

DUNCAN KENNEDY'S THIRD GLOBALIZATION,  
CRIMINAL LAW, AND THE SPECTACLE

AYA GRUBER\*

INTRODUCTION

In *Three Globalization of Law and Legal Thought (Three Globalizations)*, Duncan Kennedy traces the evolution of legal consciousness in the United States and throughout the world (but primarily in the Western world) over a 150 year period.<sup>1</sup>The article identifies three distinct eras, each characterized by a dominant mode or modes of legal thought and language: The first globalization or era of Classical Legal Thought (CLT) (1850-1914), the second globalization or era of the social (1900-1968), and the third globalization (1945-2000).<sup>2</sup>In providing his thick description of legal consciousness and *langue* within the relevant periods, Kennedy concentrates heavily on several discreet areas of law, most prominently contract law, property law, regulatory/administrative law (particularly labor law), international law, and constitutional law. Family law, for example, plays a peripheral role in the analysis, serving mainly as an example of how pluralism in certain legal areas perpetuated CLT during the first globalization.<sup>3</sup> Criminal law figures tangentially in this version of the three globalizations.<sup>4</sup>

The purpose of this brief essay is to weave the story of criminal law in to the first two globalizations and examine how much explanatory heft the story of the third globalization has in relation to current criminal law, particularly that of the

---

\* Professor of Law, University of Colorado Law School. I would like to thank Pierre Schlag and Justin Desautels-Stein for inviting me to be part of the workshop on the *Three Globalizations* at the University of Colorado Law School and Jorge Esquirol for helping me develop ideas for this essay. Most importantly, I express my deepest gratitude to Duncan Kennedy, whose work and career have long been an inspiration and who has served as a mentor for many years.

<sup>1</sup> Kennedy, Du. "Three Globalizations of Law and Legal Thought: 1850-2000." *The New Law and Economic Development. A Critical Appraisal*. Ed. Trubek, D. & Alvaro Santos. Cambridge: Oxford University Press, 2006 [hereinafter "Three Globalizations"].

<sup>2</sup> Unlike the first two globalizations, the third globalization cannot be summarized by reference to an overriding legal philosophy or set of techniques like the first two. *See infra* pp. 2–3.

<sup>3</sup> "Three Globalizations", *supra* note 1, at 34–35.

<sup>4</sup> However, Duncan did inform me at the workshop on the *Three Globalizations*, that there is an unpublished version of the account in which criminal law figures more prominently.

United States. In doing so, the paper will delve into whether the rise of the late 20<sup>th</sup> century penal state in the United States and elsewhere says something about post-1968 legal consciousness that is not fully explored by Kennedy's account of the third globalization. Before delving into these issues, however, I offer a few short caveats and an observation. The first caveat is this essay does not purport to advance a comprehensive historical account of criminal law during the first two globalizations. The bits and pieces it adds to the story of CLT and the social are unscientifically selected and somewhat impressionistic because they have been gathered in my effort to understand and critically assess current criminal law. Consequently, given my generally non-historical perspective, the paper has much less to say about the first two globalizations than the third, which, thankfully, is the topic of this symposium. Second, the analysis in this essay will largely be limited to law in the United States. This is not to signal any substantive conclusion about the ascendancy of United States law during the third globalization or to suggest that U.S. law is now the source of exportation of criminal law ideals.<sup>5</sup> Both of those things may be true, but this essay does not provide evidence of that. It is again solely for competency reasons that the paper is limited in this manner.

Turning to my preliminary observation, there is something that moves me on an almost instinctual level about the form of Kennedy's project. The account of the first two globalizations is particularly compelling because it characterizes CLT and the social as linearly evolving modes of consciousness with clear parameters. As all-encompassing phenomena, legal discourses either conform to them or, like family law during the era of CLT, are exempted from them.<sup>6</sup> However, the fact that there are exemptions from the relevant consciousness does not evidence a competing legal language. In fact, in the account the first globalization, appeal to the Savignian compromise serves to reconfigure the many exceptions to CLT in the periphery as part of the CLT project because they resulted from peripheral elites accepting the CLT versions of market law under the cover of fidelity to "national"

---

<sup>5</sup> This contention is set forth convincingly in "Three Globalizations", *supra* note 1, at 67–69, and it does seem to be accurate in the criminal law context. However, this is not an issue taken up by this particular essay.

<sup>6</sup> "Three Globalizations", *supra* note 1, at 35.

values.<sup>7</sup> Moreover, pluralism in legal thought during the first two globalizations can be written off as remnants of the preceding consciousness.<sup>8</sup>

Whereas the eras of CLT and the social were characterized by singularly dominant consciousnesses that existed at a certain level of abstraction, the third globalization is a complex, almost schizophrenic, state of affairs in which legal actors deploy neoformalist arguments along with public policy considerations in an effort to procure desired legal outcomes in an apolitical way.<sup>9</sup> In the third globalization there are infinite *paroles*, multitudinous conflicting law projects, and unpredictable adjudicative outcomes.<sup>10</sup> I just wonder whether it is the lens of history that allows one to view CLT and the social as such neat categorical abstractions and the headiness of currency that makes everything in the third globalization seem so messy and complex. Despite this concern regarding the neatness of hindsight, I believe that the discreet categories of CLT and the social were largely reflected in the criminal law of the relevant time frames.

## I. CRIMINAL LAW AND CLT

*Three Globalizations* explains that CLT rendered criminal law, like other areas of public law such as constitutional and administrative law, outside of the core of law, which consisted of contract, property, and other areas of private law.<sup>11</sup> So unlike family law, which was part of the private-ordering system but was exempted from CLT, criminal law was for the most part simply absent from CLT because it “directly reflected the normative order” rather than being a product of deducing legal rules from pre-political concepts like the will.<sup>12</sup> It seems, however, that there is certainly a version of CLT in criminal law, at least in the United States. Adherence to the concept of the will underlies two important penological theories—the harm principle and retributivism. The harm principle arises from the libertarian demand that the

---

<sup>7</sup> “Three Globalizations”, *supra* note 1, at 35.

<sup>8</sup> See *id.* at 39 (noting that the social, as a legal consciousness, was “always in an embattled relationship with CLT”).

<sup>9</sup> *Id.* at 64–65 & 71.

<sup>10</sup> *Id.* at 70.

<sup>11</sup> *Id.* at 42.

<sup>12</sup> *Id.* at 31.

government limit exercises of authority to harmful behavior.<sup>13</sup> Retributivism, a Kantian notion, purports to vindicate the moral worth of the individual by recognizing his criminal choices and assessing proportional punishment.<sup>14</sup> These theories of morality command that criminal law only sanction behavior that both produces negative results and involves scienter on the part of the criminal actor.<sup>15</sup>

Criminal law during the period of the first globalization arguably evidenced the influence of CLT, even if modestly. The story is more complex regarding the harm principle than retributivism. In the period of the first globalization, certain aspects of criminal law reflected the same libertarian notions that undergirded legal reasoning in the *Lochner* era. Exercises of regulatory police power involving criminal and civil penalties regularly collapsed under the weight of harm principle-driven Supreme Court jurisprudence.<sup>16</sup> On the other hand, the turn of the century saw a robust movement toward increased morality policing,<sup>17</sup> due in no small part to the perceived problems of immigration,<sup>18</sup> the accrual of power to the federal government

<sup>13</sup> See Mill, J. S. *On Liberty*. Ed. Elizabeth Rapaport. Indianapolis: Hackett Publishing Co. 1978, 9.

<sup>14</sup> See Kant, I. *The Philosophy of Law*. Trans. W. Hastie. Edinburgh: T. & T. Clark, 1887, 198 (stating that “Juridical Punishment” must be imposed “only because the individual on whom it is inflicted *has committed a Crime*”). The categorical imperative is “connected (entirely *a priori*) with the concept of the will,” Kant, I. *Groundwork of the Metaphysic of Morals*. Trans. H. J. Paton. New York: Harper Torchbooks, 1964, 89, and thus originates from “the *a priori* conditions of human cognition,” Gruber, A. “Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense.” *Buffalo Law Review* 52 (2004): 433, 451.

<sup>15</sup> See LaFave, W. R. & Scott, A. W. Jr. *Criminal Law* 2d ed. St. Paul, MN: West Group, 1986, 248 (noting that mens rea ensures the punished are “morally blameworthy”); Kyron Huigens, K. “The Dead End of Deterrence, and Beyond.” *Wm. & Mary L. Rev.* 41 (2000): 943, 956 (calling mens rea “essentially retributivist”); Gruber, A. “A Distributive Theory of Criminal Law.” *Wm. & Mary L. Rev.* 52 (2010): 1, 19 (noting that “retributivists nearly universally define culpability with reference to mens rea”).

<sup>16</sup> See, e.g., *Minnesota v. Barber*, 136 U. S. 313 (1890) (reversing conviction and invalidating law regulating sale of beef); *Rhodes v. Iowa*, 170 U. S. 412 (1898) (holding that transportation intact packages could not be the subject of state regulation; *but see* *Austin v. Tennessee*, 179 U.S. 343 (1900) (drawing a distinction between tampered goods and opened packages and intact packages). The sheer number of Supreme Court cases cited in *Austin* upholding state police power exposes the acceptance in legal doctrine of police power exercises even during the era of CLT’s ascendancy. See *id.*, *infra* notes 17–19 and accompanying text.

<sup>17</sup> See generally Goldberg, S. B. “Morals-Based Justifications for Lawmaking: Before and After *Lawrence v. Texas*.” *Minn. L. Rev.* 88 (2004): 1233, 1247-54 (tracing the expansion of morals policing during the end of the 19th and early 20th centuries).

<sup>18</sup> See Bradley, C. M. “Criminal Law and Procedure: Anti-Racketeering Legislation in America.” *Am. J. Comp. L.* 54 (2006): 671, 674 (stating that in the late 19th and early 20th centuries “[a] combination of xenophobic fear of undesirable aliens, Victorian revulsion against the immoral practice of prostitution, and, to a lesser extent, genuine concern for the welfare of the women, created a strong public reaction against prostitution,” which in turn precipitated a federal criminal law response)

in an effort to fight organized crime,<sup>19</sup> and widespread vagrancy laws to address the transient unemployed.<sup>20</sup> Nevertheless, such deviations from the libertarian ideal might be explained culture-based exceptions to CLT, much like family law.<sup>21</sup> Indeed, the opposition to Victorian morality policing during the “roaring twenties” is more easily understood as a product of changing social mores than a consequence of legal intellectuals’ adherence to an abstract legal principle prioritizing harm. Moreover, the trend toward increasingly subjecting seemingly harmless behavior to criminal regulation appears to have occurred at the close of the 19<sup>th</sup> century, which Kennedy identifies as the denouement of CLT.<sup>22</sup>

The criminal law of the first globalization more clearly reflected a retributive logic. On the substantive law front, criminal statutes sanctioned “garden variety” crimes, rather than regularly using criminal law as part of public welfare schemes or to generally manage dangerous individuals.<sup>23</sup> Moreover, at that time, mandatory

---

<sup>19</sup> See *id.* at 673–675.

<sup>20</sup> See White, A. A. “A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924.” *U. Colo. L. Rev.* 75 (2004): 667, 682–85 (observing that the civil war’s creation of a population of idle laborers, industrial capitalisms’ brutal labor conditions, and the expansion of railways led to a perceived “tramp problem,” which engendered a spate of statutory vagrancy laws).

<sup>21</sup> See *supra* note 7 and accompanying text.

<sup>22</sup> See Goldberg, *supra* note 17, at 1247–54 (citing cases). Compare legal theorist Christopher Tiedeman’s 1886 statement, “This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. . . . Any law which goes beyond that principle, which undertakes . . . to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government,” with commentator Ernst Freund’s 1904 statement, “The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts.” Reynolds, G. H. & Kopel, D. B. “The Evolving Police Power: Some Observations for a New Century.” *Hastings Const. L.Q.* 27 (2000): 511, 512–13 (quoting Tiedeman, C. G. *A Treatise on the Limitations of the Police Power in the United States*. St. Louis: F. H. Thomas Law Book Co., 1886, 4–5, and Freund, E. *The Police Power: Public Policy and Constitutional Rights*. Chicago: Callaghan & Company, 1904, 6.

<sup>23</sup> See, e.g., *People v. Flack*, 125 N.Y. 324, 334 (1891) (“It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system, (unless in exceptional cases,) both must be found by the jury to justify a conviction for crime.”). The creation of the public welfare offense scheme is generally traced to the early 20<sup>th</sup> century and linked to the famed Supreme Court case *U.S. v. Balint*, 258 U.S. 250 (1922). See, e.g., Kennedy, J. E. “Making the Crime Fit the Punishment.” *Emory L.J.* 51 (2002): 753, 765 (“The public welfare doctrine was born in the early part of the last century as a creature of statutory interpretation.”). The Court in *Balint*, while recognizing “the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime,” nonetheless declared that “where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the

sentencing regimes still reigned supreme, reflecting the retributive philosophy that punishment should be calibrated to the criminal act and not dependent on the offender's background circumstances or rehabilitative potential.<sup>24</sup> It also seems that *Three Globalizations* is accurate in its assessment that criminal law was not a privileged area of law during the first globalization. It cannot be said that as a general matter criminal law was the primary or even a significant force in defining rights and relationships in United States society, given the relative modesty of criminal enforcement and sentencing.<sup>25</sup> On the international landscape, criminal law hardly existed at all.<sup>26</sup> Finally, there was no doubt some level of transnational transplantation or diffusion of criminal law, especially through constitutional borrowing—Germany's influence on Japan's Meiji Constitution and the United States' on Argentina's Constitution in the mid and late 19<sup>th</sup> Century come to mind.<sup>27</sup> However, it appears that there was no organized effort on the part of western nations to export their criminal law regimes.

## II. CRIMINAL LAW AND THE SOCIAL

As with CLT, I believe that the criminal law story in the United States generally supports *Three Globalizations'* description of the social. According to the

---

punishment of the negligent person though he be ignorant of the noxious character of what he sells.” *Balint*, 258 U.S., at 251–53. *But see* Sayre, F. B. “Public Welfare Offenses.” *Colum. L. Rev.* 33 (1933): 55, 64–65 (tracing the development of the public welfare offense to the mid-19<sup>th</sup> Century).

<sup>24</sup> See *Williams v. N.Y.*, 337 U.S. 241, 248 (1949) (noting that criminal procedure had abandoned “the old rigidly fixed punishments” by the 1930s and 40s). U.S. Dept. of Justice Bureau of Justice Assistance, *National Assessment of Structured Sentencing*, at 5, <https://www.ncjrs.gov/pdffiles/strsent.pdf>. (“At the end of the 19th century, sentencing reform in the United States involved replacing the flat sentence with indeterminate sentences.”); Powell, W. J. & Cimino, M. J. “Prosecutorial Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?” *W. Va. L. Rev.* 97 (1995): 373, 378 (“In 1870, New York became the first state to utilize an indeterminate-sentencing system. By 1922, all but four states and the federal government employed some type of indeterminate sentencing or used the parole system which functioned in the same way. By the 1960s, every state had an indeterminate-sentencing structure or some variation.”).

<sup>25</sup> See Stuntz, W. *The Collapse of American Criminal Justice*. Cambridge, MA: The Belknap Press of Harvard University Press, 2011, 31 (arguing that the local nature of criminal enforcement in the relatively homogeneous communities of the gilded age led to “low crime rates, frequent acquittals, and a small prison population”).

<sup>26</sup> See El Zeidy, M. M. “The Principle of Complementarity: A New Machinery to Implement International Criminal Law.” *Mich. J. Int’l L.* 23 (2002): 869.

<sup>27</sup> See Kanamori, S. “German Influences on Japanese Pre-war Constitution and Civil Code.” *European J. L. & Econ.* 7 (1999): 93; Gordon, M. “Don’t Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type.” *Wash. U. Global Stud. L. Rev.* 8 (2009): 487.

article, during the second globalization, there was a marked philosophical shift in thinking about the bases for criminal punishment.<sup>28</sup> I would add that the social was the era of criminology, victimology, the asylum, social causes of crime, criminal psychology, and rehabilitation. Drawing on insights from psychology and sociology, legislatures and courts began to envision crime as a disease of social or psychological origin and the criminal justice system as mechanism to effect treatment.<sup>29</sup>

Criminal law also became a tool of social engineering with legislators assessing strict criminal liability for violations of certain regulatory schemes.<sup>30</sup> Of course, strict criminal liability runs counter to Kantian retributivism and by extension will theory because it metes out punishment in the absence of intent-based culpability.<sup>31</sup> When faced with this argument in 1922, the Supreme Court's response in *U.S. v. Balint* clearly reflected the legal consciousness of the social period:

[I]n the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.<sup>32</sup>

In addition to withdrawing from the retributivist requirement of intent, criminal law also receded from the harm principle.<sup>33</sup> The conception of criminal confinement as treatment liberated criminal law from the requirement of harm and allowed legislatures to incarcerate and treat individuals on the basis of predictions

---

<sup>28</sup> "Three Globalizations", *supra* note 1, at 44.

<sup>29</sup> See Oleson, J. C. "Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984." *U. Rich. L. Rev.* 45 (2010): 693, 699–700 ("Indeed, for much of the early twentieth century, crime was viewed as a disease, and one that could be cured. It was believed that criminals were dynamic actors and could change, if only judges, prison wardens, and probation officers tried hard enough. In contrast, retribution seemed like a backward and unenlightened basis for punishment.").

<sup>30</sup> See *supra* note 23.

<sup>31</sup> See Sayre, *supra* note 23, at 82–83 (arguing that public welfare offenses run counter to the traditional requirement of individual culpability).

<sup>32</sup> *Balint*, 258 U.S. at 252.

<sup>33</sup> See Allen, F. A. *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (Storrs Lectures on Jurisprudence)*. New Haven: Yale University Press, 1981, 44 ("The liberal political stance and penal rehabilitationism coexist in a continuing state of tension[.]").

about their future dangerousness due to psychological defects.<sup>34</sup> Beginning in the 1930s, states adopted sexual psychopath laws designed to incapacitate and rehabilitate those who posed the greatest risk of committing future sex crimes.<sup>35</sup> Courts upheld laws that indefinitely detained individuals on the basis of vague psychological evidence on the grounds that sex offenders constitute “a definite abnormal type, recognized by the medical profession, who require confinement, treatment, and care, both for their own protection and for the protection of the public.”<sup>36</sup> As a consequence, sexual psychopath laws “could be wielded even more capriciously and to greater harm than could the old statutory regime.”<sup>37</sup> Nonetheless, scholarly commentary during the social period justified the legal regime as the “scientific procedure for control of sex crime . . . consistent with the trend toward treatment policies in criminal justice in preference to policies of punishment.”<sup>38</sup> In the sentencing arena, the affirmation of indeterminate sentencing over more structured sentencing regimes directly reflected social reasoning.<sup>39</sup> Defending a judge’s discretionary imposition of the death penalty against a due process attack, the Supreme Court wrote in 1949:

Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.<sup>40</sup>

*Three Globalizations* states that in the period of the social, the structure of CLT “flipped,” and “the periphery became the core.”<sup>41</sup> However, although the philosophy

---

<sup>34</sup> See *id.* at 46 (observing that because “[l]ines between therapy and repression tend to fade,” “[o]ne of the striking ironies of American history is the emergence of regimes of virtual slavery in the antebellum prisons in Auburn and Sing Sing, regimes motivated at the outset by rehabilitative objectives”).

<sup>35</sup> See Schmeiser, S. R. “The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning” *Yale J.L. & Human.* 20 (2008): 163, 206–16.

<sup>36</sup> *People v. Chapman*, 4 N.W.2d 18, 27 (Mich. 1942).

<sup>37</sup> Schmeiser, *supra* note 35, at 209.

<sup>38</sup> Sutherland, E. H. “The Diffusion of Sexual Psychopath Laws.” *Am. J. Soc.* 56 (1950): 142, 142.

<sup>39</sup> See *supra* note 24.

<sup>40</sup> *Williams*, 337 U.S. at 248–49.

<sup>41</sup> “Three Globalization”, *supra* note 1, at 43.



of criminal law markedly changed in the period of the social, the importance of criminal law, for the most part, did not. The attempts to use criminal law as a tool of regulation, at least in the United States, were fairly modest. The advent of the public welfare offense did not lead to a revolution of widely applied strict liability criminal laws.<sup>42</sup> Perhaps with the exception of sexual psychopath laws, the focus on rehabilitation, although theoretically carrying the threat of mass incarceration of the “dangerous,” did not have the practical effect of radically expanding the prison population.<sup>43</sup> In addition, while certainly a bane to many liberals, indeterminate sentencing, it turns out, did not extend prison lengths nearly as much as the determinate sentencing schemes enacted during the third globalization.<sup>44</sup> Moreover, while social reasoning spurred new international economic institutions, the international criminal regime remained merely reactive and fairly stagnant. Despite fledgling attempts to assess international criminal liability in the wake of World War I, international criminal liability was not formally applied until the Nuremburg and Tokyo tribunals.<sup>45</sup> Moreover, these international trials are often seen more as a *post hoc* manifestations of traditional victor’s justice than reflections of an emergent international moral consensus about international criminal law.<sup>46</sup>

### III. CRIMINAL LAW IN THE THIRD GLOBALIZATION: VICTIMS’ RIGHTS AND THE SPECTACLE

Turning to the third globalization, I begin with a chicken and egg observation. From an understanding of the parameters of the relevant legal consciousness, one can likely deduce which areas of law were particularly salient (i.e. contract law in CLT and administrative law in the social). By the same token, looking

---

<sup>42</sup> See *infra* note; Coffee, J. C. Jr. “Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law.” *B.U. L. Rev.* 71 (1991): 193 (observing that the explosion of regulatory crimes occurred after 1960).

<sup>43</sup> See Thompson, H. A. “Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History.” *J. Am. Hist.* (2010): 703, 704 (“In the thirty-five years leading up to and including the tumultuous 1960s, the number of Americans incarcerated in federal and state prisons had increased by 52,249 people. In the subsequent thirty-five years that group increased by 1,266,2435.”); *infra* note 47.

<sup>44</sup> See *infra* notes 49 and 76; text accompanying notes 77–78.

<sup>45</sup> See *supra* note 26.

<sup>46</sup> See “United States v. Araki et al., Dissenting Opinion of Justice Pal.” *The Tokyo Major War Crimes Trial*. Vol. 21. Eds. Pritchard, R. J. & Zaide, S. M. New York and London: Garland Publishing, 1981, 36-37 (calling Tokyo Tribunal “a mere tool for the manifestation of power.”).

at the areas of law that appear particularly ascendant in the relevant time frame can help elucidate the boundaries of any extant legal consciousness. This paper's analysis adopts the latter approach and begins with the claim that criminal law is a particularly salient area of law in the period of the third globalization, particularly after the final demise of the social in 1968. It then turns to *Three Globalization's* concept of legal consciousness and *langue* during this period. Next, the paper discusses the extent to which criminal law's ascendancy reflected legal consciousness during the third globalization, as Kennedy explains it, and was produced by post-CLT, post-social legal technologies. Finally, it explores whether a thorough understanding of the dominance of criminal law reveals characteristics of third globalization legal consciousness and technique not fully catalogued by *Three Globalization*.

#### A. THE PRIMACY OF CRIMINAL LAW IN THE THIRD GLOBALIZATION

Few in the field of criminal justice would deny the massive expansion in criminal law in the United States after 1968.<sup>47</sup> Since that time, the number of people incarcerated,<sup>48</sup> the length of sentences,<sup>49</sup> the number of criminal laws on the books,<sup>50</sup>

---

<sup>47</sup> See Sun Beale, S. "The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization." *Am. U. L. Rev.* 54 (2005): 747, 753-54 ("A blue ribbon ABA task force found that more than forty percent of federal criminal provisions passed after the Civil War had been enacted in the twenty-eight year period between 1970 and 1998. A detailed study commissioned by the Federalist Society concluded that there had been a thirty percent increase in federal offenses carrying criminal penalties between 1980 and 2004.") (footnotes omitted); *supra* note 43.

<sup>48</sup> See Gruber, A. et al., eds. *Practical Global Criminal Procedure: United States, Argentina, and Netherlands*. Durham: Carolina Academic Press, 2012, 5 (noting "the over 300% rise in population of people in the correctional system from 1980 to 2005."); Teichman, D. "The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition." *Mich. L. Rev.* 103 (2005): 1831, 1832 (same).

<sup>49</sup> In the mid-eighteenth century criminal sentences "rarely exceeded three months, and often proved as fleeting as twenty-four hours." Hirsch, A. J. "From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts." *Mich. L. Rev.* 80 (1982): 1179, 1187. Today, 71% of criminal sentences are between 5 years and life imprisonment. See *Quick Facts about the Bureau of Prisons*, <http://www.bop.gov/news/quick.jsp>. See also Ghoshray, S. "America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model." *New Eng. J. on Crim. & Civ. Confinement* 34 (2008): 313, 313-14 (noting that "many states that have stripped authority from their parole board and resorted to a predominantly fixed sentencing regime" which "resulted in significant increases in both the average length of incarceration for nonviolent crimes and the size of the incarcerated population in proportion to the general population"); Shepherd, J. "Blakely's Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime." *Hastings L.J.* 58 (2007): 533, 536 (observing the "increase the average sentence lengths and incarceration rates for violent crimes" after the advent of sentencing guidelines).

<sup>50</sup> See *supra* note 46.

the monetary resources devoted to criminal law,<sup>51</sup> and judicial and legislative activity regarding criminal law have steadily risen,<sup>52</sup> despite actual declines in crime rates.<sup>53</sup> For the last several decades, criminal law stories have fascinated evening news watchers on a daily basis, and criminal law has been a regular theme of political campaigns, arguably rising to a decisive issue in George H.W. Bush's defeat of Michael Dukakis.<sup>54</sup> In addition, politicians' emphases on and the media's portrayal of criminal defendants and victims helped facilitate the shift away from social reasoning in the popular imagination and toward a neoliberal ethic of individual responsibility by casting the deviant criminal element as the cause of social disorder and degradation.<sup>55</sup>

Recent decades have also witnessed an explosion of international criminal law. *Ad hoc* international tribunals, hybrid tribunals, local courts exercising universal jurisdiction, and the permanent ICC are producing millions of pages of documents expounding, creating, and refining international criminal law and procedure.<sup>56</sup> Every

---

<sup>51</sup> See Teichman, *supra* note 48, at 1832 ("Between 1982 and 2001, the resources dedicated by American taxpayers to the justice system have more than quadrupled.").

<sup>52</sup> Statistics from the federal government are telling. From 1991 to 2008 the number of criminal convictions nearly doubled (from 46,788 to 82,823). The percentage of cases plea bargained also rose from 86.5% convictions based on pleas to 97% of convictions based on pleas (In 1991, 5,555 convictions were after trial as compared to 2,639 in 2008). Despite the decline in the number of convictions after trials, appeals rates actually increased from 9,949 in 1991 to 10,379 in 2008. Miller, M. L. & Wright, R. F. *Criminal Procedures - Prosecution & Adjudication: Cases, Statutes, and Executive Materials*. 4<sup>th</sup> ed. Austin: Wolters Kluwer Law & Business - Aspen Publishers, 2011, 715.

<sup>53</sup> See Bureau of Justice Statistics, U.S. Dep't of Justice, *Four Measures of Serious Violent Crime*, last visited May 7, 2010 <http://www.ojp.usdoj.gov/bjs/glance/tables/4meastab.htm> (showing stable rates for "actual" crimes between 1973 and 1994, dramatically decreasing rates between 1995 and 2001, and stable rates from 2001 to 2007, with a spike in 2006 and dip in 2007).

<sup>54</sup> The ultimate poster child for "no tolerance" was Willie Horton, a convicted murderer who committed kidnapping and rape while out on a 48 hour furlough in Governor Michael Dukakis's state. Horton took center stage during Dukakis's bid for presidency and played no small part in his decisive defeat. See Lauter, D. "Crime Issue Becoming Election Battleground." *L.A. Times*, June 13, 1988, at 1.

<sup>55</sup> See Gruber, A. "Rape, Feminism, and the War on Crime." *Wash. L. Rev.* 84 (2009): 581, 621 ("Over the last several decades, the political rhetoric of crime and punishment has gone hand in hand with the trenchant argument against public welfare. Horrendous criminals became the perfect straw men, invaluable as examples of why there should be 'no tolerance for people's 'poor excuses.'"); Simon, J. *Governing Through Crime: How the War on Crime Transformed American Democracy And Created a Culture of Fear*. New York: Oxford University Press, 2007, 159 (discussing neoliberal punishment).

<sup>56</sup> As Ruti G. Teitel explains:

Currently, the humanitarian regime is being entrenched through codifications chartering new international judicial institutions that make criminal justice the primary means of enforcing international rights law. Although international criminal tribunals began on an *ad hoc* basis, they have become the international community's primary response to humanitarian crises. A consensus on establishing a new institution dedicated to ongoing international adjudication of violations of humanitarian law is seen in the convening of the *ad hoc* tribunals regarding the

day state actors, political groups, and jurists call for new criminal tribunals and substantive international crimes (Somali pirate tribunals, the international crime of human trafficking, outlawing female circumcision).<sup>57</sup> On the transnational plane, some European countries have in the last several decades faced the same uptick in criminal legislation and enforcement experienced by the United States. The Netherlands, commonly considered one of the most lenient countries in the world, for example, saw a 255% rise in prison population between 1990 and 2005.<sup>58</sup> It also recently added life without parole to its sentencing regime.<sup>59</sup> Throughout the world, countries have been engaging in projects to “modernize” their criminal systems by replacing certain civilian aspects with adversarial processes.<sup>60</sup> Although seemingly non-sequitur, American-style adversariality has become synonymous with the notion of fairness, civility, human rights, and anti-corruption in criminal law.<sup>61</sup> Behind these criminal reformation initiatives, one can find USAID money, IMF demands for stability, and U.S. legal scholar-initiated envoys to update “backward” criminal

---

Balkans and Rwanda, leading to the recent establishment of a permanent International Criminal Court. Consequently, there is now a turn to an expanded discourse of international criminal justice. The charters that form bases of the new international tribunals complicate traditional understandings of the law of war, the parameters of war and peace and the state’s duties to its citizens, by extending international jurisdiction beyond national borders and situations of conflict to penetrate states during times of peace.

“Humanity’s Law: Rule of Law for the New Global Politics.” *Cornell Int’l L.J.* 35 (2001): 355, 363–64; see also Spiga, V. “Non-retroactivity of Criminal Law.” *J. Int’l Crim. Just.* 9 (2011): 5, 11–12 (observing that after Nuremburg, “international criminal law expanded and became a more precise and certain area of law, thanks both to the ratification by a growing number of states of international treaties criminalizing the conduct of individuals and to international case law interpreting specific elements of the crimes or contributing to the gradual crystallization of crimes under customary international law”); Bayefsky, A. F. “The Legacy of the Universal Declaration of Human Rights.” *ILSA J. Int’l & Comp. L.* 5 (1999): 261, 263 (noting “the increase of international criminal judicial processes, specifically, the two ad-hoc international criminal tribunals and the International Criminal Court”).

<sup>57</sup> See, e.g., Isanga, J. M. “Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes.” *Am. U. L. Rev.* 59 (2010): 1267, 1274 (arguing for the “expansion of the jurisdiction of the International Tribunal on the Law of the Sea (ITLOS) as a permanent forum for the prosecution of suspected pirates”); Annas, C. L. “Irreversible Error: The Power and Prejudice of Female Genital Mutilation.” *J. Contemp. Health L. & Pol’y* 12 (1996): 325, 325 (advocating treating female genital mutilation as a crime against humanity or crime of torture).

<sup>58</sup> See Gruber et al., *supra* note 48, at 11.

<sup>59</sup> *Id.*

<sup>60</sup> See Esquirol, J. L. “The Failed Law of Latin America.” *Am. J. Comp. L.* 56 (2008): 75, 106 (observing that the adversarial “model [is] urged on the region” of Latin America and “[n]umerous countries have replaced or are now in the process of replacing their codes of criminal procedure”).

<sup>61</sup> See *id.* at 106–08; see also McLeod, A. “Exporting U.S. Criminal Justice.” *Yale L. & Pol’y Rev.* 29 (2010): 83.

systems.<sup>62</sup> In short, during the period of the third globalization, criminal law stepped out and said, “It’s my time.”

#### B. HOW CRIMINAL LAW DEVELOPMENTS SUPPORT KENNEDY’S THIRD GLOBALIZATION ANALYSIS

According to *Three Globalizations*, during the period of third globalization and especially after 1968, CLT and the social ceased to exist as distinct legal consciousnesses, and no overarching legal or political philosophy replaced them at that level of abstraction.<sup>63</sup> Invocations of CLT and the social in their pure forms occurred, but they manifested as stock, “old-hat” arguments invoked by right and left wingers.<sup>64</sup> The more important legacy of the clash of CLT and the social was a legal landscape in which parties utilized remnants of the consciousnesses, in the form of policy arguments and public law neoformalism, to achieve desired legal results and at the same time rise above politics.<sup>65</sup> Within this practice, the marshaling of the concept of an identity with attendant legal implications (rights, non-discrimination, etc.) became very important.<sup>66</sup> However, utilizing the language of constitutional or human rights, identity, and policy produced indeterminate legal and political results because the language “permits an infinite variety of *parole* by those who learn to speak” it and produces “as many ‘solutions’ as there are law-making authorities.”<sup>67</sup> It appears that the sole normative demand of legal consciousness in the third globalization was that law be apolitical.

The question is whether or to what extent this legal backdrop explains the post-1968 surge in criminal legislation, enforcement, judicial activity, and popular rumination. For sure, certain aspects of criminal law discourse and developments in the United States seem to vindicate *Three Globalization’s* description of consciousness and *langue* in the third globalization. One of Kennedy’s prime examples of public law neoformalism involves the rights revolution in criminal procedure during the Warren

---

<sup>62</sup> See Esquirol, *supra* note 60, at 106.

<sup>63</sup> “Three Globalizations”, *supra* note 1, at 63.

<sup>64</sup> *Id.* at 64.

<sup>65</sup> *Id.* at 71.

<sup>66</sup> *Id.* at 66–68.

<sup>67</sup> *Id.* at 67.

Court era.<sup>68</sup> However, the third globalization has arguably seen the zenith and nadir of criminal defendants' rights in the United States.<sup>69</sup> If the Warren Court represents the quintessence of public law neoformalism, the question becomes whether the subsequent more conservatively constituted Court (led by Burger, Rehnquist, and Roberts) also utilized technologies of the third globalization in its crime-control oriented analysis. I think one could answer this question in the affirmative. First, conservative Court members engaged in public law neoformalism by appealing to constitutional structure and meaning to determine that the defendant did not have the particular right at issue.<sup>70</sup> The non-formalist arguments appeared as policy considerations regarding the importance of police expertise, safety, and discretion.<sup>71</sup> And of course both liberal and conservative criminal procedural decisions are rife with balancing tests.<sup>72</sup>

In addition to the generative moments in judicial criminal procedural law, the third globalization saw an upswing in political, legislative, and police activity regarding crime. U.S. criminal legal academics now routinely complain about the problems of over-criminalization.<sup>73</sup> It is true that some of the criminal laws that law

---

<sup>68</sup> *Id.* at 68.

<sup>69</sup> See Kamisar, Y. "How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice." *Earl Warren and the Warren Court: The Legacy in American and Foreign Law*. Ed. Harry N. Scheiber. Lanham: Lexington Books, 2007, 91, 112 ("Since the Warren Court's revolution in criminal procedure came to an end, most of the famous cases that marked the revolution have been ... read narrowly, applied grudgingly, and riddled with exceptions by the Burger and Rehnquist Courts.").

<sup>70</sup> See, e.g., *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (stating that "[w]e have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person" and "from the time of the founding to the present, the word 'seizure' has meant a 'taking possession'" (internal citations omitted)).

<sup>71</sup> For example, in *New York v. Quarles*, 467 U.S. 649, 656 (1984), Justice Rehnquist crafted a "public safety" exception to the requirement that police give *Miranda* warnings before interrogation and reasoned:

In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

<sup>72</sup> See e.g., *Illinois v. Gates*, 462 U.S. 213 (1983) (replacing two-pronged *Aguilar-Spinelli* test, which limited the ability of state actors to rely on informant testimony, with a more permissive totality-of-the-circumstances test).

<sup>73</sup> See *supra* note 46.

professors and students argue epitomize criminal law's overreach (i.e. criminalizing tearing the tag off a pillow) are legacies of the social period,<sup>74</sup> in which public welfare regimes often included minor criminal penalties.<sup>75</sup> For the most part, however, scholars understand the criminalization explosion in the United States to be a matter of increased illegalization, prosecution, and punishment of street (particularly drug) crimes and sex crimes.<sup>76</sup> The criminalization phenomenon, apart from the rights revolution in criminal procedure, does appear to be distinctly legislative and administrative, rather than judicial, which is reminiscent of the social. In fact, during the third globalization, the trend was to remove judicial discretion in the one area of the criminal trial centralizing the judge, sentencing,<sup>77</sup> and transfer that power to legislatures in the form of mandatory minimums and three strikes laws and to "expert" sentencing commissions promulgating sentencing guidelines.<sup>78</sup> In the social, such a transfer of power would be done in the name of some program of social engineering. The sentencing guideline movement in the United States, however, has been justified on the most formalistic grounds—that of securing "uniformity" in sentencing.<sup>79</sup> Thus, perhaps contrary to Kennedy's characterization, in many ways, the hero figure in criminal law during the third globalization is not the judge, but the

---

<sup>74</sup> See Stuart P. Green, S. P. "Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses." *Emory L.J.* 46 (1997): 1533.

<sup>75</sup> See *supra* notes 30–32 and accompanying text.

<sup>76</sup> Erik Luna describes the surge in criminalization, despite the philosophical shift away from social reasoning:

Both federal and state governments have contributed over the past quarter century to a punishment binge of unprecedented size and scope. Although the downfall of the "rehabilitative ideal" and the rise of determinate sentencing were supposed to herald an age of fairness and proportionality, the upshot has been a massive increase in punishment irrespective of theoretical justification or practical experience. Anti-recidivist statutes and "mandatory minimums" have been particularly popular, imposing stiff punishment regardless of all other considerations. Some of the most notorious examples involve low-level drug offenders and other minor criminals sentenced to years or even decades in federal prison

Luna, E. "The Overcriminalization Phenomenon." *Am. U. L. Rev.* 54 (2005): 703, 710–11 (footnotes omitted).

<sup>77</sup> See Gruber et al., *supra* note 48, at 14 ("Once the liability portion of the adversarial trial has ended in a guilty verdict, the judge plays a far more active role in sentencing.")

<sup>78</sup> Cowart, L. E. "Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit." *DePaul L. Rev.* 47 (1998): 615, 629 ("The deprivation of judicial discretion can be seen, at a minimum, in the formation of sentencing commissions and mandatory sentencing guidelines, and now in the form of three strikes legislation as well.")

<sup>79</sup> See 28 U.S.C. § 991(b)(1)(B) (2006) (creating the Sentencing Commission to "provide certainty and fairness").

legislator.<sup>80</sup> Yet that legislator mediates formalistic rhetoric and social concerns about dangerous individuals to push through crime control measures.

If *Three Globalizations* is correct that legal consciousness during the third globalization is a kind of schizophrenia in legal reasoning, perhaps it makes sense that only during a time in which the left over techniques of CLT and the social were up for grabs could the right argue in such a self-contradictory manner in support of increased criminalization.<sup>81</sup> The massive growth of criminal institutions was directly facilitated by those on the right most committed to the partisan view of CLT and the notion of small government.<sup>82</sup> In fact, President Reagan pointed to criminal actors as exemplifying why social reasoning fails and people should be treated as autonomous agents.<sup>83</sup> At the same time, sentencing regimes violated basic retributive principles by determining incarceration lengths, not with regard to culpability, but by *ad hoc* and fairly unscientific determinations of harm and dangerousness.<sup>84</sup> A new wave of sexual psychopath laws, now called sexual predator laws, proliferated.<sup>85</sup> Unlike the laws of the social that reflected a trend toward treating criminals as socially diseased and in need of treatment, predator laws, as the change in nomenclature indicates, see sex offenders as immutably evil monsters who cannot be cured (yet are also somehow completely culpable for the “choice” to offend).<sup>86</sup> The socially beneficial solution

---

<sup>80</sup> See “Three Globalizations”, *supra* note 1, at 65.

<sup>81</sup> See Whitman, J. Q. “The Free Market and the Prison.” *Harv. L. Rev.* 125 (2012): 1212, 1230, 1214 (“The revolution in favor of markets has been a revolution against intrusions by Big Government, while the penal revolution has brought about a massive growth of a sort of government activity more dramatically intrusive than any other.”).

<sup>82</sup> White, A. A. “Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society.” *Ariz. St. L.J.* 37 (2005): 759, 820 (arguing that the current neoliberal regime is “a contradictory blend” supporting capitalism and “illiberal” social norms); “Distributive Theory”, *supra* note 15, at 19 (noting the irony of conservative support for “the criminal regulatory system [which] has grown to embody a massive and inefficient taxing-and-spending program that distributes funds to carceral programs nearly exclusively for the poor”).

<sup>83</sup> See Reagan, Ronald “Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut.” June 20, 1984. *Pub. Papers* 1: 884, 885 (attributing crime rates to “a liberal social philosophy that too often called for lenient treatment of criminals”).

<sup>84</sup> The U.S. Sentencing Guidelines, for example, infamously set the sentence lengths for possession of crack cocaine at 100 times the sentence lengths for possession of powder cocaine. See *Kimbrough v. U.S.*, 552 U.S. 85 (2007) (discussing disparity).

<sup>85</sup> See generally Yung, C. R. “The Emerging Criminal War Against Sex Offenders.” *Harv. C.R.-C.L. L. Rev.* 45 (2010): 435, 453-54.

<sup>86</sup> See, e.g., 148 *Congressional Record* H916 (daily ed. March 14, 2002) (remarks of Rep. Green) (stating that Two Strikes and You’re Out Child Protection Act is “simply about taking these sick monsters off the streets . . . to try to end the cycle of horrific violence that is every parent’s nightmare”).



and/or the one that appropriately recognizes culpability is thereby to permanently incapacitate them.<sup>87</sup>

C. WHAT AN UNDERSTANDING OF LATE 20<sup>TH</sup> CENTURY PUNITIVENESS  
CAN ADD TO THE ANALYSIS OF THE THIRD GLOBALIZATION

While it is true that in many ways criminal law adjudication and legislation in late United Statesean modernity exemplifies *Three Globalization's* account of legal consciousness and *langue* in the third globalization, the question is whether Kennedy's grid fully explains what has happened in criminal law. One can make a formidable case that the third globalization's particular mix of policy analysis and neoformalism provides a totalizing account of the criminal law trajectory. During the first globalization, pure CLT prevented the growth of criminal law because it frowns upon criminal law as social engineer or manager of dangerousness. By the same token, the social also had some built-in limiting mechanisms. The concept of social causes of crime might serve to temper emotional outrage or formalistic retributivist sentiments that lead to more and harsher criminal laws.<sup>88</sup> Moreover, under the treatment model, criminal law decisions are deferred to scientific experts, who tailored predictive and treatment modes to the available science. It thus was only when the remnants of CLT and the social provided victims' rights groups, politicians, and legislators with a menu of ideologically conflicting legal tools, from which to pick and choose, that the ideal combination existed to usher in a particularly punitive era.

On the other hand, CLT certainly provided the language, in the form of retributivism and individual responsibility, in which a crime control enthusiast could argue for more and harsher criminal law.<sup>89</sup> Moreover, one would naturally expect criminal law to flourish markedly during the era of the social. Criminal law could have become a primary feature of the regulatory and administrative state.<sup>90</sup> Then how

---

<sup>87</sup> See Schmeiser, *supra* note 35.

<sup>88</sup> See Garland, D. *The Culture of Control: Crime and Social Order in Contemporary Society*. Chicago: University of Chicago Press, 2001, 9 ("For most of the twentieth century the openly avowed expression of vengeful sentiment was virtually taboo.").

<sup>89</sup> See Stuntz, *supra* note 25, at 31 (attributing late 19<sup>th</sup> Century leniency to the localness of criminal law rather than retributive philosophy).

<sup>90</sup> This has apparently happened in recent decades. See *supra* note 46.

come only during the period of the third globalization, and especially after 1968, did criminal law appear like a particularly privileged field?

One answer might be that economic, social, and cultural forces independent of legal consciousness led to the resolution of criminal law issues in favor of conservatives, victims, and prosecutors.<sup>91</sup> However, a case can be made that there was something else happening in legal consciousness and language, aside from neoformalism, balancing tests, and policy arguments, that helps explain the proliferation of criminal prohibitions, enforcement, and reform during the third globalization. Much of the trend toward increased punitiveness in the United States and in international and transnational law can be traced to the powerful victims' rights movement. The victims' rights movement has led in direct and indirect ways to the United States' reign as the most punitive western nation. On the international field, victims' rights claimants are literally clogging the courts of the ICC and other tribunals.<sup>92</sup> In many ways, this movement is exemplary of *Three Globalizations*' description of legal consciousness and *langue* during the third globalization. Victims appear in the law as an identity group that uses the language of rights to undergird their claims.<sup>93</sup> The judge is then called on to balance victims' rights against defendants' rights.<sup>94</sup> Crime victims sometimes appear as traditional minorities ("weak" parties), for example, the Tutsi in the International Criminal Tribunal for Rwanda (ICTR) processes.<sup>95</sup> At other times, they are "strong" parties—they have

---

<sup>91</sup> Cf. Garland, *supra* note 88, at 7 & *passim* (discussing the "social, economic, and cultural arrangements of late modernity" that led to the punitive era in the United States).

<sup>92</sup> See Kaoutzanis, C. "Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight Against Impunity and Victim Participation." *U.C. Davis J. Int'l L. & Pol'y* 17 (2010): 111, 129-30.

<sup>93</sup> See Gillis, J. W. & Douglas E. Beloff, "The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts." *McGeorge L. Rev.* 33 (2002): 689, 689-90 (calling the victims' movement "one of the most successful civil liberties movements");

<sup>94</sup> See, e.g., 150 *Congressional Record* 7296 (2004) (statement of Sen. Feinstein) (urging passage of the CVRA because "the scales of justice are out of balance"); President's Task Force on Victims of Crime, *Final Report* December 1982, 114 (finding that the justice system lost its "essential balance" by disserving victims).

<sup>95</sup> See Alvarez, J. E. "Rush to Closure: Lessons of the Tadic Judgment." *Mich. L. Rev.* 96 (1998): 2031, 2074 (discussing the ICTR's challenge of balancing victims' rights and procedural protections). However, the characterization of Tutsi's as a subordinated group is a contestable claim, given that during the ICTR proceedings, the former Tutsi rebels (RPF) had taken control of the government and asserted quite a bit of influence over tribunal processes. See "Prosecutor Accused: Did Carla del Ponte do Too Little or Too Much in Rwanda? Both." *TheEconomist.com* Aug. 21, 2003, <http://www.economist.com>

political clout, are backed by powerful prosecutors, and have financial resources and advocates at their disposal—seeking to appear as disenfranchised minorities.<sup>96</sup> More often, however, criminal policy is driven by the fictional, sensationalized victim, with which society is emotionally and morally compelled to identify.<sup>97</sup>

A phenomenon undergirding the victims' rights revolution during the third globalization was the growth of mass communication. With the advent of television (and now social media), society became accustomed to witnessing spectacular events with regularity. With the growing number of public and private news outlets vying for public attention space, events had to be described ever more provocatively and accessibly.<sup>98</sup> Within this framework, narratives began to revolve around identifying victimhood and wrong-doer status. The public would absorb a narrative, have intuitions about justice based on identifying bad and good actors, and demand accountability from legal actors.<sup>99</sup> The party best able to communicate a victimhood narrative within the spectacle became the privileged litigant.<sup>100</sup>

The above analysis may not fully describe a distinct legal consciousness. However, it does seem map a process whereby controversies entered the legal sphere as spectacular events from which jurists, legislators, and scholars identified victims, derived intuitions of justice, and accordingly created or advocated legal remedies to do justice utilizing available legal tools. Law became a forum for expressing outrage

---

ist.com/node/2010873/print?story\_id=2010873 (“The Rwandan government has obstructed Ms. del Ponte in many ways. Her complaints to the Security Council were put to one side, and in May, under pressure from America, she agreed to drop her investigations into the role of the RPF.”).

<sup>96</sup> See Gruber, A. “The Feminist War on Crime.” *Iowa L. Rev.* 92 (2007): 741, 775 (arguing that the victim's rights movement “is not about marginalized groups using identity politics to fight oppression” but about “powerful privileged groups using stereotypes to affect policy in a way that expressly decreases the rights of the worst-off and legitimizes, rather than challenges, subordinating institutions”).

<sup>97</sup> See “Distributive Theory” *supra* note 15, at 72 (arguing that “politicians often choose to publicize cases in which victims are definitionally not responsible, in particular, violent crimes involving small children”).

<sup>98</sup> See generally Rapping, E. “Television, Melodrama, and the Rise of the Victims' Rights Movement.” *N.Y.L. Sch. L. Rev.* 43 (1999 – 2000): 665.

<sup>99</sup> See Demleitner, N. V. “First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders.” *Iowa L. Rev.* 87 (2002): 563, 568 (observing that within the public discourse, “[t]he victim became increasingly pitted against the offender, and only long sentences appeared to validate her pain and suffering”).

<sup>100</sup> This is not the same thing as the spectacle of punishment during the late 18<sup>th</sup> Century. See Foucault, M. *Discipline and Punish: The Birth of the Prison*. Trans. Alan Sheridan. New York: Vintage, 1977, 11 (noting how the decline of the punishment spectacle led to punishment becoming “an economy of suspended rights”).

at those causing spectacular harms and solidarity with the unfairly harmed. Markus Dubber explain:

The identification with the victim at the expense of identifying with the offender provides an additional benefit to the onlooker, which may well have contributed to the success of the victims' rights movement. By denying any similarities with the offender upon which identification could be based, the onlooker transforms the essentially ethical question of punishment into one of nuisance control. An ethical judgment is no longer necessary. . . . Once the offender is excluded from the realm of identification, the question "how could someone like us (or, stronger, like me) have done something like this" no longer arises.<sup>101</sup>

The phenomenon of victim identification as a legal concept may seem somewhat opposed to Duncan's notion that the crux of legal consciousness during the third globalization involved the appearance of political neutrality. However, within spectacle-based legalism, the legal actors do not see themselves as doing politics so much as doing justice by remedying obvious harm of a universal character.<sup>102</sup> In this sense, reasoning by spectacle is similar to public law neoformalism in that it also "rebels in the name of 'absolutes' outraged in a particular context." It is, however, distinct from neoformalism in the sense that the moral prerogatives are derived from narrative-driven intuitions, and once these intuitions are formed, the job of the jurist is to find or create the law supporting that intuition. In this sense, it is not adherence to abstract concept like rights and identity that drives legal decision-making, although they are certainly invoked rhetorically, but the emotional connection to idealized subjects.<sup>103</sup> Of course, not every legal controversy rises to the level of a spectacle. In this sense, spectacle-based legalism will not be reflected in every area of the law, just as, for example, contract law may have been resistant to the influence of the social during the period of the second globalization.

---

<sup>101</sup> See Dubber, M. D. "The Victim in American Penal Law: A Systematic Overview." *Buff. Crim. L. Rev.* 3 (1999–2000): 3, 9.

<sup>102</sup> Henderson, L. N. "The Wrongs of Victims' Rights." *Stan. L. Rev.* 37 (1985): 937, 952 (noting that "the symbolic strength of the term 'victims' rights overrides careful scrutiny: Who could be anti-victim?")

<sup>103</sup> See "Distributive Theory", *supra* note 15, at 48–49 (asserting that although victims' rights reformers use the liberal language of rights, they actually demand distributional changes to alleviate victim suffering).

Reasoning from the spectacle thus exists alongside, utilizes, and can complement neoformalist and policy-based reasoning.

Like CLT and the social, spectacle-based legalism and victim identification cuts both right and left. It, for example, favors liberal reform projects directed toward ending persecution of women and other minorities utilizing the tool of international human rights law.<sup>104</sup> It might also bolster conservative U.S. tort reform efforts premised on curbing an epidemic of frivolous lawsuits initiated by greedy plaintiffs and their lawyers and enabled by irrational juries.<sup>105</sup> In the criminal law context, the spectacle nearly always favors the prosecution.<sup>106</sup> Occasionally, defendants are able to cast themselves as the real victims (i.e. those subject to police brutality or racial profiling, battered women who kill, subway vigilantes, or those who attack in response to racial harassment).<sup>107</sup> For the most part, however, criminal law spectacles involve brutalized victims and monstrous offenders.<sup>108</sup> It is no surprise, then, that spectacle-based legalism has undergirded a proliferation of criminal law and enforcement around the world.

Spectacle-based legal consciousness has spawned legal methods that are quite distinct from neoformalist techniques like constitutionalism and rights rhetoric, social techniques like policy arguments, and other third globalization techniques like balancing and identity. One of favored techniques during the third globalization has been the legal narrative. The legal papers created during the third globalization are

---

<sup>104</sup> See *supra* notes 57 & 96 and accompanying text.

<sup>105</sup> See “Distributive Theory”, *supra* note 15, at 71 (“Within tort reform discourse, the victim is the fully responsible immoral party, and the defendant requires protection from an irrational, even socialist, legal system set on violating his rights in the name of redistribution.”); McCann et al. “Java Jive: Genealogy of a Juridical Icon.” *U. Miami L. Rev.* 56 (2001): 113, 132 (observing that news coverage parallels “the simplistic tort tales circulated by tort reformers”).

<sup>106</sup> See Dubber *supra* note 101, at 6 (characterizing the victims’ rights movement as a “political movement, fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition”); Mosteller, R. P. “New Dimensions in Sentencing Reform in the Twenty-First Century.” *Or. L. Rev.* 82 (2003): 1, 23 (“[R]estorative justice does not fit within the victims’ rights movement, which often advocates for punishment and retribution.”).

<sup>107</sup> See Dubber, *supra* note 101, at 11 (“In American practice, cases of domestic abuse in which a woman kills her male partner often come down to a question of who is considered to be the ‘true’ victim, the deceased man or the accused woman.”) (footnote omitted).

<sup>108</sup> See Henderson, L. “Co-Opting Compassion: The Federal Victims’ Rights Amendment.” *St. Thomas L. Rev.* 10 (1998): 579, 586–87 (contending that society views defendants as “monsters,” or “undifferentiated, poor, angry, violent, Black, or Latino male[s]”).

filled with detailed factual descriptions of the legal controversies that call for remediation.<sup>109</sup> In the United States, the fact sections of written cases have increased manifold, and legislation, especially in the criminal law context, often starts off with lengthy and hyperbolic descriptions of the grave concerns addressed by the statutory measures.<sup>110</sup> The narratives are typically tailored toward the decisions reached and involve the identification of good and bad actors. In the criminal law context, decisions that favor the prosecution tend to contain long and detailed descriptions of the heinous nature of the crime and the criminal background of the perpetrator.<sup>111</sup> Decisions that favor the defense boast briefer descriptions of the crime and defendant characteristics and may emphasize the particular police abuse instead.<sup>112</sup> In the international context, court cases have purposefully become a forum in which to record the spectacle. Court documents are meant to record the “truth” of the spectacular event to memorialize that which should never be forgotten.<sup>113</sup>

Another manifestation of spectacle-based legalism is the notion that in-court experiences, themselves, provide remedies to victims. In the United States, recent decades have seen extensive criminal law reforms intended to give victims a voice in the criminal process, let them exert greater control over the process, and thereby

---

<sup>109</sup> See West, R. *Narrative, Authority and Law*. Ann Arbor: University of Michigan Press, 1993, 430-36 (demonstrating pro-death penalty Supreme Court Justices’ tendency to emphasize the horrific details of the murder); cf. Conaghan, J. “Wishful Thinking or Bad Faith?: A Feminist Encounter with Duncan Kennedy’s Critique of Adjudication.” *Cardozo L. Rev.* 22 (2001): 721, 741–42 (critiquing Duncan Kennedy’s *Critique of Adjudication* for failing to adequately account for the operation of narrative in legal discourse).

<sup>110</sup> See, e.g., Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248 § 102 (“Declaration of Purpose” specifically listing 17 child victims of grievous sexual crimes).

<sup>111</sup> *Sawyer v. Smith*, 497 U.S. 227, 230 (1990) (in the context of a retroactivity decision, describing brutal murder and adding that the defendant stated he committed the murder to show “just how cruel he could be”); *Payne v. Tennessee*, 501 U.S. 808, 812 (1991) (in the context of the constitutionality of victim impact statement, detailing a “horrifying scene” with “blood covered walls” and stating that one of the victims, a 3-year-old child, “miraculously” survived wounds from a “butcher knife that completely penetrated through his body from front to back”).

<sup>112</sup> See West, *supra* note 109, at 436; see, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (beginning with the statement, “The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence” providing no details about Miranda’s crime, but describing violent police interrogation tactics).

<sup>113</sup> See *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, para. 21 (Mar. 5, 1998) (noting that one of the functions of the ICTY was to “contribute to the settlement of wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia”).

“make them whole.”<sup>114</sup> In the international arena, the importance of victims’ cathartic participation has led to a victim right to be heard, despite the practical problem of adjudicating genocide and war crime cases involving hundreds, even thousands, of victims.<sup>115</sup> Because spectacle-based legalism involves narrative-driven intuitions of justice, there is no need to wait for a determination of guilt (or that the crime even occurred) before designing remedies for those identified as victims.<sup>116</sup> Victims’ rights reformers reject that post-adjudication remedial measures are sufficient on the ground that the victim benefits by participating in and influencing the very processes by which the defendant’s guilt and sentence are determined. Some of the in-court remedies for victims involve notice and presence.<sup>117</sup> The most visible and important reforms involve victim impact statements and evidence.<sup>118</sup> Through impact statements and evidence, the victim (and prosecution) bring the spectacle, or some version of it, into court—from horrific descriptions of suffering and death to carefully crafted videos portraying a decedent’s life set to music.<sup>119</sup> The law then

---

<sup>114</sup> See Henning, K. “What’s Wrong With Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice.” *Cal. L. Rev.* 97 (2009): 1107, 1165 (observing that victims’ rights provisions ask judges to determine “what financial, emotional, and material reparations are needed to make the victim whole.”); Cassell, P. G. “In Defense of Victim Impact Statements.” *Ohio St. J. Crim. L.* 6 (2009): 611, 622 (observing that “the consensus appears to be that victim impact statements allow the victim “to regain a sense of dignity and respect rather than feeling powerless and ashamed”) (quoting *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006)); “Distributive Theory”, *supra* note 15, at 45–52 (discussing the victims’ rights movement’s demands for victim participation).

<sup>115</sup> See generally Bachrach, M. “The Protection of Rights and Victims under International Criminal Law.” *Int’l Law.* 34 (2000): 7; see Gordon, G. S. “Toward an International Criminal Procedure: Due Process Aspirations and Limitations.” *Colum. J. Transnat’l L.* 45 (2007): 635, 697–98 (“[V]ictim empowerment [in the ICC] essentially reconfigures the structure of international criminal justice. Although in principle the enumerated victim rights must be exercised without prejudice to those of the accused, it is difficult to reconcile this with the extraordinary influence victims may exert over the process.”) (footnote omitted).

<sup>116</sup> See Gruber, A. “Victim Wrongs: The Case for a Criminal Defense Based on Wrongful Victim Behavior in an Era of Victim’s Rights.” *Temp. L. Rev.* 76 (2003): 645, 666 (“By giving these complainants rights as ‘victims,’ the law presupposes that the complainants’ version of events is true (and by implication the defendants’ is not true). From the beginning, then, the designated victim – most likely designated by the prosecution—is innocent beyond doubt, absolutely truthful, and even deserving of reverence.”).

<sup>117</sup> See “Distributive Theory”, *supra* note 15, at 45–52 (discussing victims’ rights reforms that affect trial processes).

<sup>118</sup> See *Payne*, 501 U.S. 808 (finding constitutional the introduction of victim impact evidence during death sentence hearings); see generally “Distributive Theory”, *supra* note 15, at 57–63.

<sup>119</sup> See *People v. Kelly*, 171 P.3d 548, 567–68, 572 (Cal. 2008) (video montage of photos and video clips of decedent’s life set to music). The video is available on the Supreme Court’s website, at <http://www.supremecourtus.gov/media/media.aspx>.

expressly directs juries and jurists judging defendants' fate to base sentencing decisions on how best to do justice in light of the spectacle.<sup>120</sup>

There is one final legal phenomenon that is difficult to understand merely as a left over tool of CLT or the social. U.S criminal law in the latter 20<sup>th</sup> Century has emphasized private party distribution whereby the pain of the victim can be reduced by inflicting pain on the offender (or put another way, the pleasure of the victim can be increased by taking away pleasure from the offender's life).<sup>121</sup> This distribution of pleasure and pain cannot be explained by CLT as it exists in criminal law, namely retributivism. Again, retributivism revolves around the notion of the will and therefore bases punishment on intentional wrong-doing.<sup>122</sup> The distributive trend in criminal law, driven by the spectacle and victim identification, seeks to redress victim harm, regardless of intent. Victim impact evidence, for example, introduces into the legal process pain and suffering that the defendant may not have intended to cause and may not have even known existed.<sup>123</sup>

Nevertheless, it is possible characterize the concept of assessing of punishment to relieve victim suffering as principle that derives from the social period. The various victims' rights reforms can be seen as products of the disciplines of sociology and psychology.<sup>124</sup> One might contend that during the third globalization, criminal law simply began to respond to the needs of a distinct social group: victims.<sup>125</sup> While this account of victim-centered criminal law is compelling, victims' rights reforms do appear to differ in meaningful ways from other social-period reform projects. First, social constructions of criminal law have always involved either the management or treatment of dangerous people or the prevention

---

<sup>120</sup> See *Payne*, 501 U.S. at 832 (O'Connor, J., concurring) (defending victim impact evidence and asserting that murder "transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.")

<sup>121</sup> See generally "Distributive Theory", *supra* note 15.

<sup>122</sup> See *supra* note 15 and accompanying text.

<sup>123</sup> See *Booth v. Maryland*, 482 U.S. 496, 504 (1987) (opining that victim impact evidence "may be wholly unrelated to the blameworthiness of a particular defendant" because "the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family").

<sup>124</sup> See Cassell, *supra* note 114 (arguing that victims receive psychological benefits from participating in and influencing the criminal process).

<sup>125</sup> See *supra* note 95 (discussing victims as a marginalized group).



of dangerous behavior.<sup>126</sup> Punishing defendants to satisfy victims is a penal purpose wholly separate from deterrence, incapacitation, or rehabilitation.<sup>127</sup> Moreover, looking to social causes of crime is anathema to victims' rights adherents. Victim-based distributive logic rests on a presupposition, driven by the spectacle, that internally evil criminals are wholly responsible for harming victims.<sup>128</sup> Victims' rights law adopts and reinforces the principle that crime is not a public matter of social disorder produced by and affecting society but is rather a private matter of particular individuals harming other individuals.<sup>129</sup> To the extent that society is involved at all, involvement comes in the form of passive observation and reaction to spectacular harms. Finally, victim-based distribution does not seem to be a product of disciplined scientific study in the fields of psychology or sociology. It is not particularly facilitated by sociological evidence about how to manage social reactions to crime.<sup>130</sup> Although distribution assumes some level of psychological satisfaction on the part of the victim when the criminal is punished, this assumption is based less on actual scientific studies of victims and the discipline of victimology and more on the spectacle's portrayal of victims' attitudes regarding horrific crimes.<sup>131</sup>

#### CONCLUSION

This essay was meant to start a conversation about what the ascendancy of criminal law in the latter 20<sup>th</sup> Century might tell us about third globalization and vice versa. For sure, the story of criminal law in many ways supports Duncan Kennedy's framework of global legal consciousness from 1850-2000. However, there are other ways in which the trajectory of criminal law developments evidences patterns of legal thought and technique not fully explored in *Three Globalizations*. Much of modern

---

<sup>126</sup> See *supra* notes 33–40 and accompanying text.

<sup>127</sup> See “Distributive Theory”, *supra* note 15, at 22 (“The punishment dictated by the victim’s need for closure may be less or more than what constitutes appropriate deterrence or desert.”).

<sup>128</sup> See *supra* notes 86 & 108 and accompanying text.

<sup>129</sup> See *supra* note 83 and accompanying text.

<sup>130</sup> See *supra* note 54–55 and accompanying text (discussing the political nature of the victims’ rights movement).

<sup>131</sup> See Henderson, L. N. “The Wrongs of Victim’s Rights.” 37 *Stan. L. Rev.* 37 (1985): 937, 964–65 (“Common assumptions about crime victims—that they are all ‘outraged’ and want revenge and tougher law enforcement—underlie much of the current victim’s rights rhetoric. But in light of the existing psychological evidence, these assumptions fail to address the experience and real needs of past victims.”) (footnote omitted).

criminal law has been driven by emotionally laden spectacle, narrative, and character, rather than cerebrally oriented deduction, neoformalism, social awareness, or identitarianism. Legal tools employed in third globalization criminal law go beyond rights rhetoric, constitutionalism, and policy argument, and include the use of narrative, performative remediation, and private distribution of pleasure and pain. Perhaps the category of criminal law is *sui generis* in the third globalization. Nonetheless, it may be interesting to continue this conversation and explore the ways in which emotion, spectacle, narrative, and victimhood have a larger influence on legal consciousness and language in the third globalization.