seditious political activity.¹⁰⁵ And it is also evident in more dynamic form in the increasing use of the criminal justice system in recent years to create and protect value in intellectual property,¹⁰⁶ as well as in the criminal law's constantly evolving proscription of "immoral" areas of employment.¹⁰⁷ Similarly, the criminal law's substantive bias is also reflected in those behaviors that it leaves beyond either its nominal condemnation or its effective sanction: consumer frauds; enslavement, sweatshops, and other violations of labor and employment law; and all manner of crimes committed against the poor.

Such critical views of the criminal justice system do much to undermine the notion that higher rates of criminality among the lower classes (or for that matter, racial minorities) merely reflect a greater tendency to behave in immoral or socially harmful ways. But these perspectives leave unanswered a number of key questions. What protective functions are served by the criminal law's valorization of property, the conceptually arbitrary (but politically relevant) distinction between criminal and non-criminal behaviors, or the way that the criminal law is enforced? Why is the

103. See generally Peter Linebaugh, *Karl Marx, the Theft of Wood, and Working Class Composition: A Contribution to the Current Debate*, 6 CRIME & SOC. JUST. 5 (1976).

104. THOMPSON, *supra* note 23, at 226; see also Douglas Hay, *Poaching and the Game Laws on Cannock Chase*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 189, 244–53 (Douglas Hay et al. eds., 1975).

105. See, e.g., Jeffrey Reiman, *The Marxian Critique of Criminal Justice*, in RADICAL PHILOSOPHY OF LAW 111, 129–33 (David S. Caudill & Steven Jay Gold eds., 1995). See generally MARK NECOLEOUS, *THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER* (2000).

106. See generally Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731 (2003).

107. Among these activities are criminalized forms of gambling, begging, the illegal drug trade, and prostitution, each of which has its cognate in substantially similar, but non-criminal activity. On the class control functions inherent in the regulation of such activities by the criminal justice system, see SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915*, at 149–200 (1983) [hereinafter HARRING, *POLICING A CLASS SOCIETY*].

contemporary criminal justice system so inclined to sanction the lower classes, especially in an era of international “labor arbitrage” where the aggregate social value of labor is directly related to its overabundance and where the fiscal burdens of criminal sanctions are so high? And what value is served, if not the furtherance of some transcendently valid moral and utilitarian agenda, by the achievement of widespread *obedience* to the law on the part of the lower classes? These questions frame a very different inquiry into the nature of the criminal justice system as an institution not of social protection or of sanction and symbolism in the abstract, but of social control aimed at the lower classes.

The attempt to uncover in the criminal justice system an agenda of social control has tended to ascribe to the system three main functions: asserting direct forms of control over surplus labor, especially via the criminal justice system’s relationship to unemployment; mobilizing idle labor to participate in the capitalist labor market; and generally disciplining the lower classes to acquiesce to the prevailing norms of property, hierarchy, and authority. A brief review of these aspects of the criminal justice system highlights their logic, history, and bases in social thought.

1. Punishment and Surplus Labor

The notion that the criminal justice system serves to control surplus labor consists of the view that criminal punishment works to regulate the ranks of surplus labor—the pools of unemployed, underemployed, and unemployable people—that are generated in the normal functioning of the capitalist economy. This thesis rests on a particular view of the relationship between the criminal justice system and the dynamics of political economy. Key to the development of such a perspective is the work of Georg Rusche and Otto Kirchheimer.

In the 1930s, Rusche and Kirchheimer presented a revolutionary account of the relationship between criminal punishment and political economy. That work was prefaced with the view that “the bond” supposed, “to exist between crime and punishment prevents any insight into the independent significance of the history of penal systems. It must be broken.”¹⁰⁸ “Punishment,” they contended, “must be understood as a social phenomenon freed from both its juristic concept and its social ends.”¹⁰⁹

108. GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 5 (Russell & Russell 1968) (1939).

109. *Id.*

With passages like this one, Rusche and Kirchheimer set forth the first of a number of insights that have proven central not only to an understanding of the labor control functions of criminal punishment, but also to an appreciation of the social control dimensions of the criminal justice system more broadly. In particular, as the passages above reveal, they contend that there exists in modern societies no general connection either between justifications for (or theories of) punishment and what the criminal law actually does, or between punishment policies and the empirical realities of crime and criminality. Instead the whole enterprise of criminal justice must be understood above all in its relationship to the economic structures of society.¹¹⁰

From this perspective, Rusche and Kirchheimer determined that both the mode and the level or intensity of criminal punishment in society are largely determined in the first instance by social, or class, structure, and in the second instance by the prevailing social value of labor.¹¹¹ They concluded in this vein that imprisonment has its origins in the rise of capitalism, the commodity form, and the factory system. These developments conspired to reduce the social value of individuals to that of their labor, to reduce their lives to the measures of time on which the logic of incarceration is traditionally based, and to instill the utilitarian framework that underlies the key justification of incarceration. Likewise via the factory and related systems of production and management, these developments provided the organizational and architectural templates on which the modern prison would be based. Finally—and this leads to one of their most important insights as far as we are concerned—these developments created for the prison its primary functions: the control and disciplining of a population no longer subject to the security and certainty of pre-capitalist life.

110. Showing clearly the influence of Marx, Rusche and Kirchheimer suggest that this correspondence between economic structures and criminal punishment reflects a still more integral relationship between criminality and class conflict. The criminal law and its institutions of punishment are neither simply indexes of, nor functional responses to, the levels of moral wrongfulness or social harm in the abstract. Rather, the entire criminal justice system is conditioned by class conflict and ultimately facilitates the control and domination of the interests of powerful classes over weaker classes, capital over labor. In this light, traditional justifications for crime and punishment are, presumptively, ideological forms which a truly critical account of punishment must be prepared to transcend. *Id.* at 72–83, 95–102, 141–43; cf. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 3–37, xi–xiv (1991).

111. In this sense, they actually advance a two-part thesis about the relationship between punishment and social structure: a “severity of punishment” argument, which holds that punishment tends to become more severe in times of economic decline; and a “utility of punishment” argument, which holds that punishment expands in scale in times of economic decline to absorb surplus labor. It is primarily the latter of these that concerns us. On the interrelationship of these arguments, see, for example, IVAN JANKOVIC, *PUNISHMENT AND THE POST-INDUSTRIAL SOCIETY* (1977).

Rusche and Kirchheimer determined that, while social and economic structures broadly influence the kind of punishments prevalent in a society, the social value of labor tends to determine the relative severity of sanctions within that system of punishment. And so, while the rise of capitalism prefigured the rise of the prison, it also tied the length and prevalence of prison sentences to the value of labor, hence to the prevailing level of surplus labor. When labor is abundant, imprisonment increases as imprisonment serves to warehouse surplus labor and to drive workers to work at prevailing wages. When labor is relatively scarce, imprisonment falls as the need to control workers diminishes and more workers are returned to the market.¹¹²

This is, in a nutshell, Rusche and Kirchheimer's thesis on the nature of criminal punishment as a mechanism of labor control. Although more rigid and economic than many modern scholars would prefer, their approach is not insensitive to countervailing tendencies. Rusche and Kirchheimer recognized that in times of extreme labor scarcity or social crisis, incarceration itself might play a direct role in putting people to work—with the prison essentially becoming a workshop, factory, or labor agency.¹¹³ They were also aware that political forces can alter imprisonment practices in ways contrary to the logic of labor control, sometimes increasing incarceration, sometimes decreasing it.¹¹⁴ Likewise, they appreciated that fiscal concerns may often impose completely extraneous limitations on how many people the state can afford to incarcerate, perhaps contrary to the logic of labor control. And yet they thought the basic correlation between unemployment and incarceration would generally hold true in the long run.¹¹⁵

This extraordinary idea about the relationship between criminal punishment and surplus labor—in fact, between the whole of the criminal justice system and surplus labor—represents one of the most influential efforts to uncover the social control functions of the criminal justice system.

112. Georg Rusche, *Labor Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice*, 10 CRIME & SOC. JUST., 2, 4–5 (Gerda Dinwiddie, trans.) (1978).

113. The use of the criminal law to mobilize labor in this direct fashion is particularly evident with regard to blacks in the American South. See generally DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (1978). In other cases, criminal law, especially vagrancy law, was used to mobilize white workers. See generally Sidney L. Haring, *Class Conflict and the Suppression of Tramps in Buffalo, 1892–1894*, 11 J. LAW & SOC'Y 873 (1977); Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265 (1992); Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667 (2004).

114. Rusche, *supra* note 112, at 4.

115. RUSCHE & KIRCHHEIMER, *supra* note 108, *passim*.

The labor control thesis has inspired a number of contemporary efforts to demonstrate a connection between imprisonment and labor supply. Over forty statistical studies as well as several narrative accounts have been compiled that confirm a direct relationship between unemployment and incarceration or other forms of criminal punishment.¹¹⁶ While uncertainty persists, this research tends to support Rusche and Kirchheimer's thesis, demonstrating positive relationships between punishment and labor supply in regard to prison admissions, overall prison population size, and severity of sentence.¹¹⁷ As we shall see shortly, though, the most important feature of Rusche and Kirchheimer's work is not so much this notion of a direct relationship between criminal justice and labor supply, but a broader, more contextual sense of the relationship between criminal justice and labor.

An important question follows from the labor control thesis: By what modes of mediation does unemployment influence incarceration rates? For Rusche and Kirchheimer, the mediation between incarceration and unemployment inheres in the convergence of two factors: the effect of unemployment on the social value of labor and the principle of lesser eligibility, which we have already discussed in relationship to the social welfare system. They reasoned that as an increase in labor supply lowers the social value of labor, this, in turn, diminishes political and moral impediments to punishment. Greater unemployment also worsens social conditions for the poor, which, according to the principle of lesser eligibility, makes it more difficult to maintain incarceration's disciplinary or deterrent effect without increasing both its scope and intensity. Accordingly, maintaining the same level of social control under conditions of increased unemployment requires an increase in the punitive character of punishment.¹¹⁸

116. For a review of these efforts, see generally Theodore G. Chiricos & Miriam A. Delone, *Labor Surplus and Punishment: A Review and Assessment of Theory and Evidence*, 39 SOC. PROBS. 421 (1992).

117. Chiricos and Delone found considerable support for the labor control thesis. Among their determinations is that "the relationship of labor surplus to punishment is more than six times as likely to be positive (87 percent) as negative (13 percent) and nineteen times as likely to be significant and positive (57 percent) as significant and negative (3 percent)." *Id.* at 428. This held true for prisons admission, overall prison population, and severity of sentence; it also held true for different levels of "aggregation" (e.g., national, state, and county). *Id.* at 428-29. This body of research also indicates a relationship between unemployment and criminal punishment that is "independent of the mediating influence of criminal behavior." *Id.* at 429.

118. See, e.g., RUSCHE & KIRCHHEIMER, *supra* note 108, at 151-52; see also Dario Melossi, *Gazette of Morality and Social Whip: Punishment, Hegemony and the Case of the USA, 1970-92*, 2 SOC. & LEGAL STUD. 259, 262 (1993) [hereinafter Melossi, *Gazette of Morality and Social Whip*].

Others have sought to complement this view of the specific connection between incarceration and unemployment with the notion that unemployment puts more pressure on the state to maintain control of the lower classes. This perspective sees the unemployed as “social dynamite,” a “dangerous class,” whose threats to “respectable” society translate into salient political pressures to toughen the criminal justice system generally. Alternatively, increased numbers of unemployed people may pose a greater challenge to the always contradictory and tenuous ideology of equality and opportunity on which contemporary market economies and their accompanying political systems depend for legitimacy. In this light, increases in unemployment necessitate more frequent and intensive use of incarceration in order to maintain constant levels of social control.¹¹⁹

A third line of thought locates the connection between unemployment and incarceration in the intersection of ideology and human agency. By this view, judges and prosecutors express through more severe decision making the heightened anxieties and fears generated by increases in unemployment.¹²⁰ In particular, elite internalization of a sense of crisis is the medium that translates higher unemployment into greater incarceration.¹²¹ What is notable about this approach is that, like the more structural accounts just mentioned, it is not dependent on any notion of official conspiracy on behalf of the upper classes; neither does it assume an unmediated relationship between labor dynamics and criminal justice. Instead, it invokes the subtle role of culture, ideology, and politics in translating class interests into official decision-making.¹²²

The differences among these perspectives reflect a deeper question about the relative importance of social structure versus human agency (including politics, law, and culture) in shaping modern society. Suffice to say that structure and agency represent complementary dynamics and the course of history reflects their complex interplay.¹²³ The view in this Article is that social structure plays a key role in conditioning more conscious behaviors within the criminal justice system. Such structures establish an evolving framework in which criminal justice responses are ordered and from which

119. A notable example of this type of scholarship seeks to explain the expansion in federal criminal liability over the past couple of decades as a calculated effort to deflect public attention from social problems and failed economic policies. See generally David E. Barlow et al., *The Political Economy of Criminal Justice Policy: A Time-Series Analysis of Economic Conditions, Crime, and Federal Criminal Justice Legislation 1948–1987*, 13 JUST. Q. 223 (1996).

120. Chiricos & Delone, *supra* note 116, at 424–26.

121. See, e.g., Dario Melossi, *Changing Representations of the Criminal*, 40 BRIT. J. CRIMINOLOGY 296, 298–99 (2000).

122. See generally STEVEN BOX, *RECESSION, CRIME AND PUNISHMENT* (1987).

123. See, e.g., Reiman, *supra* note 105, at 115–17.

they derive their rationality and coherence. It is for this reason unnecessary to choose from among these possible connections between incarceration and unemployment a single one that is correct. Instead, each offers a complementary account of how conditions of surplus labor are translated into higher rates of imprisonment—or how, for that matter, a “neutral” system of criminal justice, ostensibly committed to protecting victims and punishing wrongdoers, and relatively devoid of conspiratorial elements, could actually exert more general dynamics of social control over the lower classes.

2. Labor Discipline and Social Marginality

In its purest form, Rusche and Kirchheimer’s labor control thesis suggests not only a very direct causal relationship between unemployment rates and incarceration rates, but also a proportional relationship between these phenomena over time. This presents an apparent difficulty in the face of dramatic increases in incarceration rates over the past three decades, which have not been preceded by comparable increases either in unemployment rates or, for that matter, crimes committed.¹²⁴ Rather than falsifying Rusche and Kirchheimer’s thesis, though, this apparent problem with their thesis has inspired a closer consideration of the link between unemployment and incarceration, which has in turn led to the elucidation of another, more nuanced and perhaps more important dimension of the criminal justice system’s social control function.

In essence, the thesis that has emerged is that through punishment and deterrence, the criminal justice system serves an active, labor-disciplining function which operates alongside its more passive labor control function. As Dario Melossi has been keen to remind, this thesis is actually already implicit in Rusche and Kirchheimer’s project.¹²⁵ It involves two mutually supporting processes: one directly coercive and tied in with the principle of lesser eligibility; the other coercive in a relatively softer, more “educative” sense and realized not strictly by the threat of punishment, but by the criminal justice system’s internal structures of socialization.

124. See generally George C. Galster & Laure A. Scaturro, *The U.S. Criminal Justice System: Unemployment and the Severity of Punishment*, 22 J. RES. ON CRIME & DELINQ. 163 (1985). On the tenuous relationship between this increase in incarceration and crime rates, see generally Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, in 26 CRIME AND JUSTICE: PRISONS 17 (Michael Tonry & Joan Petersilia eds., 1999).

125. Dario Melossi, *Introduction to RUSCHE & KIRCHHEIMER*, *supra* note 108, at ix, xxiii–xxviii; see also GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 98, at 93–96.

While the first of these processes is similar in conception to conventional notions of deterrence, the idea here is not that the criminal justice system uses the threat of imprisonment to deter criminality as such. Rather, by punishment and the threat of punishment, the criminal justice system accomplishes the more subtle function of deterring the poor from falling out of the working class, embracing deviant forms of employment, or otherwise eschewing the legitimate norms of capitalist society. Punishment practices (most commonly, incarceration) can be seen as coercive mechanisms that respond to qualitative conditions of employment and the demand, articulated by economic elites through the criminal justice system that workers “perform” within the traditional economy notwithstanding these conditions. As Melossi puts it, punishment is entwined with the prevailing “economy of performance” of society.¹²⁶ “When performance demands increase, the area of human behavior that is punished (and the general severity of punishment) will also increase. The opposite happens when performance demands decrease.”¹²⁷ In this respect, punishment “functions as a sort of ‘gazette of morality.’”¹²⁸ By this view, punishment is not simply correlated with labor surplus, which is Rusche and Kirchheimer’s thesis; it is more generally entwined with class conflict, and in particular the need to maintain relatively quiescent labor market participation.

This notion parallels the thesis developed by the historian Douglas Hay. Hay famously argues that in eighteenth-century England, the criminal justice system “was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, [and] in constantly recreating the structure of authority which arose from property and in turn protected its interests”—all under conditions of economic change and general social crisis.¹²⁹ This was achieved by a regime of punishment that combined, in highly ritualized and discretionary ways, real punishments, symbolic punishments, and threats of punishment. In fact, reminding of the importance of context to the issues, Hay concerns himself not only with punishment, but also with an assortment of criminal justice institutions and doctrines. He describes how elites could use the institutions to advance a complex ideology of order, hierarchy, and property rights that retained the appearance of a universal good, while actually aggressively disciplining (“terrorizing”) the lower classes into compliance with the social order.

126. Melossi, *Gazette of Morality and Social Whip*, *supra* note 118, at 262.

127. *Id.*

128. *Id.*

129. Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 17, 25 (Douglas Hay et al. eds., 1975).

Hay's argument may be regarded narrowly, as a somewhat controversial claim about the course of development of eighteenth-century England's criminal justice system.¹³⁰ But it can also be seen as a broader reflection on the subtle ways that the criminal justice system can exert social control over the lower classes. By stressing that social control under the criminal justice system does not always mean *direct* control, and that threats, symbols, and other messages short of actual punishment can be just as important in regulating the behavior of the lower classes, Hay offers a compelling way to understand the social control functions of the criminal justice system where overt mechanisms of class domination and class exploitation have often been substantially displaced by more subtle ones.

In fact, with some notable exceptions, the most overt, instrumentalist means of disciplining labor via the criminal justice system are rarely observed today. Yet, this disciplinary function continues to characterize the role of the criminal justice system in contemporary society, albeit usually in the more subtle ways that concern Hay. Today, rather than transparent schemes of old, such as leasing convicts to private business or auctioning off vagrants to those in need of labor, it is the threat of incarceration that serves most often to discipline labor. Those who refuse to support themselves by accepting legitimate wage labor at its market rates face harsh sentences if they turn instead to crime for support. This dilemma captures the reality of everyday life for many lower class people, for whom crime presents a real alternative to unemployment, underemployment, and relentless poverty—an alternative made all the more appealing by recent, deleterious changes in the structure of work, the availability of welfare, and the overall condition of the lower class.¹³¹ That most lower class people do not regularly resort to crime, even in the face of such abject social marginality, or that they themselves may have strong commitments to the harsh treatment of criminals, hardly disproves this claim, as many conservatives suggest. Instead, such apparent complications merely show

130. Hay's historical claims have drawn criticism from those, like John Langbein and Peter King, intent to show that valid considerations of morality and democracy, and not dynamics of class conflict, informed the patterns uncovered by Hay. Whatever their merits, these claims are less important than the broader inquiry Hay's work has invited into the role of ideology, symbolism, and informal practices in constituting the class control functions of criminal law and criminal punishment. On this debate, see GARLAND, PUNISHMENT AND MODERN SOCIETY, *supra* note 98, at 118–24.

131. See JOHN HAGEDORN WITH PERRY MACON, PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY 101–05, 118–27 (1988); JAY MACLEOD, AIN'T NO MAKIN' IT: ASPIRATIONS AND ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD 31–33, 177–79 (1987). See generally WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS (1996); Stephen W. Baron, *Street Youth Labour Market Experiences and Crime*, 38 CAN. REV. SOC. & ANTHROPOLOGY 189 (2001).

that this disciplinary function actually works quite well in socializing acceptance of the prevailing social order and of the means by which it replicates itself.¹³²

In the light of this thesis, criminal justice emerges as a way of directly regulating surplus labor—the Rusche and Kirchheimer thesis—and also as a means of containing class conflict, controlling social marginality, and affirming the sanctity of wage labor and private property. This agenda is carried out by a complex array of institutional responses with varying degrees of directness: the warehousing by imprisonment of surplus labor; the control, both directly and symbolically (in the parlance of justification theory, the deterrence) of dissent and other acts, like riot or theft, that threaten social order; and, even more diffusely, the use of the entire edifice of crime and punishment to articulate Melossi's gazette of morality.

Compounding these disciplinary effects is the role of the modern prison in actually training inmates to submit to modern structures of workplace authority, labor management, and private life. Although also suggested in the work of Rusche and Kirchheimer,¹³³ this thesis is made perhaps most forcefully by Michael Ignatieff. Ignatieff shows how, under the aegis of liberal, "humanitarian" reformism, the prison was constructed around the relentless and often brutal inculcation of industrial labor values—around a campaign, as he puts it at one point, "to implant the inner disciplinarians of guilt and compunction in working-class consciences."¹³⁴ While his initial emphasis is historical and English, Ignatieff proposes that this disciplinary orientation, which he regards as so vital to wresting labor market compliance from "free" people, remains a defining characteristic of the contemporary prison in the Western world—a point we will explore later. Equally clear is that these functions are not confined to actual imprisonment; they are just as aggressively advanced by intermediate sanctions, especially probation and parole, which typically encourage labor market participation by the threat of actual incarceration.¹³⁵

132. On concerns about labor discipline and social discipline generally in the rise of the politics of law and order, see CHRISTIAN PARENTI, *LOCKDOWN AMERICA* 3–13, 29–44, 238–42 (1999).

133. RUSCHE & KIRCHHEIMER, *supra* note 108, at 63, 107; *see also* GARLAND, *PUNISHMENT AND MODERN SOCIETY*, *supra* note 98, at 95. Cf. DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* 40–41, 50–51 (Glynis Cousin trans., Barnes & Noble Books 1981) (1977).

134. MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750–1850*, at 212–13 (1978).

135. *See generally* JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* (1993).

3. Policing and the Control of the Lower Classes

The criminal justice system's social control function extends to policing as well. According to most authorities, the police evolved from the very outset not as arbiters of crime control and public safety, but as agents in the construction and maintenance of social order under capitalism.¹³⁶ From the beginning, the main functions of the police centered around what Mark Neocleous calls the "consolidation of the social power of capital and the wage form"; this extended to the "fabrication of . . . wage labour" via the suppression of archaic or otherwise unacceptable modes of employment, the securing of capitalist forms of property and the social hierarchies built upon them, and the maintenance of spatial boundaries among the classes.¹³⁷

Whether this class control agenda characterizes modern police is more controversial. Several notable scholars including Theodore Ferdinand, Eugene Watts, and especially Eric Monkkonen, have argued that the period from the end of the nineteenth century through the beginning of the twentieth century marked a shift in police functions away from social control to crime control.¹³⁸ By pointing to evidence of general decline of more obvious instances of class policing—for example, strike breaking and harassment of tramps—combined with a new emphasis on "real" or serious crime, and by appealing to the very plausible notion that the consolidation of industrial capitalism and the growing effectiveness of other means of social control rendered class control by the police obsolete, this crime control thesis seems to present a compelling challenge to the view of contemporary police as agents of class based social control.

Nevertheless, a number of scholars, including not only Neocleous but also social scientists Helen Boritch and John Hagan and legal historian Sidney Haring, have countered that the real transition in the nature of police power over this period was from transparent and explicit, to less

136. See ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 30–64 (Robert Fogel & Stephan Thernstrom eds., 1981); cf. Cyril D. Robinson & Richard Scaglion, *The Origin and Evolution of the Police Function in Society: Notes Toward a Theory*, 21 LAW & SOC'Y REV. 109 (1987). See generally WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870* (1973); Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1 (Norval Morris & Michael Tonry eds., 1980)

137. NEOCLEOUS, *supra* note 105, at xii–xiii.

138. See MONKKONEN, *supra* note 136, at 156–61; Theodore N. Ferdinand, *From a Service to a Legalistic Style Police Department: A Case Study*, 4 J. POLICE SCI. & ADMIN. 302, 304–12 (1976); Eugene J. Watts, *Police Response to Crime and Disorder in Twentieth-Century St. Louis*, 70 J. AM. HIST. 340, 351–58 (1983). See generally Nathan Douthit, *Police Professionalism and the War Against Crime in the United States, 1920s–30s*, in 2 POLICE FORCES IN HISTORY 317 (George L. Mosse ed., 1975).

transparent and more subtle, forms of class repression. They argue that the embrace of norms of crime control, professionalism, and to some extent rule of law values, which seems so clearly to mark their transition to crime control, actually allowed the police to better legitimate and better conceal their *class* control functions while imposing no great restraints on what the police actually do. Moreover, these scholars contend, the consolidation of industrial capitalism, with its near universalization of wage labor and its entrenchment of notions of legality, did relieve the police of many of the more active obligations of class control, leaving them to perform more passive, less visible, and seemingly more neutral functions in maintaining bourgeois order.¹³⁹

A central claim of this critical scholarship is that the act of “neutrally” enforcing the criminal law often constitutes an exercise in the control of the lower classes by the police.¹⁴⁰ Facially neutral laws, apparently keyed to protecting consensual interests and values, are enforced by the police in ways that implicate the lower classes and that allow the state to assert special control over their lives. The social control activity of the police is not limited to formal law enforcement. Indeed, the police actually spend relatively little in the way of time and resources enforcing the criminal law.¹⁴¹ Much of their work consists of informal (sometimes extralegal)

139. NEOCLEOUS, *supra* note 105, at 63–118. Sidney Haring relies on his study of urban policing in the period between the Civil War and the First World War specifically to refute the crime control thesis. HARRING, *POLICING A CLASS SOCIETY*, *supra* note 107, at 3–4. Haring argues that the “police institution . . . [in] its modern form emerged from class struggle under industrial capitalism” and remains “essentially the same” now as it was in the late nineteenth century. *Id.* at 3. For Haring too, professionalization, the adoption of rule of law norms, as well as bureaucratization and the overall de-politicization of policing, were all adopted in ways that enhanced the legitimacy of the police and so actually improved their ability to control the lower classes. *Id.* at 247–58. What the police actually did, according to Haring, entailed both dramatic undertakings, like strike-breaking and the persecution of radicals, and seemingly mundane operations, like the cultivation of work ethics, thriftiness, and other bourgeois values, often in the guise of enforcing “public order” offenses. *Id.* at 49–60, 147–48, 198–200, 222–23. And of course, there was also the general mandate of protecting property. *Id. passim*. A very similar rejoinder to the Monkkonen thesis is offered by Helen Boritch and John Hagan in their study of almost a century of policing in Toronto. Boritch and Hagan argue that Monkkonen draws too rigid and arbitrary a distinction between class control functions and genuine criminal enforcement. Helen Boritch & John Hagan, *Crime and the Changing Forms of Class Control: Policing Public Order in “Toronto the Good,” 1859–1955*, 66 SOC. FORCES 307, 313–15, 330–31 (1987). They perform an empirical analysis of Toronto policing records which suggest less a shift from class control to crime control than “an ongoing historical synthesis in the class and crime control functions of the police.” *Id.* at 309–10, 331.

140. Nicholas R. Fyfe, *Policing the City*, 32 URB. STUD. 759, 766–67 (1995).

141. NEOCLEOUS, *supra* note 105, at 93–94. As Neocleous puts it, “criminal law enforcement is something that most police officers do with the frequency located somewhere between virtually never and very rarely.” *Id.* at 93. Although the issue is controversial, police

interventions against, and sometimes on behalf of, the poor: responding to accidents and mediating non-criminal disputes; monitoring the entry of the poor into affluent neighborhoods and important commercial districts; challenging loiterers, trespassers, and other suspicious persons; and confining prostitutes, hustlers, and other peddlers of deviant goods to areas suitably remote from upper class life.¹⁴² Police personnel themselves sometimes identify this project of policing the boundaries of class as their central function.¹⁴³

IV. THE CHANGING DYNAMICS OF SOCIAL CONTROL AND THE RULE OF LAW'S FATE IN MODERN SOCIETY

The social welfare system and the criminal justice system are not mutually exclusive institutions of social control. Quite the contrary, the history of the twentieth century shows clearly that they have often discharged their social control functions in parallel, often complementary fashion. Nevertheless, through much of this period—especially from the 1940s through the 1970s—the social welfare system occupied the dominant role in this regard. Consistent with this asymmetrical relationship, through this period the social welfare system expanded fairly steadily in overall size and in the relative comprehensiveness of its protections, while the criminal justice system remained relatively small in scale, and its methods increasingly invested in welfarist tendencies. Beginning in the early 1970s, however, this relationship between the social welfare system and the criminal justice system began to undergo an inversion that would first install the criminal justice system as the dominant, and the social welfare system as the subordinate, system of social control of the lower classes. Second, it would establish a punitive orientation as the dominant motif of social control in virtually all respects—purging the criminal justice system of its welfarist tendencies and installing ever more punitive tendencies in what has remained of the social welfare system. This Part describes this change in the dominant form of social control in some detail. It draws on this to explain the deterioration of rule of law norms. And with a focus on the role of fiscal crisis, ideology, and the overall political economy of

may spend *most* of their time on non-criminal functions. RICHARD V. ERICSON, *REPRODUCING ORDER: A STUDY OF POLICE PATROLWORK*, 52–55 (1982); Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 700–04 (1967).

142. See Fyfe, *supra* note 140, at 764–65; cf. MIKE DAVIS, *CITY OF QUARTZ* 223–60, 267–316 (Vintage Books 1992) (1990).

143. See, e.g., ANTHONY V. BOUZA, *POLICE UNBOUND* 73–74 (2001); Fyfe, *supra* note 140, at 760.

contemporary America, it also undertakes to explain why this process has unfolded.

A. The Relationship Between the Social Welfare System and the Criminal Justice System as Modes of Social Control

From the very outset, two very basic factors suggest a surrogate relationship between the social welfare system and the criminal justice system. First, their agendas of social control have a shared focus on the lower classes. Second, these agendas are roughly directed to the same key missions: the direct management of surplus labor; the prosecution of an agenda of moral training centered on labor discipline; and the general goal of policing the habits of the poor—all with the aim of socializing, politicizing, and legalizing the dysfunctions of capitalism and the class conflict that is embedded in these dysfunctions.

Of course the forms by which each articulates this agenda are very different. However pernicious the social control dimensions of the social welfare system vis-à-vis the lower classes, as we have seen, it prosecutes its agenda in a relatively soft fashion. Participation in the social welfare system is at least formally optional; coercion is largely by denial of support to the needy, not by positive forms of punishment. Pernicious features aside, the social welfare system's overall program is generally rooted in a left-liberal agenda steeped in progressive, egalitarian, even humanistic values. All of this distinguishes the social welfare system from the criminal justice system, which is by its very nature premised on the coercive application of force and violence. While post-war/pre-1970s penology and criminality often embraced welfarist themes (disingenuously, according to many),¹⁴⁴ the logic of the contemporary criminal justice system is overtly coercive, inegalitarian, separatist, indeed fundamentally reactionary.¹⁴⁵ For these reasons, the criminal justice system has been aptly described as a hard or "right-handed" (as opposed to soft or "left-handed") mode of controlling the lower classes.¹⁴⁶

144. By the 1970s a full-blown critique of welfarist criminal justice policies had emerged, primarily from leftists who stressed how welfarist themes rationalized the system's social control functions. See generally STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* (1985).

145. On the contemporary criminal justice system's embrace of these values, see generally DAVID GARLAND, *THE CULTURE OF CONTROL* (2001) [hereinafter GARLAND, *THE CULTURE OF CONTROL*].

146. On the right-handed/left-handed distinction, see PIERRE BORDIEU, *The Left Hand and the Right Hand of the State*, *LE MONDE*, Jan. 14, 1992, reprinted in *ACTS OF RESISTANCE* 1 (Richard Nice trans., New Press 1998).

The shift from the social welfare system to the criminal justice system as the dominant mode of social control has been of enormous importance to the fate of the rule of law in contemporary society. But I do not wish to suggest that this shift has been absolute. Rather, it is characterized by the newfound hegemony, not the absolute dominance, of the criminal justice system, and by the diffusion of a much more punitive logic within each mode of social control. On one level, this has occurred by the retrenchment of the social welfare system in parallel with the expansion of the criminal justice system, with the functions formerly discharged by the latter increasingly taken over by the former. On another level, this shift has taken political and ideological form in changes in the relative prestige and legitimacy of each mode of control.

B. The Retrenchment of the Social Welfare System

Born tentatively out of the Progressive Era and the Great Depression, the American social welfare system continued to evolve in fits and starts through the first three decades of the postwar era.¹⁴⁷ In the period from the 1960s through the early 1970s, spurred by the “War on Poverty,” the system expanded dramatically.¹⁴⁸ By the early 1970s, the American social welfare system consisted of a number of key programs, all in some degree mandated, funded, or administered by the federal government: relatively comprehensive social insurance; public relief in the form of income supports; subsidized housing; food assistance, particularly via the food stamp program; various health insurance programs, particularly for the elderly and disabled; as well as minimum wage standards and unemployment insurance. Along with this expansion in areas of coverage came lower eligibility thresholds, which entitled more people to receive

147. Although the New Deal only began, in Michael Katz’ words, a “semiwelfare state,” it did dramatically expand welfare programs of all sorts: social insurance, including retirement and unemployment benefits; work relief; outdoor relief; transient services; and housing support. KATZ, *supra* note 91, at 224–55. The centerpiece of this program was the creation of the Social Security System. *Id.* at 242–50. The New Deal was particularly significant for federalizing for the first time the main agencies of welfare. *Id.* at 225–27. On the evolution of the social welfare system, see generally PIVEN & CLOWARD, *REGULATING THE POOR*, *supra* note 85.

148. Between 1965 and 1972, federal spending on social welfare increased from \$75 billion to \$185 billion. KATZ, *supra* note 91, at 266. This increase in funding was aimed primarily at programs that increased the magnitude of relief available, especially Aid to Families with Dependent Children and government assisted housing, that improved access to health care and nutrition, and that promoted “opportunity” (principally by training and education) and community-based responses to the ills of lower class life. *Id.* at 269–82. In many, but not all, instances, eligibility requirements were also loosened. *Id.* at 270.

benefits, greater benefits within these programs,¹⁴⁹ and the erosion of racial barriers to eligibility.¹⁵⁰ This expansion of the social welfare system was not insignificant to the condition of the lower classes, whose standards of living and life opportunities were improved considerably.¹⁵¹

These positive features did not, however, obviate the system's problematic aspects, which went well beyond either social control functions or the affronts to the rule of law which we have mentioned. Even at its height, the social welfare system remained an irrational patchwork of programs, unresponsive to the basic needs of many members of the lower classes, and able to mitigate but not substantially eliminate unemployment, poverty, and social marginality. Consistent with its function as an institution of social control rather than of genuine social reform, the system that emerged was by all appearances *designed* to leave intact existing distributions of economic power, wealth, and social privilege.¹⁵² Despite its liberalization, the social welfare system never abandoned its array of restrictive, disciplinary eligibility requirements, and never offered an attractive alternative to any but the worst kinds of work. Moreover, those parts of the social welfare system that most directly benefit the lower classes—public assistance, food aid, and public housing—were never more than a small share of government expenditures.¹⁵³ A number of programs, including social and unemployment insurance, have consistently been funded by regressive taxation.

The enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") constitutes the definitive moment

149. As a result of these changes, for example, the number of families drawing the primary form of public assistance, Aid to Families with Dependent Children ("AFDC"), increased by several fold between 1960 and 1972. In 1960, 787,000 families received AFDC benefits, and by 1972, 3,049,000 did. Admin. for Children & Families, Cash Assistance for Needy Families, <http://www.acf.hhs.gov/news/stats/3697.htm> (last visited Oct. 21, 2005) [hereinafter Cash Assistance]. Over that same period, the percentage of the United States population "on welfare" increased from less than two percent to over five percent. Admin. for Children & Families, Percentage of the U.S. Population on Welfare Since 1960, http://www.acf.hhs.gov/news/stats/6090_ch2.htm (last visited Oct. 21, 2005).

150. Boris, *supra* note 89, at 29–32.

151. KATZ, *supra* note 91, at 262–63, 278; *see also* Sar A. Levitan & Robert Taggart, *The Great Society Did Succeed*, 91 POL. SCI. Q. 601, 603–613 (1976–77). *See generally* ROBERT H. HAVEMAN, *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS: ACHIEVEMENTS, FAILURES, AND LESSONS* (Robert H. Haveman ed., 1977).

152. KATZ, *supra* note 91, at 263.

153. *Id.* at 242–43, 246–47. A rigid distinction between social insurance and public assistance was built into the social welfare system from the time of its modern formulation in the 1930s. *Id.* at 245–47. By the 1970s, the vast majority of government spending on welfare was flowing to those not in the lower classes. *Id.* at 275–76.

in the retrenchment of the social welfare system.¹⁵⁴ PRWORA almost completely “devolved” to the states the role of administering public assistance; it restricted immigrants’ eligibility for several forms of benefits; it restricted eligibility for Supplemental Security Income (“SSI”); it time-limited food stamp eligibility and denied food stamps to broad categories of people, particularly “able bodied” people without children; and perhaps most notably, the act completely eliminated the main vehicle of income support, Aid to Families with Dependent Children (“AFDC”), replacing it with Temporary Aid for Needy Families (“TANF”), a time-limited program that requires “workfare” or job training participation as conditions of eligibility. With regard to this last change, the statute also gave states incentives to encourage workfare participation and to reduce overall welfare roles; it allowed the states to cap benefit levels and to delegate administrative functions to private charities and churches; and it also featured an array of rules relative to the discouragement of single motherhood.¹⁵⁵ As one authority sums it up, “PRWORA totally reorganized federal/state relations on welfare requirements[,] thereby ending a sixty-year-old federal entitlement system designed to provide a safety net for America’s poor.”¹⁵⁶

In line with its explicit purposes, which include “end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage” and renouncing individual “entitlement” to government assistance,¹⁵⁷ the Act has reduced considerably the number of public assistance beneficiaries as well as overall levels of welfare “dependency.”¹⁵⁸ Moreover, most of those who “left” the welfare roles in

154. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 5, 7, 21, 25 & 42 U.S.C.).

155. For an overview of the Act’s main features, see BRENDON O’CONNOR, *A POLITICAL HISTORY OF THE AMERICAN WELFARE SYSTEM: WHEN IDEAS HAVE CONSEQUENCES* 228–35 (2004) [hereinafter O’CONNOR, *A POLITICAL HISTORY*]. See generally Gail P. Dave et al., *Development in Policy: Welfare Reform*, 16 YALE L. & POL’Y REV. 221 (1997).

156. O’CONNOR, *A POLITICAL HISTORY*, *supra* note 155, at 226.

157. 42 U.S.C. § 601(a)(2)(b) (2000). The Act’s other stated purposes were all concerned with enforcing a traditional family structure. See *id.* § 601(a)(1)–(4). On the decline in food stamps, see DEP’T OF HEALTH & HUMAN SERV., *INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS 2002*, at II-15 tbl.IND 3b (2003) [hereinafter *INDICATORS OF WELFARE DEPENDENCE*]; see also Marcia Bok & Louise Simmons, *Post-Welfare Reform, Low-Income Families and the Dissolution of the Social Safety Net*, 23 J. FAM. & ECON. ISSUES 217, 220–21 (2002).

158. *INDICATORS OF WELFARE DEPENDENCE*, *supra* note 157, at I-7 tbl.SUM 1, II-5 tbl.IND 1b (showing decline in number of beneficiaries and percentage dependant on AFDC/TANF, food stamps, and Supplemental Security Income in aftermath of PRWORA); *id.* at II-13 tbl.IND 3a (showing decrease of one quarter in the percentage of population receiving AFDC/TANF

the Act's aftermath were apparently forced off by deterrent and disqualifying provisions.¹⁵⁹ In addition to reducing public assistance caseloads, PRWORA also reduced caseloads for ancillary benefits, like food stamps, Medicaid, and child care services—a phenomenon observers ascribe more to the new statute's intimidating tone than its formal effects on eligibility.¹⁶⁰ PRWORA also seems to have worked much better at diminishing caseloads than either reducing poverty (which was not among its formally stated purposes) or integrating beneficiaries into the workforce.¹⁶¹

Despite its practical and symbolic significance, PRWORA was not the beginning of welfare reform. Beginning much earlier, statutory and administrative reforms designed to restrict public assistance eligibility and reduce caseloads as well as benefit amounts were regularly adopted and even more regularly proposed.¹⁶² In addition to this, overall funding was reduced both for actual benefits and for administration.¹⁶³ As a result, the percentage of Americans receiving public assistance was kept largely constant from the 1970s until the passage of the 1996 legislation¹⁶⁴—despite the fact that during this same period before PRWORA, average AFDC benefits per recipient fell considerably.¹⁶⁵ Throughout this period, Congress

between 1970 and 1999); see also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 371 tbl.563 (2003); Cash Assistance, *supra* note 149.

159. And many of these people have suffered great hardship. Karen A. Curtis, *Financial Penalties Under the Temporary Assistance for Needy Families Program: Policy Discourse and Strategies for Reform*, 23 J. FAM. & ECON. ISSUES 239, 240 (2002).

160. Bok & Simmons, *supra* note 157, at 223–29.

161. See, e.g., *id.* at 221–31; Sylke Nissen, *Control and Marginalization: Federal and Local Welfare Politics in New York City*, 32 CRIME, L. & SOC. CHANGE 235, 246–47 (2000).

162. On the key role of the Reagan administration in fomenting an aggressive assault on welfare, see generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, *THE NEW CLASS WAR: REAGAN'S ATTACK ON THE WELFARE STATE AND ITS CONSEQUENCES* (1982) [hereinafter PIVEN & CLOWARD, *THE NEW CLASS WAR*]. Restrictive reforms were often initiated by the states, which throughout the history of American welfare have retained considerable authority over these matters, even where federal programs are concerned. KATZ, *supra* note 91, at 292–95. An expanded emphasis on work within the welfare system was an area of unsuccessful attempts at reform under President Carter. See, e.g., Desmond King, *Sectionalism and Policy Formation in the United States: President Carter's Welfare Initiatives*, 26 BRIT. J. POL. SCI. 337, 345–51 (1996). On reform efforts leading up to the 1996 Act, see Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 280–98 (1998).

163. INDICATORS OF WELFARE DEPENDENCE, *supra* note 157, at A-10 tbl.TANF 3. On the scale of funding cuts in the 1980s, see KATZ, *supra* note 91, at 297.

164. Admin. for Children & Families, Temporary Assistance for Needy Families (TANF) Percent of Total U.S. Population, 1960–1999, <http://www.acf.hhs.gov/news/stats/6097rf.htm> (last visited Oct. 21, 2005).

165. INDICATORS OF WELFARE DEPENDENCE, *supra* note 157, at A-7 fig.TANF 2, A-13 tbl.TANF 6.

and the presidency also undertook several times to give states more authority to “enforce work among recipients, to exclude certain types of applicants [from] assistance, and to establish new mechanisms of surveillance.”¹⁶⁶

Other aspects of the social welfare system were rolled back prior to PRWORA. Even before PRWORA, the value of unemployment insurance programs had begun to decline, such that today these programs provide substantially less support than several decades ago.¹⁶⁷ A similar trajectory characterizes other programs. With increases becoming rarer and more modest, the federal minimum wage is at its lowest point in real dollars in over forty years and is thirty percent below its peak value in 1968.¹⁶⁸ Through the 1980s and 1990s, subsidized housing programs were cut back and public housing tenants subjected to all manner of draconian conditions of eligibility and occupancy.¹⁶⁹ These developments are especially significant because they have a more direct effect on lower class males, who have never been generally entitled to public assistance programs like AFDC, but whose labor market participation and adherence to conventional norms have been most tenuous. Also notable is that the only social welfare program that has expanded appreciably over the last several decades, the Earned Income Tax Credit program, effectively requires labor market participation as a condition of eligibility.¹⁷⁰

166. Yvonne Zylan & Sarah A. Soule, *Ending Welfare as We Know It (Again): Welfare State Retrenchment, 1989–1995*, 79 SOC. FORCES 623, 624, 628–29 (2000). In fact, the government experimented with work requirements in the 1960s. Boris, *supra* note 89, at 29–30.

167. On the increasing inadequacy of unemployment insurance programs, see, for example, MAURICE Emsellem et al., ECON. POL’Y INST., *FAILING THE UNEMPLOYED: A STATE BY STATE EXAMINATION OF UNEMPLOYMENT INSURANCE SYSTEMS* 1–10 (2002); Heather Boushey & Jeffrey Wenger, *Coming Up Short: Current Unemployment Insurance Benefits Fail to Meet Basic Family Needs*, EPI ISSUE BRIEF No. 169, Oct. 31, 2001, at 1–5.

168. Edith Rasel et al., *Step Up, Not Out: The Case for Raising the Federal Minimum Wage for Workers in Every State*, EPI ISSUE BRIEF No. 149, Feb. 7, 2001, at 1–2.

169. The overall trend in public housing over the last three decades entails an overall stagnation in public housing stock (including subsidized housing) as well as a focus on subsidization of private housing stock. See, e.g., MASON C. DOAN, *AMERICAN HOUSING PRODUCTION 1880–2000: A CONCISE HISTORY*, 156–57, 191–92 tbl.F (1997); R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING: IDEOLOGY AND CHANGE IN PUBLIC POLICY* *passim* (2d ed. 1995); PAUL PIERSON, *DISMANTLING THE WELFARE STATE?* 74–99 (1994); see also Roger Biles, *Epilogue to FROM TENEMENTS TO THE TAYLOR HOMES* 265, 265–69 (John F. Bauman et al. eds., 2000). On eligibility and occupancy rules, see Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government’s War on Drugs: A Legal and Rhetorical Analysis of Department of Housing and Urban Development v. Rucker*, 10 GEO. J. ON POVERTY L. & POL’Y 157, 158–60 (2003).

170. For an overview of the features and functions of the Earned Income Tax Credit, see SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, *HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT* (2003).

Predictably, this long process of retrenchment has imposed considerable social costs on the lower classes. Official poverty rates, which in some respects tend to discount contemporary levels of poverty, show that poverty declined steadily during the post-war era through the mid 1970s, but has not decreased appreciably since then.¹⁷¹ Neither has the prevalence of “deep poverty” among those at the lowest end of the income scale.¹⁷² Moreover, over the last thirty years poverty has become more concentrated in center cities with only recent indications of a diffusion into suburban areas;¹⁷³ and, like virtually all social problems incidental to the retrenchment of the social welfare system, poverty has also remained especially concentrated among blacks and single women with children.¹⁷⁴ Following a long period of postwar improvement, in the 1970s real wages entered a prolonged period of stagnation and relative decline.¹⁷⁵ This has led to the “working poor” phenomenon, characterized by active labor market participation that does not lead out of poverty.¹⁷⁶ Over the same period, overall economic

171. ROBERT POLLIN, *CONTOURS OF DESCENT: U.S. ECONOMIC FRACTURES AND THE LANDSCAPE OF GLOBAL AUSTERITY* 45–47 (2003); BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, *CURRENT POPULATION REPORTS, POVERTY IN THE UNITED STATES: 2002*, at 3–4 fig.1 (2003). In particular, the official measure, which is consumption- (as opposed to income-) based and indexed to food prices, has not been regularly updated to account for changes in consumption and labor patterns, household composition, or relative inequality. See NATIONAL RESEARCH COUNCIL, *MEASURING POVERTY: A NEW APPROACH* 1–15 (Constance F. Citro & Robert T. Michael eds., 1995); Thomas Corbett, *Poverty: Improving the Measure After Thirty Years (A Conference)*, 20 *Focus* 51, 51 (1999); Robert K. Triest, *Has Poverty Gotten Worse?*, 12 *J. ECON. PERSP.* 97, 97–100 (1998).

172. *INDICATORS OF WELFARE DEPENDENCE*, *supra* note 157, at III-7 tbl.ECON 2 (measuring by the percentage of the population with incomes less than fifty percent of the poverty line).

173. See ALAN BERUBE & WILLIAM H. FREY, BROOKINGS INST., *A DECADE OF MIXED BLESSINGS: URBAN AND SUBURBAN POVERTY IN CENSUS 2000*, at 1–3, 12 (2002); PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 29–58 (1997). See generally Lincoln Quillian, *Migration Patterns and the Growth of High-Poverty Neighborhoods, 1970–1990*, 105 *AM. J. SOC.* 1 (1999).

174. On the persistence of high poverty rates and other dynamics of inequality among blacks, see, for example, Taryn Lindhorst & Ron Mancoske, *Race, Gender and Class Inequalities in Welfare Reform*, 10 *RACE GENDER & CLASS* 27 (2003). On the persistence of high poverty rates and other dynamics of inequality among single women with children, see KATHRYN H. PORTER & ALLEN DUPREE, CTR. ON BUDGET & POLICY PRIORITIES, *POVERTY TRENDS FOR FAMILIES HEADED BY WORKING SINGLE MOTHERS, 1993 TO 1999*, at 6–7 (2001).

175. See, e.g., POLLIN, *supra* note 171, at 42–45 tbl.2.7, fig.2.1; Jared Bernstein & Lawrence Mishel, *Has Wage Inequality Stopped Growing?*, *MONTHLY LAB. REV.*, 3, 8 chart 3 (1997). Significantly, the percentage of the officially poor who work full time has also increased significantly and steadily since the 1970s. U.S. Census Bureau, *Historical Poverty Tables*, tbl.18, <http://www.census.gov/hhes/poverty/histpov/hstpov18.html> (last visited Oct. 21, 2005).

176. See, e.g., Bok & Simmons, *supra* note 157, at 233–34. See generally KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (Vintage 2000).

inequality began a dramatic increase,¹⁷⁷ food insecurity and hunger remained entrenched problems for a substantial minority of people,¹⁷⁸ and homelessness, vagrancy, and begging all returned to the fore as common features on the contemporary American landscape.¹⁷⁹ By every indication, though, retrenchment policies are likely to continue to unfold.¹⁸⁰

C. The Transformation of the Criminal Justice System and the Erosion of the Rule of Law

While the social welfare system has fallen into retrenchment, the criminal justice system has moved in a radically different direction. Over the last several decades, the criminal justice system has undergone a massive transformation, expanding dramatically its overall domain and intensifying its expressions of sovereignty. In the course of this transformation, the criminal justice system has retreated from an earlier, belated embrace of rule of law norms, reflected in the civil liberties revolution of the 1960s and early 1970s, to return to a state of conflict with these norms. This development is particularly significant given the intensity of sovereignty in the criminal justice context.

The idea of the sovereignty of law embodied in legality and legal generality directly implies the familiar principles, *nulla cimen sine lege* and *nulla peona sine lege*. Moreover, as our earlier discussion makes clear, generality presupposes separation of powers and is inconsistent with the retroactive assertions of criminal justice authority, and with excessively individualized, vague, or discretionary definitions of criminality. Generality also commands adherence to principles of formal equality under the law as well as the administration and adjudication of criminal law in accordance with regular procedures.

Of course the actual fulfillment of these normative commitments depends upon the circumscription of criminal justice functions by an array of positive legal rules. Generality and legality must be embodied in

177. See, e.g., DANIEL H. WEINBERG, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, A BRIEF LOOK AT POSTWAR U.S. INCOME INEQUALITY 1 (1996).

178. See MARK NORD ET AL., U.S. DEP'T OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2001 (2003); see also INDICATORS OF WELFARE DEPENDENCE, *supra* note 157, at III-19, tbls.ECON 8a & 8b.

179. On the role of welfare retrenchment, among other structural causes, in the resurgence of homelessness, see JOEL BLAU, THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES 33-90 (1992).

180. O'CONNOR, A POLITICAL HISTORY, *supra* note 155, at 251-57; Robert Pear & Raymond Hernandez, *Campaign Politics Seen as Bottleneck for Welfare Law*, N.Y. TIMES, June 6, 2004, at A1.

conceptions of non-retroactivity, separation of powers, equal protection, and due process that are not just juridical principles but doctrines by which exercises of state power can be challenged. Likewise, the law must govern the state's assertion of claims of criminal suspicion, liability, and desert of punishment upon which its sovereignty rests, and do so in a manner that ensures compliance with the principles just mentioned as well as fidelity to the law itself on the part of officials.

It is in this manner that limits on state powers to gather evidence and detain subjects by notions of probable cause, reasonableness, and warrant requirement can be seen as critical to the realization of rule of law norms. The same can be said of the right to exclude illegally obtained evidence, to challenge illegal arrests, to a fair trial with effective counsel and meaningful confrontation of witnesses, to meaningful appeal, and to punishment as provided by law. All of these very practical procedural protections are essential to ensuring the state's adherence to the rule of law's normative agenda.¹⁸¹ Needless to say, although many of these rights are expressed in long-standing constitutional and common law principles, on the whole, they became meaningful only recently in American criminal law and procedure, and only by a fortuitous combination of structural conditions and political and judicial activism.¹⁸²

Just as American criminal justice approached compliance with the rule of law in the late 1960s and early 1970s, it began a steady retreat from this position. Long predating the "war on terrorism," this trend involves a whole series of developments in law and policy. Well-described by others,¹⁸³ the main feature of this trend need only be mentioned briefly to capture its essence. The relentless attrition of rights regarding search and seizure and arrest,¹⁸⁴ effective representation by counsel,¹⁸⁵ and appeal¹⁸⁶ has expanded

181. For a further elaboration of the connection between rule of law norms and practical civil liberties and procedural protections, see generally FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* (1996).

182. See generally JEANNE THEOHARIS & ATHAN THEOHARIS, *THESE YET TO BE UNITED STATES: CIVIL RIGHTS AND CIVIL LIBERTIES IN AMERICA SINCE 1945* (2003).

183. For an overview of the erosion of civil liberties and the relationship of these developments to rule of law norms, see generally ALLEN, *supra* note 181; DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) [hereinafter COLE, *NO EQUAL JUSTICE*]; JOHN F. DECKER, *REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA* (1992); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE: 1950-1990* (1993); David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS* 101 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273 (1986-87).

184. See generally David Cole, *Discretion and Discrimination Reconsidered*, 87 GEO. L.J. 1059 (1999); Illya Lichtenberg, *Police Discretion and Traffic Enforcement*, 50 CLEV. ST. L.

considerably the acceptable boundaries of discretionary, unequal, and legally unauthorized assertions of state power. From its promising expansion in earlier decades, equal protection doctrine has become almost irrelevant in the face of racial profiling and overwhelming racial inequalities in punishment.¹⁸⁷ And the expansion of “harmless error” doctrine has muted the formal authority of the law over official decisions.¹⁸⁸

REV. 425 (2002–2003); Tracey Maclin, *The Decline of the Right of Locomotion*, 75 CORNELL L. REV. 1257 (1989–90); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

185. The main problem in this area over the last several decades has been the failure of funding and services to keep up with the increased caseloads or resources available to prosecutors and police. See Rebecca Marcus, Comment, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 228, 233 (1994); see also Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 656–81 (1986); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6–12 (1998); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 356–74 (1995). Other impediments include increased court fees and costs, and even the effects on litigation of sentencing reform. Peter Erlinder, *Muting Gideon's Trumpet: Pricing the “Right to Counsel” in Minnesota Courts*, 60-DEC BENCH & B. MINN. 16 (2003); Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts*, 92 CAL. L. REV. 425, 427, 443–80 (2004).

186. The erosion of rights of appeal is especially evident in the habeas corpus context. These changes are reflected in a number of cases and statutes, including for example the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, & 42 U.S.C.); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (affirming exhaustion requirement); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (endorsing waiver doctrine); *Stone v. Powell*, 428 U.S. 465 (1976) (barring exclusionary rule claims). On these reforms, the effects of which are most salient in the death penalty context, see generally Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 (2002); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002).

187. Equal protection claims against racial profiling require evidence of intent and feature no exclusionary rule. See, e.g., Brooks Holland, *Safeguarding Equal Protection Rights*, 37 AM. CRIM. L. REV. 1107, 1109–10 (2000); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342–62 (1998); see also *Whren v. United States*, 517 U.S. 806, 812–13 (1996) (rejecting subjective analysis of police officers' intent in search and seizure cases for Fourth Amendment purposes). On discrimination in sentencing policy, see generally David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995). On the problem of race and equal protection in the criminal justice context, see generally Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559 (1998).

188. On the origins of the harmless error doctrine, which were initially legislative, and its gradual expansion over the last several decades, see Harry T. Edwards, *To Err Is Human, But Not Always Harmless*, 70 N.Y.U. L. REV. 1167, 1173–83 (1995); see also Jeffrey O. Cooper, *Searching for Harmlessness*, 50 U. KAN. L. REV. 309, 313–17 (2002).

These changes in doctrine are accompanied by equally significant changes in policy. The criminal justice system has expanded about five-fold in overall size in the last thirty years, incarcerating and exercising supervision over a massively expanded segment of the population.¹⁸⁹ This increase reflects above all the fact that, compared to thirty years ago, the criminal law is significantly more punitive, applying much lengthier, more onerous punishments.¹⁹⁰ There has also been significant expansion in the use of “intermediate” punishments like parole and probation.¹⁹¹ Such increases in the scale of the criminal justice response reflect an absolute expansion in sovereignty that, as we shall see later, imposes serious practical limits on the state’s capacity to adhere to rule of law norms.

Other changes in sentencing policy have not only reaffirmed, but dramatically expanded the discretion and overall power of prosecutors.¹⁹²

189. The number of people subject to the jurisdiction of the criminal justice system at every level—whether as suspects, defendants, or offenders—has increased about *five fold* in less than thirty years. At last count, American prisons and jails held over two million people on any given day. PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, NCJ 198877, PRISON AND JAIL INMATES AT MIDYEAR 2002, 1, 7 (2003); JAMES J. STEPHAN & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, NCJ 198272, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000, at 3 (2003). Moreover, the current rate of imprisonment is at least three times greater than the rate at any point prior to 1970. HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME 18–22 (2003). This incredible increase has generated equally large increases in the prevalence of the prison experience, both past and projected. At current rates, 6.6 percent of all Americans and about one-third of black Americans males may expect to serve time in prison in their lives. THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, 1 (2003). The expansion of the criminal justice system can also be seen financially. Over the last twenty years or so, “justice expenditures” have increased from 1.10 percent of gross domestic product to 1.66 percent; adjusted for inflation this represents a mean per-capita increase in annual expenditures on criminal justice from \$158 in 1982 to \$320 in 2001. LYNN BAUER & STEVEN D. OWENS, U.S. DEP’T OF JUSTICE, NCJ 202792, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2001, at 3, 8 (2004).

190. Increases in incarceration rates over the last several decades have not been proportional to increases in crime. To broach a different issue, neither have such increases clearly reduced the incidence of crime. For a critical review of the literature on this topic, see, for example, RUTH & REITZ, *supra* note 189, at 92–102.

191. See LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, NCJ 201135, PROBATION AND PAROLE IN THE UNITED STATES, 2002, at 1 (2003); DIANA R. GORDON, THE JUSTICE JUGGERNAUT 92–147 (1990).

192. See, e.g., Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 503–12 (1992); William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 97 W. VA. L. REV. 373, 382–95 (1995). Recent congressional legislation, the Feeley Amendment in particular, further limits judicial authority in sentencing. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–76;

Explicitly retroactive sanctions have come to proliferate.¹⁹³ At the same time, expanded notions of criminality have caused the criminal justice system to regulate an increasingly broad range of behaviors.¹⁹⁴ On the administrative side, private involvement in criminal justice processes in the form of private corrections and policing and victims' rights, has reemerged as a means of placing sovereignty beyond the purview of rule of law norms.¹⁹⁵ Policing, prosecution, and corrections have all become increasingly aggressive and contemptuous of legal restraints, as reflected in widespread lawlessness on the part of each of these institutions.¹⁹⁶ These

see also David M. Zlotnick, *The War Within the War on Crime*, 57 SMU L. REV. 211, 218–24 (2004).

193. A retroactive effect is evident in a number of very popular programs in contemporary criminal justice: sex offender registration laws, civil commitment regimes, and habitual offender laws. These regimes impose onerous (if not strictly “punitive”) and often indefinite sanctions on the basis of past acts, even where those acts were committed prior to the enactment of the new regime. But the courts have found ways to insulate each from constitutional challenge on this ground. In upholding sexual offender registration measures, the courts have generally taken one of two approaches. One approach is that such laws do not implicate the Ex Post Facto Clause because they do not entail punishment. See, e.g., *Smith v. Doe*, 538 U.S. 84, 97–99 (2003); *Rodriguez v. State*, 93 S.W.3d 60, 79 (Tex. Crim. App. 2002). The other approach is to reason that such measures actually criminalize failure to comply with the relevant regime and in this sense are prospective, not retroactive. See, e.g., *State v. Armbrust*, 59 P.3d 1000, 1003 (Kan. 2002). The courts have generally saved civil commitment laws from Ex Post Facto analysis by deeming them non-criminal. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 369–71 (1997); *Peterson v. State*, 36 P.3d 1053, 1055–57 (Wash. Ct. App. 2000). With habitual offender laws, the argument has usually been to construe the relevant conduct as the offence for which punishment is enhanced, which negates the problem of retroactivity. See, e.g., *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (declaring such a sentence to be “a stiffened penalty for the latest crime, which is considered to be an aggravated offence because a repetitive one”); *United States v. Tucker*, 982 F. Supp. 1309, 1312–13, (N.D. Ill. 1997) (extending this principle to sentencing guidelines and describing the trend among circuit courts). A similar development is evident in retroactive changes to statutes of limitations, an agenda particularly relevant to sex crimes; but here too the problem has been avoided by the courts. See, e.g., R. Brian Tanner, Comment, *A Legislative Miracle: Revival Prosecutions and the Ex Post Facto Clauses*, 50 EMORY L.J. 397, 410–22 (2001). A recent Supreme Court ruling has held this practice to be unconstitutional under the applicable Ex Post Facto Clause, at least where the original statute of limitations had expired by the time the revival statute was enacted. *Stogner v. California*, 539 U.S. 607 (2003).

194. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–23 (2001) [hereinafter Stuntz, *The Pathological Politics of Criminal Law*].

195. On the rise of private prisons and their antithetical relationship to rule of law norms, see Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111 (2001). On private policing, see David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1193–1229 (1999). On victims' rights and their juridical implications, see Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357 (1999).

196. On this tendency among police, see, for example, U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-111, REPORT TO THE HONORABLE CHARLES B. RANGEL, HOUSE OF REPRESENTATIVES: LAW ENFORCEMENT: INFORMATION ON DRUG-RELATED POLICE CORRUPTION

developments made it appropriate, even before the current hysteria about terrorism, to wonder whether rule of law norms would survive at all in the criminal justice context.

This transformation of the criminal justice system accords with a deeper shift in culture and ideology. As David Garland shows, the criminal justice system as it had come to exist in the early 1970s was characterized by a number of relatively soft, welfarist features: a tendency to view crime as an episodic social pathology susceptible to reduction through social reform; a view of “the criminal” as a redeemable member of society susceptible to individual rehabilitation; a skeptical posture towards retributivist, incapacitating, or symbolic modes of punishment and an accompanying bias against overly harsh sentences; and an overarching faith in professionalism and progress.¹⁹⁷ Within a very short time—certainly at some point between the mid 1970s and mid 1980s—this was almost completely replaced by a new and radically different orthodoxy, defined by very different commitments: a tendency to see criminality as insusceptible to rehabilitation, if not genetically (or racially) coded; a return to retribution and incapacitation as goals of punishment; a skepticism towards professional norms as impediments to the fight against crime; and a rejection of a progressive orientation in favor of an explicitly pessimistic and reactionary attitude towards the prospects of achieving a crime-free society.¹⁹⁸

D. The Shift in the Dominant Mode of Social Control and its Causes

Critical to understanding the nature of this transformation of the criminal justice system is its relationship to the welfare state. The latter’s retrenchment and the former’s explosive growth reflect different sides of a single process, what social scientists Katherine Beckett and Bruce Western

(1998) Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States* (1998), <http://www.hrw.org/reports98/police/index.htm> (last visited Oct. 21, 2005). On lawlessness among prosecutors, see, for example, JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* (2000), <http://www2.law.columbia.edu/instructionalservices/liebman> (identifying prosecutors’ failure to convey exculpatory evidence to defendants as the second most frequent type of reversible error in capital cases) (last visited Oct. 21, 2005). On lawlessness among prison officials, where it often takes the form of inmate-on-inmate and official-on-inmate rape, see, for example, HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* (2001) <http://www.hrw.org/reports/2001/prison/report.html> (last visited Oct. 21, 2005); HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* (1996).

197. GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145, at 1–2.

198. *Id.*; cf. BECKETT, *supra* note 86, at 79–88.

call “a larger shift in the governance of social marginality.”¹⁹⁹ As the welfare state has withdrawn from its role in governing the lower classes, the criminal justice system has expanded its functions in this realm, in the process coming into increasing conflict with rule of law norms. It is by this process that the demise of the welfare state has undermined the rule of law. This section describes the nature of this process as well as its causes. A critical theme in this discussion is that the very factors that account for this shift in the governance of marginality—the consolidation of neo-liberalism and the onset of chronic fiscal crisis—have heightened the state’s social control response, exacerbating the criminal justice system’s conflict with the rule of law.²⁰⁰

1. The Social Control of Marginality in the Age of Social Welfare Retrenchment

As even the most casual student of welfare policy knows, the end of welfare has hardly ended the kind of social marginality to which welfare had been so responsive. Indeed, the retreat of the welfare state has combined with neo-liberal policies to generate what racial sociologist Loïc Wacquant calls a condition of “advanced marginality” characterized by the de-proletarianization of broad sections of the lower classes and the consignment of others to increasingly casual, unrewarding work, the experience of increasingly permanent, spatially concentrated poverty, the collapse of informal supports, and heightened political and social stigmatization of poverty.²⁰¹ In this context the threat of disorder looms

199. Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 44 (2001).

200. It is important to recognize at the outset the importance of more specific forces in this shift in social control: electoral and institutional politics, business’ profit-driven manipulation of anxieties about crime, actual increases in crime rates, and even a shift in the tenor of political rhetoric and scholarly debates about crime. This Article does not deny the influence of these essentially political and cultural factors; rather, it situates them within an overarching set of structural changes which have prefigured the course of these changes. For a review of the complex political and cultural forces at work in social welfare retrenchment, see generally O’CONNOR, *A POLITICAL HISTORY*, *supra* note 155. For a review of the equally complicated forces that have shaped the expansion and transformation of the criminal justice system, see generally BECKETT, *supra* note 86; GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145; David J. Rothman, *More of the Same: American Criminal Justice Policies in the 1990s*, in PUNISHMENT AND SOCIAL CONTROL 29 (Thomas G. Blomberg & Stanley Cohen eds., 1995); Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 194.

201. See generally Loïc J. D. Wacquant, *The Rise of Advanced Marginality: Notes on its Nature and Implications*, 39 ACTA SOCIOLOGICA 121 (1996) [hereinafter Wacquant, *The Rise of Advanced Marginality*]; Loïc Wacquant, *Urban Marginality in the Coming Millennium*, 36 URB.

constantly, augmented by accelerating inequalities in income, wealth, and power. Social control remains an essential function for the state if it is to prevent these conditions from degenerating into an explosion of criminality, riots, and other expressions of disorder, and the further deterioration of respect for establishment norms regarding property, authority, and work. According to scholars like Wacquant, Beckett, and Western, the criminal justice system's metastatic development over the last several decades reflects its gradual inheritance from the welfare system of a lead obligation in addressing this problem.²⁰² A brief review underscores the kind of process they have in mind.

Against the otherwise ungoverned threat of disorder, for example, there are several times more police and correctional officers per capita today than there were thirty years ago. Notably, these officers are organized in reactive, increasingly militaristic ways.²⁰³ They are better armed.²⁰⁴ "S.W.A.T." teams are ubiquitous, as is the overall militarization of law enforcement—in organization, training, weaponry, and the like. Novelties once found mainly among large and wealthy police departments, things like computer coordinated command systems, mobile command posts, sniper teams, and "airborne" units, have become ubiquitous "crime fighting" devices.²⁰⁵ And of course, law enforcement has embraced more aggressive policing strategies, including quality of life, public order, and "zero-tolerance" concepts, with their overt investment in the maintenance of class boundaries in social space.²⁰⁶ All of this reflects an expanded commitment by police not only to a class-laden project of controlling crime—which, as many critics point out, cannot explain the inflationary growth of any part of the criminal justice system—but also to maintaining class boundaries in public space, containing militant protests, and generally affirming the sanctity of order, hierarchy, and property.

STUD. 1639, 1643 (1999); Douglas S. Massey, *The Age of Extremes: Concentrated Affluence and Poverty in the Twenty-First Century*, 33 DEMOGRAPHY 395 (1996).

202. Beckett & Western, *supra* note 199, at 44–47.

203. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 89–171 (1993).

204. Jacqueline M. Graves, *How Cops Will Rearm, Tom Clancy Style*, FORTUNE, July 11, 1994, at 16.

205. On the development of this apparatus, see, for example, PARENTI, *supra* note 132, at 111–38.

206. For an overview of various features of this model of policing in practice, see generally HARD COP, SOFT COP: DILEMMAS AND DEBATES IN CONTEMPORARY POLICING (Roger Hopkins Burke ed., 2004). See also PARENTI, *supra* note 132, at 90–110; Fyfe, *supra* note 140, at 764–65. See generally Maria Foscarnis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1 (1996).

This new emphasis on social control extends to a renewal of the criminal justice system's labor-disciplining function, as this too has been abandoned by the shrunken welfare state. Instead of relatively soft incentives to embrace the virtues of work, these "rejects of market society"²⁰⁷ are presented with three choices: either accept whatever work opportunities (or increasingly paltry and temporary welfare benefits) are available; sink into a level of destitution from which the state might not save them; or resort to criminal means of support and risk increasingly severe punishment. It is the last of these options, of course, that contemporary criminal justice policy is increasingly aimed at foreclosing. Expressed in terms of the principle of lesser eligibility, the current regime presents the lower classes with ever more onerous consequences of nonparticipation in the labor market to match both the deterioration of labor standards and the retreat of social welfare. The rhetoric of morality and public safety aside, such is the real logic of "truth in sentencing," "three strikes" laws, and other policies designed to intensify punishment.

In similar fashion, the criminal justice system has also come to play a greater role in asserting physical and spatial control over the unemployed, the underemployed, and the down and out in a post-welfare world. One does not have to accept rigidly Rusche and Kirchheimer's labor control thesis (which, it will be recalled, is premised on a lock-step and cyclical relationship between labor supply and incarceration) to appreciate, in the nature of contemporary incarceration, the truth of their broader claim—that incarceration has evolved as a means of containing the most redundant and useless components of the capitalist labor force. Such is the view taken by Raymond Michalowski and Susan Carlson, who attempt to cast the relationship between labor surplus and incarceration in "historically contingent" terms, as having evolved along with changes in economic structure, the emergence of a permanent "underclass," and the demise of the social welfare system. From such a perspective, the dramatic increases evident in incarceration levels over the past three decades are but the reflection of a policy of criminalizing and warehousing the "rejects of market society"—*in lieu* of their becoming officially unemployed.²⁰⁸ Consistent with this view, Beckett and Western also argue on empirical

207. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 98 (2001) [hereinafter Wacquant, *Deadly Symbiosis*].

208. See generally Raymond J. Michalowski & Susan M. Carlson, *Unemployment, Imprisonment, and Social Structures of Accumulation: Historical Contingency in the Rusche-Kirchheimer Hypothesis*, 37 CRIMINOLOGY 217 (1999). Michalowski and Carlson see the relationship between unemployment rates and incarceration over their most recent period of analysis, 1980–1992, as distorted in large part by the emergence of an underclass that no longer actively participated in the job market. *Id.*

grounds that prison is now the lead institution for the regulation of unemployed labor in contemporary America.²⁰⁹ The logic of this is more than just warehousing, though. Most incarcerated people have indeed committed crimes, but the kinds of crime for which they are incarcerated highlight even more clearly the social control dynamics at work. The vast majority of inmates are being held for drug, property, and public order offenses—crimes that, at root, involve breaches of the boundaries of acceptable labor activity. Equally consistent with the present thesis is the fact that these crimes account for the majority of the growth in incarceration over the last several decades.²¹⁰

Neither are these the only indications of a stepped-up effort to control labor through criminal justice functions. Despite the spectacular increase in the scale of incarceration and the transformation of the prison that has accompanied this growth, Ignatieff's vision of the prison remains relevant today. Prisons adhere to a general labor disciplining function of stressing actual workforce training as the key rehabilitative goal, and, in some cases, undertaking the commercial exploitation of prison labor.²¹¹ Such an emphasis on labor market participation is also imposed on many of the four million or so offenders on probation, parole, or other forms of intermediate

209. Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1040–44 (1999).

210. On these dynamics, see RUTH & REITZ, *supra* note 189, *passim*.

211. Contemporary prisons are overwhelmingly committed to regimentation and other structured hierarchies. As at the origin of prisons, most contemporary inmates today lead lives that are strictly controlled for most of the day, every day. Just as entrenched are various regimes for prison labor. Nowadays, this tends to consist of labor for the benefit of the state, easily coerced from bored inmates by making labor a condition of privileges and other benefits of confinement. In a rebuke, of sorts, to the principle of lesser eligibility, most inmates prefer work to idle boredom in any case. In recent periods of supposed labor shortage, the idea of expanding prison labor back into the private, for-profit sector has resurfaced, to be championed by academics and government officials alike. Here, the contemporary rhetoric is especially telling. Even many liberal commentators embrace the idea, arguing along with more conservative authorities, that market-style labor will better enhance inmates' "employability" and "marketable skills" while investing them with the values and ethics considered necessary to rejoin the ranks of the working class. See, e.g., Editorial, *Inmates in the Labor Pool*, CHRISTIAN SCI. MONITOR, March 27, 2000, at 8. Prison officials and corrections experts speak repeatedly of the benefits that prison labor affords in the form of "enhance[d] discipline," as well as "job training and rehabilitation" and improved "inmate financial responsibility." FEDERAL BUREAU OF PRISONS, *Factories with Fences: The History of Federal Prison Industries* 10–11 (1996). For very explicit expressions of this view, see, for example, Lynn McAuley, *Work with a Purpose: The Role of Work Force Development in the New Millennium*, CORRECTIONS TODAY, Oct. 1999, at 8; Jeremy Travis, *Prisons, Work and Re-Entry*, CORRECTIONS TODAY, Oct. 1999, at 102–03. see also Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 374–98 (1998).

sanction, who are often required to search for work (and in some cases, to hold down jobs) as a condition of avoiding imprisonment.²¹²

Even the most casual perspective on this process notices its coincidence with the control of racial minorities—blacks in particular. As indicated earlier, this reflects both the independent and enduring significance of race as an axis of social control *and* the convergence of race with class in defining the kinds of marginality over which the criminal justice system governs.²¹³ Concentrations of blacks and lower class populations pose potentially distinct but usually convergent threats to social order—threats that generate increased arrests, greater police violence, escalated imprisonment, and an overall expansion in the scale of the criminal justice system.²¹⁴ In the demographic convergence of race and class too, as Wacquant points out, are heightened occasions for social control: greater concentrations of poverty; greater unemployment and underemployment rates; more frequent riots; higher rates of conventional criminality; and a mutually reinforcing stigma.²¹⁵ Race aggravates both marginality and its effects, thereby enhancing the sense of threat and the felt need to reject the welfare state for ever more coercive and punitive forms of control.

2. Explaining the Changing Dynamics of Social Control: Neo-Liberalism, the Transformation of Capitalism, and the Fiscal Crisis of the State

Not least among the factors motivating this shift in the social control of the lower classes is the increasingly hegemonic reign of neo-liberalism over American politics of the past several decades. As both policy and ideology,

212. See GORDON, *supra* note 191, at 116–18, 129–30.

213. On the convergence of race and class in the operation of the criminal justice system, see generally TONRY, *supra* note 100; JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (1996).

214. Empirical support for these contentions is fairly extensive and the overall “threat” literature fairly well developed. This approach has its origins both in the work of Rusche and Kirchheimer and (especially in its racial dimensions) in the scholarship of HUBERT M. BLALOCK, JR., *TOWARD A THEORY OF MINORITY-GROUP RELATIONS* (Capricorn Books 1970) (1967). See generally David Jacobs & Ronald E. Helms, *Testing Coercive Explanations for Order: The Determinants of Law Enforcement Strength over Time*, 75 SOC. FORCES 1361 (1997) (describing a relationship between economic inequality and police force size); David Jacobs & Ronald Helms, *Collective Outbursts, Politics, and Punitive Resources: Toward a Political Sociology of Spending on Social Control*, 77 SOC. FORCES 1497 (1999) (on the relationship between “mass racial threats” and corrections spending); Martha A. Myers, *Black Threat and Incarceration in Postbellum Georgia*, 69 SOC. FORCES 373 (1990) (on the relationship between black/lower class threat and incarceration).

215. Wacquant, *Deadly Symbiosis*, *supra* note 207, at 95–127. See generally Wacquant, *The Rise of Advanced Marginality*, *supra* note 201.

this new regime is actually a contradictory blend of neo-conservative features with genuinely neo-liberal themes. For on the one hand (in its neo-liberalism), this regime is characterized by its active support for “free market” capitalism, including de-regulation, privatization, and a rejection of Keynesian economic policies; on the other hand (in its neo-conservatism), this regime also promotes social norms of a decidedly authoritarian, illiberal character, especially with regard to the lower classes.²¹⁶

Neo-liberalism is fundamentally hostile to the social welfare system and has taken an active role in attacks on its intellectual and political credibility. It casts the social welfare system as inherently inconsistent with both neo-liberal economic policies and neo-conservative social values, as irrelevant to the middle and upper classes, as an inevitable drain on social income and wealth, and as a fetter on labor market participation on the part of the lower classes.²¹⁷ By the same token, neo-liberalism—still speaking of the entire, contradictory edifice—features an equally inherent affinity for the expansion of the criminal justice system. From the standpoint of its economic agenda, the merits of order and labor discipline overcome any costs in artificial labor shortages and the “disqualification” of labor that inhere in the embrace of social control by criminal justice. From the standpoint of its social agenda, the payoff of an expanded criminal justice system is the legitimization of social inequality in moral and retributivist terms. It is in this vein that political critiques of the social welfare system over the last several decades have so consistently imputed to that system not just a failure adequately to control the lower classes, but more dubiously, a role in *creating* criminality.²¹⁸

As suggested above, the hegemony of neo-liberal policies informs this shift in social control in other ways as well. For by its labor and social policies as well as its attack on the welfare state, neo-liberalism has accelerated the material and cultural degradation of the lower classes. De-industrialization, the destruction of low-skill manufacturing jobs, and the near annihilation of the labor movement, which all have some basis in the continuation of the state’s aggressive embrace of capitalist interests,²¹⁹ have set the stage for concentrated, permanent poverty, the proliferation of the

216. GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145, at 98–102; *see also* Loïc Wacquant, *The Penalisation of Poverty and the Rise of Neo-Liberalism*, 9 EUR. J. ON CRIM. POL’Y & RES. 401, 404 (2001) [hereinafter Wacquant, *The Penalisation of Poverty*]. On the characteristics of neo-liberalism as political economy, *see* POLLIN, *supra* note 171, at 3–20.

217. GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145, at 154–58.

218. On this perspective, *see* BECKETT, *supra* note 86, at 28–29, 34–36, 49–52.

219. On the long germination of urban crisis and social marginality, *see generally* THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996).

drug trade, the expansion of “predatory” street gangs, the elimination of viable work, urban riots, persistently high rates of property crime, and other expressions of an emergent “underclass.”²²⁰ In short, neo-liberalism is both the ideological and the policy basis for the development of Wacquant’s advanced marginality; it is the mechanism that “qualifies” the poor for arrest, imprisonment, and other expressions of this new means of governing marginality.²²¹

This new dynamic of marginality accompanies the advent of generalized crisis in American capitalism. The period from the end of the Second World War through the early 1970s was one of unprecedented prosperity, characterized by tremendous growth in gross domestic product, income, productivity, profits, and overall standards of living, by economic stability, and by extraordinary American ascendance in the world economy.²²² Since then, however, rates of growth in gross domestic product, income, productivity, and profits have all fallen off; American dominance in manufacturing and international trade has receded dramatically; deep recessions have returned to the fore; and the economic system has become less governed and, apparently, less governable.²²³ Even the alleged prosperity of the mid and late 1990s dissolves under a critical eye as more of a boon for the already-affluent than the dawn of a new era of widespread prosperity.²²⁴ These deteriorating structural conditions have not only spurred increasing social marginality; they have immersed all of society in uncertainty and insecurity.

These key features of the age of neo-liberalism, marginality and generalized crisis, have contributed in several ways to the shift in the dynamics of social control. For, as Garland points out, the tendency of generalized social crisis to heighten the sense of threat and insecurity among the upper classes inevitably encourages hard, criminal justice

220. On the role of economic policy changes of the last several decades in creating an concentrated urban poverty, see JARGOWSKY, *supra* note 173, at 145–213; *see also* WILSON, *supra* note 131.

221. *See generally* Wacquant, *The Rise of Advanced Marginality*, *supra* note 201.

222. *See generally* Andrew Glyn et al., *The Rise and Fall of the Golden Age*, in *THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE* 39 (Stephen A. Marglin & Juliet B. Schor eds., 1990).

223. On the overall decline of the American economy since the early 1970s, *see generally* ERIC HOBBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991*, at 403–18 (Vintage Books 1996) (1994); PHILIP ARMSTRONG ET AL., *CAPITALISM SINCE 1945* (Basil Blackwell 1991) (1984). The theme of disorganization and crisis is actually explored by a number of scholars. *See generally* SCOTT LASH & JOHN URRY, *THE END OF ORGANIZED CAPITALISM* (Univ. of Wis. Press 1987); CLAUS OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* (1985).

224. *See* POLLIN, *supra* note 171, *passim* (see especially app. 1).

responses to the problems of social control.²²⁵ Furthermore, in the face of these dynamics, the social welfare system appears as a woefully inadequate model of social control (notwithstanding limitations on its capacity for social control occasioned by this very neo-liberal agenda).²²⁶ In addition to this it seems that the only viable way to assert control over the lower classes is via the overtly punitive model of social control that the criminal justice system provides. By this logic, “nothing works”—or rather, *seems* to work—except reactionary, get-tough policies. The criminal justice system must be expanded and the power of the state in this domain intensified; and the social welfare system must be drawn back and made more punitive in its own right.²²⁷ At the same time marginality and crisis provide a structural basis for the ideological critique of the welfare state; for it is on the social welfare system that poverty as well as economic volatility and stagnation are blamed.²²⁸

The rise of neo-liberalism and its institutional adjuncts goes a long way towards explaining the shift in the dominant mode of social control. But to focus on this alone leaves out a critical element in this process, a thirty-year period of fiscal crisis that has further influenced these developments. Undoubtedly, sustained fiscal realities limit the state’s ability to rely on criminal justice as a mode of social control.²²⁹ However, this is only part of the story. Fiscal crisis has imposed even greater limits on the social welfare system and its utility as a means of social control, and in this way influenced its displacement as a dominant means of social control.

An understanding of this process owes much to James O’Connor’s classic work on the political economy of the social welfare system. According to O’Connor, fiscal crisis is inherent in the welfare state. This follows from the interaction of several dynamics. O’Connor takes the view, consistent with the idea of the welfare state as a mechanism of social control, that its institutions are fundamentally oriented to the socialization and politicization of the costs of capitalism.²³⁰ The problem is that while the

225. GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145, at 175–90, 196–97.

226. This accords with a tendency, described by Piven and Cloward, for the upper classes to see the lower classes as uniquely responsive to punitive policies of control. PIVEN & CLOWARD, *THE NEW CLASS WAR*, *supra* note 162, at 38–39.

227. See generally GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145.

228. See Offe, *Democracy Against the Welfare State*, *supra* note 66, at 528.

229. GARLAND, *THE CULTURE OF CONTROL*, *supra* note 145, at 191–92.

230. For O’Connor, such costs entail “social capital” (consisting of both “social expenses” and “social investments”), which provides incentives and direct support for the “reproduction of labor,” private capital accumulation, and “social expenses,” which consist of both traditional welfare and “warfare” functions, and which are oriented to the consumption and support of excess capital and labor. O’CONNOR, *THE FISCAL CRISIS*, *supra* note 68, at 101–17, 159–69. On

welfare state socializes these costs, it is unable to socialize the profits of capitalism in sufficient amounts to cover the bill. On one level, this follows from the inability of the capitalist state to challenge the basic hegemony that capital exercises over the political system.²³¹ On another level, it also shows the inherent limits of welfarist reform. For even to tax capital sufficiently to pay the costs of the welfare state is politically untenable—as would be the alternative, to resort to inflationary monetary policies.²³² Either course would also defeat the central purpose of the welfare state within the political economy of capitalism, which is to sustain profitability in the face of capitalism's tendencies toward social crisis. This would also tend to undermine the legitimacy of the state itself.²³³

According to O'Connor, this intractable problem is exacerbated by several factors: the steady expansion of military expenditures (the "warfare state"); the tendency of demands on the welfare state to expand along with rising standards of living; and most of all, the growth of the welfare state in response to increasing agitation by the lower classes *and* the efforts of capitalists (especially monopoly capitalists) to displace labor costs as well as the costs of maintaining social order onto the state.²³⁴ In addition to these factors, we might add a more uniquely contemporary one: a kind of tax competition that has taken hold both domestically and internationally by which businesses leverage lower tax rates in exchange for investment towards "economic development."²³⁵

For O'Connor, the result of these dynamics is a condition of chronic fiscal crisis, a prediction borne out by the recent history of government finance.²³⁶ This inevitably compromises both the fiscal viability of welfare

O'Connor's framework, see, for example, Fred Block, *The Fiscal Crisis of the Capitalist State*, 7 ANN. REV. SOC. 1 (1981); see also OFFE, *Crisis of Crisis Management*, *supra* note 77, at 57.

231. O'CONNOR, *THE FISCAL CRISIS*, *supra* note 68, at 40. A very similar point is made by Offe. OFFE, *Crisis of Crisis Management*, *supra* note 77, at 49–50.

232. O'CONNOR, *THE FISCAL CRISIS*, *supra* note 68, at 203–15.

233. *Id.* at 40. Offe makes the same point: "The state protects the capital relation from the social conditions it produces without being able to alter the status of this relationship as the dominant relationship." OFFE, *Crisis of Crisis Management*, *supra* note 77, at 49–50.

234. O'CONNOR, *THE FISCAL CRISIS*, *supra* note 68, at 9–10, 64–70, 159–61. O'Connor also mentions in this connection the end of subsistence production, a process still very much underway thirty years ago, when his work appeared.

235. On the international parameters of this issue, see generally Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000); Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97 (2000); Donald L. Bartlett & James B. Steele, *Paying a Price for Polluters: Many of America's Largest Companies Foul the Environment but Clean up on Billions of Dollars in Tax Benefits*, TIME, Nov. 23, 1998, at 72.

236. On the contemporary parameters of fiscal crisis, see POLLIN, *supra* note 171, at 68–75, 94–104 (analyzing fiscal problems under the Bill Clinton and George W. Bush administrations).

programs and the political legitimacy of the social welfare system. Fiscal crisis results directly in the elimination of some social welfare programs and in a reduction in the functionality of remaining programs.²³⁷ By both of these means, fiscal crisis gives apparent credence to ideological critiques of the concept of welfare as unworkable and to tax revolts and other acts of middle and upper class rebellion that underlie the dynamics of fiscal crisis in the first place.²³⁸ Amidst these tendencies, the social welfare system itself inevitably loses legitimacy as a mode of social control.²³⁹

At the same time that the fiscal crisis erodes the legitimacy of the social welfare system and renders it increasingly untenable, it increases the relative legitimacy of the criminal justice system. This occurs in several ways. First, as we have already seen, social crises generally generate a bias in favor of hard forms of social control of the lower classes. This bias proves self-sustaining in the context of fiscal crisis, in that the essential wisdom of hard control seems to be confirmed by the escalating social dysfunctions—and the growing dysfunctions of welfare state institutions themselves—that attend the social welfare system's loss of political favor and functionality. This is not helped by the fact that in recent years fiscal crisis has been exacerbated by changes in tax policy that simultaneously aggravate social inequality.²⁴⁰ Thus the retrenchment of the social welfare system and its consequences become part of the dynamic over which the

See generally THE FISCAL CRISIS OF THE STATES (Steven D. Gold ed., 1995); MAX B. SAWICKY, ECON. POLICY INST., THE ROOTS OF THE PUBLIC SECTOR FISCAL CRISIS (1991).

237. The effects of fiscal crisis on the viability of the welfare state are particularly salient at the state and municipal level, where governments have been called on in recent decades to assume a larger share of the burden in providing services, but face more explicit political and legal hurdles (often in the form of prohibitions on deficit spending) than does the federal government. This is compounded by the fact that fiscal crisis has often led to layoffs by these very governments, which then increase the demand for welfare programs. See SHARON PARROTT & NINA WU, CENTER ON BUDGET & POLICY PRIORITIES, STATES ARE CUTTING TANF AND CHILD CARE PROGRAMS 1 (2003); see also KATZ, *supra* note 91, at 290–92. One feature of recent welfare reform is that, as states have been given greater authority in the implementation of social welfare programs, they have also adopted budget restraints that prevent deficit spending, compounding the policy implications of fiscal crisis. See, e.g., John Kincaid, *The Crisis in Fiscal Federalism*, 76 SPECTRUM: J. OF ST. GOV'T 5 (2003).

238. Particularly destructive in this regard was the (dubious) claim that the fiscal drain of the social welfare state was itself responsible for economic stagnation in the post-Vietnam era. Anwar Shaikh, *Who Pays for the "Welfare" in the Welfare State? A Multicountry Study*, 70 SOC. RES. 531, 534–36 (2003).

239. The irony in this process for the welfare state is that the demise of the welfare state has less to do with the welfare state itself than with the concentration within it of capitalism's dysfunctions. See OFFE, *Contradictions of the Welfare State*, *supra* note 86, at 153.

240. POLLIN, *supra* note 171, at 94–108.

criminal justice system is called on to assert its agenda of social control—despite its own escalating costs.²⁴¹

Second, we have also seen how both models of social control are invested in the principle of lesser eligibility. But the criminal justice system is much more able to exploit the logic of this principle—or at least, it *seems* more able to do so—under conditions of poverty and marginality than is the welfare state. For by its nature, it presents a harsher, more direct, and by the crudely malevolent logic of contemporary social control, more efficient means of attaining compliance with the social order. This apparent advantage as a form of social control is enhanced by fiscal crisis. As the social welfare system retreats, as this retreat reduces the condition of the lower classes, and as social welfare seems less relevant to the issue of how to control the lower classes, the ability of the criminal justice system to exploit its advantage in lesser eligibility seems ever greater and more relevant.

A third reason concerns the fact that fiscal crisis is ultimately expressed as a question of political legitimacy. We may recall that welfarist responses to social control, whether within the criminal justice system or the social welfare system proper, aspire to some level of inclusiveness and humanity. In a society defined by class conflict and inequality, this project is enormously ambitious, requiring layers of treatment, rehabilitation, and social support, whether within the criminal justice system or via the institutions of social welfare. If they are to be successful, these undertakings are by their nature expensive, requiring the mobilization of vast, often redundant bureaucracies. In comparison, the criminal justice system (purged of its welfarist tendencies) is an inherently cheaper proposition. Despite ubiquitous attempts of critics to compare its costs unfavorably to those of the social welfare system—prison beds versus college education being the chief point of comparison—the criminal justice system enjoys several inherent advantages in the intersection of fiscal realities and political legitimacy which go beyond simple balance sheet comparisons. For one thing, it does nothing to challenge the distribution of wealth and income. For another, recast in reactionary terms, the criminal justice system's performance standards are much more easily obtainable, entailing little more than exclusion of the criminal from society. Indeed, to a degree the contemporary criminal justice system does not even pretend to succeed at reducing crime much less reforming criminals. Its success lies, ironically, in

241. In Wacquant's words, the shift to a criminal justice model of social control can be seen as "designed to manage the effects of neo-liberal policies at the lower end of the social structure of advanced societies." Wacquant, *The Penalisation of Poverty*, *supra* note 216, at 401; cf. BECKETT, *supra* note 86, at 7.

its failures. The more policing and prosecution resembles an assembly line that apprehends and punishes the poor with little regard for guilt and less for “legal technicalities,” the better it accords with and reflects its social control function. The more violent and abusive the prison system becomes, the more successfully it asserts its punitive function. And because it is focused primarily on exclusion and trades so exclusively in the lives of the poor, the contemporary criminal justice system also has an easier time hiding its failures—an undertaking supported by the tendency to lump all criminals and crimes into an undifferentiated category.²⁴² For all these reasons, the criminal justice system is much better able than the social welfare system to retain its legitimacy in an age of crisis.

E. The Inexorable Logic of Social Control and the Rule of Law's Fate in Modern Society

The elevation of the criminal justice system to a dominant role in the social control of the lower classes is the most fundamental reason for the rule of law's erosion in contemporary society and the reason, too, that this process is so concentrated in the criminal justice context. This follows from a very basic fact: that rule of law norms pose untenable impediments to the implementation of the criminal justice system's expanding program of social control. These norms are increasingly incompatible with a criminal justice system that has inherited the social welfare system's mission of labor control, class and labor discipline, and general protection of society from the threats of disorder that follow from social marginality.

To be sure, Hayek, Unger, and others who argue the incompatibility of the rule of law with the welfare state have a point. As we acknowledged earlier, the welfare state does indeed require individualized rulemaking, discretionary administration, and other policies that offend rule of law norms. Overall, though, the encounter between the welfare state and the rule of law remains, as it always has been, relatively benign. As we have also seen, rule of law norms actually reached their apogee in American society concurrent with the height of the welfare state. Undoubtedly, this reflects the fact that gains in social equality achieved by the welfare state offset its corrosive effects—the point made by Neumann. Perhaps more importantly, the kind of sovereignty of which the welfare state consists is itself *relatively* benign, typically entailing financial relationships and only rarely (even in its

242. See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997).

current, often more punitive iterations) involving directly coercive acts on the part of the state. In any case, the entire institution is in full retreat.

The rule of law's fate in the criminal justice context has been much more problematic. Conventional attempts to explain this invariably focus on the politics of law and order and race, on the juridical and moral failings of judges, legislators, and other officials, and on the effects of epiphenomena like the advent of crack cocaine and the war on terrorism.²⁴³ Such accounts are often apt reflections on the state of the criminal justice system and the process by which it has retreated from its hard-won commitment (to rule of law norms). Where they fail completely, though, is in grasping the connection between the rule of law's erosion and the political economy of contemporary society. They remain oblivious to how changes in this context have altered the way the state articulates its social control functions and in so doing, prefigures this erosion of rule of law norms. In fact, the rule of law's tenuous condition in the criminal justice context reflects the basic fact that the state's adherence to its normative program in this context is simply incompatible with the increasingly important function of the criminal justice system as an institution for regulating social marginality in an era of welfare retrenchment. The shift of the criminal justice system away from rule of law norms is simply a juridical reflection of the expanded, intensified commitment to social control described in the last Section.

For example, asserting this social control agenda requires that the police are able freely to threaten and intimidate the lower classes, to control their movements in space and time, and generally to serve such people with constant reminders of the limits of dissent, deviance, and non-compliance with established norms. In order to do this, the police must be able to detain, question, or arrest people without probable cause, and if need be, without any legal authorization whatsoever. They must be able to collect evidence on which criminal cases can be made with no regard for "technical" violations of the law and no fear of its exclusion or their incurring legal liability. And they must be free to resort to patently racist and class-coded means of law enforcement, as well as extra-legal violence, without fear of legal consequences.

To make this point a bit differently, when the police stop and search a poor person's automobile in apparent violation of the Fourth or Fifth Amendment, when they rough up some peaceful protestor, when they frame some unemployed youth caught on the wrong side of town, it is not simply because they are lazy or racist or ignorant, or because they are consciously

243. On this tendency, see, for example, COLE, *NO EQUAL JUSTICE*, *supra* note 183, at 181–212; ALLEN, *supra* note 181, at 57–93.

opposed to constitutional rights or rule of law values. All of this is often true, of course. But more fundamentally, when the police behave in these ways it is because doing so, though always part of the police function, is increasingly central to their role in contemporary society. Similarly, judicial authorization of such behavior—though formalizing the affront to rule of law norms—can be seen not merely as a misreading of doctrine or a failure of judicial courage, but also as an acquiescence to the reality of policing in the post-welfare world.

A similar explanation speaks to the position of contemporary prosecutors, whose discharge of the criminal justice system's social control function is dependent above all on the ability freely to prosecute, convict, and punish *without regard to* legal culpability strictly construed, but rather along the lines of more diffuse notions of who is a threat, a "bad guy," or someone who just "doesn't respect the system." In order to convert the criminal law's nominal commitment to public safety and moral retribution into an agenda for enforcing compliance with social norms generally and for doing so on the basis of class, race, and related indicia of marginality, prosecutors must have prerogatives that are precisely at odds with the rule of law: virtually unfettered discretion in plea bargaining and sentencing; the ability to intimidate defendants with onerous sanctions, including the prerogative to discriminate on the basis of class and race; the ability to use bogus evidence against them; the ability to conceal evidence from defendants; and a virtual guarantee that the defendants they face will lack competent counsel with adequate resources at their disposal.

Likewise, the use of incarceration and other forms of criminal sanction to control the poor is feasible only if retroactive sanctions are permitted, sentences are generally quite harsh, and conditions of confinement, including brutality by correctional officials, inmate violence, and overcrowding, are not subject to much in the way of effective legal restraint. These features of punishment are, among other things, essential to preserving the principle of lesser eligibility in the face of the tremendous uncertainties, the material deprivation, and the utter marginalization that characterize lower class life. To put this another way, a regime of punishment that did adhere to rule of law norms, committed to prospectivity, proportionality, and official compliance with the law, simply would not, in Hay's terms, sufficiently terrorize a population long habituated to the meanest, most insecure existence, and yet expected to accept this lot without resorting to crime or disorder.

These inherent disjunctions between the rule of law and the aggressive prosecution of a social control agenda via the criminal justice system are compounded by the massive expansion of the scale of criminal justice—

which they of course help to create. There is no particular point at which a sufficient number of poor people have been arrested, prosecuted, or imprisoned to complete the agenda of social control. Indeed, as Garland shows, part of the newly dominant “culture of control” is an irrational belief that there can be no victory in the struggle against crime and disorder—that the poor will never *really* accept their lot; that disorder and deviance are always lurking. This leaves only fiscal constraints as evident impediments to the relentless expansion of the criminal justice system. Perversely, though, these limits have a much greater effect on the institutional integrity and overall quality of the criminal justice system than on its overall size. This leads to a dynamic in which the expansion of the criminal justice system progressively reduces the very resources needed to achieve compliance with the rule of law.²⁴⁴ Only recently and in the face of enormous deficits has there been any sign that fiscal considerations might begin to reign in the size of the criminal justice system.

V. CONCLUSION

To explain the demise of rule of law norms, as this Article does, in terms of a shift in the dominant mode of social control, speaks to several important issues. First, as anticipated at the outset, this argument calls into question the dominant view of the welfare state as the most significant impediment to the realization of rule of law norms. Instead, the welfare state’s *retrenchment*, intertwined as it is with the expansion and intensification of social control functions in the criminal justice context, is shown to give a greater account of this problem. Second, the argument developed here speaks more broadly to the rule of law’s dilemma in modern society. The underlying challenge for the rule of law is to realize its norms in the context of an enduring commitment on the part of the modern state to respond to the problem of social marginality with an agenda of social

244. The system is progressively less able to provide adequate training to police, to guarantee competent counsel to defendants, to keep the courts open to the offenders, to alleviate overcrowding and inadequate security in prisons and jails, or to provide forums for the actual vindication of any such rights. Worse, the effects of expanded costs are not borne equally throughout the criminal justice system; instead they are imposed in accordance with a process of the *rationing* of criminal justice resources. Resources are only relatively scarce, and only in a thoroughly political sense, by which offenders and the accused consistently fare more poorly than police, prosecutors, and the courts. This dynamic is especially evident, for example, in the context of indigent defense. See, e.g., Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 228, 233 (1994). See generally Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

control. That response may be more or less coercive, and more or less corrosive of rule of law norms, but even in its softer, welfarist form, this response inevitably runs afoul of those norms. It is for this reason, among others, that this Article should hardly be taken as a call to resurrect the welfare state. Not only does that project create significant, if more muted, problems for the rule of law, but it is also, as we have seen, increasingly untenable given the realities of capitalism and a political economy defined by neo-liberalism and fiscal crisis.

What, then, can be done? Whether with welfare or prison, the state's response to social marginality seems inevitable. The risks in the form of unrestrained disorder and deviance are simply too great to expect it to do nothing; and no other institution seems to fit the bill. This suggests that the root problem for the rule of law—the real impediment to realizing its norms in modern society—is the problem of social marginality. This phenomenon must be substantially abolished for there to be any hope of achieving a system of governance that does not systematically offend the rule of law. And of course, as we have also seen, marginality does not drop out of the sky; it has its origins in the class structure of contemporary society and in the dynamics of exploitation that underlie this. Ironically, this realization exposes capitalism itself—the rule of law's historical progenitor—as its contemporary adversary. Can capitalism be transcended? The very thought is utopian, of course, as it must contend with the same factors that have cast the modest aims of the welfare state in an impossibly radical light. But utopian or not, this perspective at least tests the viability of the rule of law against the social reality in which we find ourselves. In this respect it is vastly more realistic than the tendency to await the rule of law's salvation at the hands of a more educated public, more enlightened legislators and administrators, more conscientious judges, or other captives of history.