

**Governing Through Crime: Criminal Law and the Reshaping of American Government 1965-2000**

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**The Land of the Free and the Home of the Fearful:  
Governing America Through Crime and its  
Consequences**

For a long time before that in the United States it had not been safe to walk in the big cities at night: sometimes in certain areas not in the day. For years they had moved about by the grace of paternal or brutal police; or under the protection of some gang. (It was in the mid-seventies that it came out for how long the United States had been run by an only partly concealed conspiracy linking crime, the military machine, the industries to do with war, and government.) Whether he chose to be protected by the bully men of the gangster groups, or by the police, or by the deliberate choice of a living area that was safe and respectable and inside which he lived as once the Jews had lived in ghettos, in America the citizen had long since become used to an organized barbarism.

Doris Lessing, *The Four Gated City*<sup>1</sup>

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<sup>1</sup> Doris Lessing, *The Four Gated City* (St. Albans, UK: Panther Books Limited, 1972), 623. In her 1972 novel, subtitled, *Vol. 5 of the Children of Violence*, Lessing imagined a new social order dominated by crime and punishment, arising in the United States from the 1970s on and spreading to Britain in the 1990s. Many thanks to Susan Haack for calling this passage to my attention.

Americans at the turn of the 21<sup>st</sup> century are in the midst of reinventing governance at almost every level of society from the state, to business firms, to schools and families. As with earlier moments of transformation, a renewed and changed understanding of freedom is motivating and shaping a broad set of efforts to recast the work of governance. This “advanced” or “neo” liberal understanding of freedom re-emphasizes the individual as a center of calculation and risk bearing, the disaggregation of society-wide classes and categories, the dismantling of bureaucratic mechanisms of organization and the replacement of command and control oriented regulation with methods of delegating responsibility for achieving broad social goals (lower crime rates, less pollution, etc.) to individuals and organizations at or near the point of direct production of those problems. These elements vary greatly in how they are cast within different institutional settings, and depending on which constellation of social interests promotes them, but they are all readily visible in the quite real change that is occurring in areas as central to contemporary existence as medical insurance, retirement benefits, higher education financing, mortgages, and bankruptcy.

Paradoxically, Americans are simultaneously engaged in an unprecedented build-up of the mechanisms of punishment and coercive social control through the criminal law. More Americans find themselves in a state of legal unfreedom than at any time since the abolition of slavery. Three percent of the adult resident population of the U.S. is under some form of correctional custody, more than two million of them in incarcerated in prisons and jails. Since 1980 the proportion of Americans in the physical custody of the state and federal governments has climbed astronomically from a remarkably consistent historic base of around 110 prisoners per 100,000, to almost 700 per 100,000 in 1999.<sup>2</sup> Moreover, there is little in the way of real mystery to this penal growth. State legislatures and

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<sup>2</sup> Allen J. Beck, “Prisoners in 1999,” Bureau of Justice Statistics Bulletin, August 2000 (U.S. Department of Justice).

Congress have produced an enormous number of new crimes to reach various kinds of undesirable behaviors. Although they have done that before, rarely have they coupled criminalization with real pressure for incarceration as a response to those crimes and prison space to meet that demand.<sup>3</sup> At the same time the prison population has become predominantly Black and Latino compared to the population as a whole. According to the latest figures, on any given day in 1999 an eighth of the entire population of black males, 20-32 were in a prison (many more were in jail or under some kind of correctional supervision in the community).

Critical social theory offers two major resolutions of this seeming paradox. The first is associated with Marxist analysis of political economy. From this perspective, the restructuring of welfare state capitalism is carried out under and ideology of freedom, but the enormous sacrifices required in the living standards of the salaried classes and even more so the dependent poor cannot be accomplished without the massive increase in coercion that is only coldly reflected in incarceration rates.<sup>4</sup> From this perspective more crime, more fear of crime, more punishment, and more valorization of punishment, are all related through the specificities of subject positionality, especially by class.

A second powerful tradition of critical social theory, Durkheimian cultural interpretation, also sheds light on the co-existence of enormous new freedoms and enormous new coercions.<sup>5</sup> From this perspective, many aspects of the neo-liberal vision of freedom predictably lead to a crisis of confidence in the stability of collective moral values. New economic and political demands associated with

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<sup>3</sup> See, Theodore Caplow and Jonathan Simon, Understanding Prison Policy and Population Trends, in Prisons, Vol. 26 Crime and Justice: A Review of Research, edited by Michael Tonry and Joan Petersilia, 63-120.

<sup>4</sup> Parenti, Christian (1998) Lockdown America: Police and Prisons in the Age of Crisis (New York: Verso); Currie, Elliott (1998) Crime & Punishment in America (New York: Metropolitan Books)

<sup>5</sup> (Kennedy 2000; Tonry 2000)

globalization, including greater exposure of the individual to the risks of market down turn and to global competition abroad and with immigrants at home have undermined cultural confidence in the moral cohesion of society. More crime and more punishment are both predictable Durkheimian responses to dramatic restructuring of the division of labor and rules by which it operates. Harsh new laws for “super-predators” and zero tolerance pressures for conformity on workers and school children are both ways of expressing anxiety that basic norms of civility are unreliable in our hyper-individualistic culture.<sup>6</sup>

While drawing heavily on both of these interpretive grids, this book sets them to a somewhat different task. As useful as both traditions of social theory are, the traditional pursuit of explanation prematurely narrows the frame in which we situate the new freedoms and the new coercions.<sup>7</sup> Rather than seeking to “explain” the strange intensification of both freedom and coercion by tracing this configuration to some deeper phenomena (class structure, conscience collective), this book aims at developing a more complicated and comprehensive picture of the surface of the present with a series of different questions about the priority of crime in American society that focus on how our efforts to govern ourselves and others are being changed by and through crime control. What new technologies of power are promoted and which old ones are recast and reinvigorated? What forms of expertise and authority are valorized and which fall into suspicion? What kinds of mentalities and which subject positions thrive in a context of crime and punishment?

For most of the 1980s and 1990s there was a deafening silence from a media focused on reporting acts of criminal violence. Even the opinion leaders of

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<sup>6</sup> Kennedy, Joseph (2000) “Monstrous Offenders and the Search for Solidarity Through Modern Punishment,” *Hastings Law Journal* 51: 829

<sup>7</sup> Chapter 1 offers a more detailed discussion of the strengths and weaknesses of these theoretical grids.

the political left in the civil rights movement, in the unions, and in the universities raised few concerns with mass incarceration or only suggested it was distracting from more important social policy concerns. Recent articles in national magazines,<sup>8</sup> and a wave of recent and forthcoming works by journalists, academics, and activists<sup>9</sup> has begun to bring this huge and largely invisible carceral landscape through which so many Americans now navigate into visibility.

The emerging picture is so perverse that it lends itself to conspiracy theories. Tax payers are tapping out the resources of their states to place enormous burdens on the self regulatory capacity of the most disadvantaged communities in America for the sake of highly dubious risk reduction benefits delivered to highly advantaged communities that have already used the private market to purchase high levels of crime security. While the predominant economic theories of our day suggest that a longterm labor shortage is a serious threat to economic growth state and federal policy aims at confining large numbers of working age Americans where their labor power is only intermittently available to the economy and where the future labor force participation is burdened with the stigma of imprisonment. While both major political parties favor racial reconciliation the same incarceration policies generate a tremendous intensification of America's racial resentments through a war on drugs fought on the turf of minority communities and largely against the young people of these communities.

Since the 1980s a few hardy souls like Mark Mauer of the Sentencing Project, like Professor Angela Davis of the University of California at Santa Cruz, and others, have been pointing to this remarkable expansion of legal coercion

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<sup>8</sup> Ellis Cose, America's Prison Generation, Newsweek, November 13, 2000 (cover story); Cait Murphy, Prison Economics: Crime and Punishment, Fortune, April 30, 2001; Eric Schlosser, Prison Industrial Complex, Atlantic Monthly

<sup>9</sup> Citations..

trying to get the attention of American public discourse. They do so against a tremendous political pressure from the political right and from victim groups to deny the convicted even a public discussion of the current nature of incarceration and the larger criminal justice system of which it is a part. Despite that there are growing signs that the American electorate is interested in a broad debate on incarceration policies, at least for those groups like drug addicts who seem most amenable to management outside the prison. Perhaps reassured by the widespread reduction in reported violent crimes during the 1990s, survey respondents place crime well below issues like education and health care in their ranking of problems facing the United States.<sup>10</sup> Faced with pressure to address those preferences even politicians fearful of being labeled “soft on crime” may consider ways to reduce the fiscal costs of mass incarceration.

This book argues that this debate on the future of mass incarceration in the United States be broadened to include the dramatic changes in American governance since the 1960s through the problem of crime, of which the extended prison population is only the most easily conceptualized. Instead of placing mass incarceration in a horizon defined by coercion, morality, social control and the perpetual danger of an expansive state, we need to consider it against the horizon of freedom, and specifically the transformations in American governance that have been carried out in the name of freedom over the last four decades. Without losing the needed public attention on the imprisonment crisis we need expand that discussion to include transformations in personal status around the legal freedom of the subject including the new terrain of the family, of the work place, of the mass consumption market place. Without losing track of the effects of both severe crime and mass incarceration on communities of the poor and communities of color we need to discuss the ways in which the crisis of fear of crime that we

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<sup>10</sup> Get citations from Mike Jacobson

have experienced over the last forty years in America has deformed the development of middle and upper class communities. Filling in this expanded picture not only provides a more accurate characterization of the problem we face but may also begin to rebuild the connections between communities that mass incarceration has helped sever.

There are times when the most important questions of all are not what should we do, but how should we think. I believe we are in such a time on the question of mass incarceration. If we treat this completely as a debate about how we respond to criminal deviance, whether we should define it up or down, whether we should have more tolerance or less, we risk locking ourselves into compromises that we will feed the penal state down the line. Only by questioning the basic logic of governing through crime can we begin to build a politics that can address the insecurities of late modernity currently reified in the form of guilt, punishment, fear of crime and “victim-ology.”<sup>11</sup>

### **I. Thinking about Crime and Government**

Typically we use the term government to mean the agencies of the political state and its sub-divisions (a panoply made more complex by American federalism). Here I want to use the terms governance and governmental to talk about a far broader array of power centers both public and private. Michel Foucault argued that we should recover:

the very broad meaning [this word] had in the sixteenth century. “Government” did not refer only to political structures or to the management of states; rather, it designated the way in which the conduct of individuals or of groups might be directed --- the

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<sup>11</sup> As an example of the danger is prematurely resolving these questions consider the emerging debate about the war on drugs. The current path of favoring treatment over incarceration for drugs sounds good unless it simply delays incarceration and spreads it out over more time under less legal conditions that provide even less due process

government of children, of souls, of communities, of families, of the sick. It covered not only the legitimately constituted forms of political or economic subjection but also modes of action, more or less considered and calculated, that were destined to act upon the possibilities of action of other people. To govern in this sense, is to structure the possible field of action of others. (Foucault 2000, 341).

Governance in this sense means neither total control or primarily acts of domination (although those can be limiting examples of governance strategies). We sometimes speak of governing as ruling,<sup>12</sup> but the sovereign is only one particularly influential model of governing in Foucault's sense of structuring the possible field of action of others. The Gap catalog and Disney World are also centers of governance without in any way seeking sovereignty.

Once we move away from the state and those acts most like the model of monarchical command (judgment, imprisonment, execution) it seems peculiar to then bring crime into the picture. Few would deny that lots of institutions seek to govern in the sense we use it here, but what can it mean to speak of governing through crime since most of these "governors" can neither define crimes nor carry out punishments. We govern through crime when "crime" and its analogs becomes the occasion, the context, or the justification for efforts to shape the conduct of others. We govern through crime when "crime" becomes the problem through which we seek to know and act on the conduct of others. We govern through crime when "crime" supplies the narratives and metaphors for people who seek to make claims on those who govern.

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<sup>12</sup> As in Robert Dahl's classic work of American political science, Who Governs?

From this perspective the incarceration of two million Americans is a way of governing through crime, but so is the rise of gated communities run by security centered private homeowners associations, so are public schools designed to facilitate metal detectors and rapid security force deployments so are rituals of embarking and disembarking from airplanes anchored in the threat of terrorism. Sometimes the relationships may be metaphoric rather than direct. Thus it is not a great jump to go from treating students primarily as potential criminals or victims to treating academic failure as a kind of crime that someone must be held accountable for whether it be the student (no more “social passing”), teachers (pay tied to test scores) or whole schools (disband schools with failing test scores). It is not a great jump to go from recognizing the legal system’s treatment of rape as a signal example of state sponsored gender discrimination to understanding heterosexuality and patriarchy as forms of organized sexual violence.

In talking about governing through crime, I mean to shift our attention from the immediate sites and targets of incarceration and criminalization to ask how the deployment of the criminal law and the technologies, mentalities, metaphors and narratives associated with it figure in efforts to govern non-criminal issues like land use in the central business district, the flow of transnational migrants and political refugees, in efforts to govern the post-patriarchal family. When we place mass incarceration and criminalization in this context I would suggest a more complicated picture comes into view.

A. Criminal justice is only one foci of governing through crime.

At its broadest we should pay attention to four aspects:

- **Punishment.** People in prison, or on probation and parole, are governed in the most obvious and conventional sense. Their actions are in varying degrees subject to direct supervision and surveillance by the state and its agents. Their ability to self govern has been intentionally and specifically disabled through measures like incarceration, denial of the right to travel, denial of the right to seek whatever employment one chooses, and denial of political rights to voting, free speech, and other political privileges and immunities. The state may hold a monopoly on imprisonment (private contractors notwithstanding), but the carceral form, recast as a kind of prophylactic exile, has become an influential model for governing in other settings where it may take the form of expulsion or suspension for school, dismissal from work, or denial of coverage in insurance. Moreover the seeker of punishment, normally the prosecutor in the criminal process, has become an important face of executive power.<sup>13</sup>
  
- **Crime.** Crime governs when gangs or other criminal organizations begin to exercise something bordering on territorial jurisdiction over neighborhoods. Crime also governs, less intentionally, when the manners and customs of active self-identifying criminals establish the norms of behavior, discourses, and dominant mentalities of non-criminals in their communities and peer groups.
  
- **Fear of Crime.** Social scientists have long recognized that fear of crime can have a more powerful effect than crime itself. Fear of crime governs

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<sup>13</sup> As I discuss in chapter 3 this applies to political executives at all levels but it has a metaphoric influence on corporate management as well where executives like “Chain-Saw Al” Dunlop gained reputations as relentless discipliners who punished unproductive workers and managers by cutting them out of the organization. Ironically, as has been true of political executives, Chain Saw Al combined his executioner role with that of more common thief when it came to appropriating firm revenues.

us when our choices of where to live, where to work, where to send our children to schools, are made with increasing reference to perceived risk of crime. Indeed, to an unprecedented degree in U.S. history, the perceived presence or absence of crime increasingly marks the social imagination of urban space, overwhelming and incorporating such earlier notions as race, ethnicity, class, and social function. In recent decades “fear of crime” has become a direct target of governmental action displacing and in some respects replacing efforts against crime itself.

- **Victim-ology.** Crime governs when the experience of being a victim of crime becomes the dominant model of the citizen much as the yeoman farmer, the industrial worker, and the biologically vulnerable consumer have been at different moments in our history. The emergence of a science of “victimology” in the 1970s was only one sign of the degree to which victims and victimization have become the “logos” or meaning behind the exercise of political authority. While the experience of violence remains as inaccessible as ever to those who have not lived through it or its closeness, it has become a highly charged site of truth and power the benefits of which are deployed not so much by victims and their immediate families as by governments.<sup>14</sup>

Our strategy throughout this book will be to attend carefully to the way “crime” in all four of these modalities contributes to constructing a rationale of governance.

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<sup>14</sup> James Kalven, *Working with Available Light* (New York Norton 1999) is the most powerful account of the phenomenology of victimization as seen by the husband a talented photographer who was brutally attacked and nearly raped and murdered while jogging along lake Michigan. Kalven’s chronicle of ten years in the life of his family as they journeyed through the process of recovery helps explain why violent crime is such a compelling metaphor for society disintegrating. Kalven also helps explain why governing through that victimization experience can lead to a vicious cycle of declining security.

B. Not Just for the Poor

Crime does not govern only those on one end of structures of inequality, but actively reshapes how power is exercised throughout hierarchies of class, race, ethnicity and gender. That crime and punishment seem to rule the lives of those trapped zones of hardened urban poverty like some of our mass public housing projects is now taken for given, but as a nation we have grown accustomed without noticing the spread of this logic to the spatial sites where middle class life is performed on an everyday basis like, office buildings, universities, day care centers, medical complexes, apartment buildings, factories and airports.

Schools today provide a striking example of this. Ethnographer John Devine titled his book on high schools at the academic bottom of the New York Public School system *Maximum Security*.<sup>15</sup> Frequent acts of violence and a massive security apparatus built up to respond to that threat have coated the surface of every day life. The architecture of the school has been given over to the metal detectors and its auxiliary technologies. The corridors are treated as if drug courier routes with a full fledged security force. Teachers, withdrawn from the business of informal norm shaping, call on these guards regularly when the sullen boredom of the classroom is disrupted by overt defiance. At the same time the schools higher up the hierarchy work hard to screen out students with a profile suggestive of violent acts, and striving families all over the city berate their student children to study harder with threats of ending up in the boot camp like settings of the worst schools. Indeed, since the mid-1990s even suburban schools are now covered with a plethora of crime focused official graffiti warning of “drug free school zone”, “youth crime watch”, and the like.

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<sup>15</sup> John Devine, *Maximum Security* (Chicago: University of Chicago Press 1996)

Middle and upper class residential developments also speak to the pervasive regulative presence of crime. Who would guess that subdivisions built to reflect the every desire and whim of very affluent consumers would prioritize security against crime in both instrument and look.<sup>16</sup> Perhaps the increasingly ubiquitous gated community is for “civil-society” what the prison has become for the state, the most concentrated and active nexus of a broad constellation of practices, mentalities, strategies, and rationalities that seem to be growing as a shadow side to the new technologies and rationalities of freedom.

One can provide a convincing interpretation of the contemporary “ghetto” and the contemporary prison as an integrated whole,<sup>17</sup> but one can also trace the very visible outlines of fear of crime and valorization of victims in middle and upper class suburban neighborhoods.<sup>18</sup> This does not mean things are the same exactly. The inner city twelve year old imprisoned in his or her apartment by parental fears of encounters with armed drug dealers and armed police officers, or literally imprisoned in a juvenile detention facility, is not the same as the suburban twelve year old imprisoned in cul de sacs, malls, and fast food restaurants, by parental fears of pedophiles and mass murderers, but there are important points of intersection where ways of thinking, ways of knowing, and ways of acting cross over boundaries of class and ethnicity.

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<sup>16</sup> Joel Garreau, *Edge Cities*

<sup>17</sup> Wacquant, Loic (2000) “The new ‘peculiar institution’: On the prison as surrogate ghetto,” *Theoretical Criminology* 4: 377

<sup>18</sup> Davis, Mike (1998) *Ecology of Fear: Los Angeles and the Imagination of Disaster* (New York: Metropolitan Books)

### C. Enabling and Empowering

Much of the work of governing through crime involves equipping and guiding subjects in the socially valorized pursuit of security and justice. We are no longer talking primarily about the work of imposing discipline or punishment over a resentful mind and resistant body. Much of the work of governing through crime involves equipping and guiding subjects in the socially valorized pursuit of security and justice. While police and prisons focus on people who are by nature or social construction highly recalcitrant to these efforts at governance, the population of those managed by fear of crime and valorization of victims includes mostly those highly motivated to conform. Indeed if we were to visualize all the crime control activities undertaken in the nation, as if looking down on electric lights at night from a satellite, we would see that the vast majority of energy is being consumed by people lining up and paying for the privilege of being in a more controlled environment.

Schools again provide an example. The Justice Department's Office of Juvenile Justice and Delinquency Prevention runs a program called "Juvenile Accountability Incentive Block Grants Program" that as its name implies provides federal funding for schools and other local government units that propose projects aimed holding juveniles accountable for misbehavior as part of the larger effort to reduce crime. Thus to quote from a recent "Bulletin"<sup>19</sup>:

The basic premise underlying the JAIBG program, initially funded in fiscal year 1998, is that young people who violate the law need to be held accountable for their offenses if society is to improve the quality of life in the Nation's communities.

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<sup>19</sup> Scott H. Decker, Increasing School Safety through Juvenile Accountability Programs, Juvenile Accountability Incentive Block Grants Program Bulletin, December 2000 (Washington D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention).

Toward this end the JAIBG program offers not new criminal laws, punishments, or enforcement systems, but rather a set of programmatic models, recommended practices, endorsed experts and forms of expertise promoted through conferences, newsletters, websites and grant competitions.

Consider the following diagram that offers an overview of programmatic strategies in school safety (attachment 1). The diagram represents for each category of participants in school safety a set of strategies. Rather than proposing specific prohibitions or punishments, the strategy promotes new responsibilities that members of these categories will voluntarily take up. These responsibilities include obligations to monitor the behavior of others, “Parents: Be clear and consistent in disciplining children”; Get involved with school and community organizations and activities”; “Students: Report crimes and threats to school officials.” The diagram recommends developing particular pathways of knowledge: “Parents: Participate in family management training or counseling opportunities”; “Schools: Design a system for reporting and analyzing violent and noncriminal incidents.”<sup>20</sup>

#### D. Many Governors

We are no longer looking only at the formal political leaders of government, but a panoply of figures exercising power in various settings including high school principals, corporate executives, and parents. In institutional setting after institutional setting one can spell out the ways that conduct described as criminal produces powerful incentives for strategic action by all players (this will be the focus of chapter 6-9). But the presence of crime does not mean that all such governing is punitive. Some times it is, as when the

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<sup>20</sup> Id, 4-5

Canadian version of the Safe Schools Act permits the minister of education (and through her numerous school principals) to speak like a prosecutor: “There will be clear consequences for students who commit serious infractions like bringing a weapon to school. They will face expulsion. Students who cause extensive property damage, swear at a teacher or threaten injury will be suspended.”<sup>21</sup> In other instances, however, the property manager faced with civil law suits brought by victims of an assault or robbery committed on a corporate campus

It is tempting to treat this as a story of crime control emanating from the sovereign and being extended further and further out in the every dayness of life through the intermediaries of private governors of all kinds. In some respects there is a process of what Stan Cohen named “net widening” as for instance as when parents, teachers, or doctors, respond to growing legal repercussions from suspicions of inappropriate touching or disciplining of children to change their conduct and engage in more policing of others. In other instances however, crime is brought into play as a threat or a claim of victimization by one person against another in an employment dispute where the objective is influencing management not mobilizing the state. In still other instances the initiative may come from state but be used by management to extend its own control needs, as when schools or businesses adopt “zero tolerance” policies regarding non-criminal conduct considered dangerous or threatening (like bringing a pocket-knife or a non-prescription drug to school) but with the goal of being able to remove low performing members and improve overall discipline. The state remains a very influential site of governing through crime and we devote the first part of the book (chapters 2-5) in describing how crime has in some sense captured the imagination of those exercising state power. Yet the story is less one of extending state power through crime as it is one where the importance the state has lent to

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<sup>21</sup> News Release, Legislature passes Safe Schools Act, June 14, 2000

crime nudges out other kinds of opportunities that a different hierarchy of public problems might produce (e.g., a government obsessed with governing by educating would produce all kinds of incentives to define various people as efficient or deficient in education, capable or incapable, and so on).

Perhaps the most visible example of how governing through crime is embedded in our self governing is the current popularity of “gated communities.” This real estate concept has quickly moved from the high end of the very wealthy or famous (Malibu Colony in the 1960s) to become a ubiquitous feature in new housing subdivisions marketed to the middle and lower middle-class. In the first half of the 1990s a third of all new residential developments in Southern California were marketed as gated communities.<sup>22</sup>

As geographers and others are pointing out, these new developments break in important ways from the approach of the first waves of post-war suburban development.<sup>23</sup> Those communities sought to recreate the feel of small town community life protected from the corruption and crime of the city. The gated community in contrast abandons any real claim to realizing community. In rejecting even the suburban municipality as a relevant structure for sharing opportunities and risks, the gated community signals an eventual retreat to the homestead itself. Those others that live within the gates may seem a tad closer but that only represents the unaffordability for most of a completely private fortress. Should the gates be breached it is every family for themselves.

The importance of crime fear and the strong desire for self sufficiency in defense found in the gated community finds an even more perfect and affordable realization in the SUV. While the popularity of the SUV has been ascribed to a number of factors including the rising incomes of many Americans and the

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<sup>22</sup> (Mills 1997, 222)

<sup>23</sup> Andres Duany, Elizabeth Plater-Zyberk, and Jeff Speck, *Suburban Nation: the Rise of Sprawl and the Decline of the American Dream* (New York: North Point Press, 2000).

relatively inexpensive gasoline prices of the 1990s, these factors facilitated consumers in purchasing what other wise might have been too impractical, but it does not explain their appeal, which as for most vehicles is primarily cultural. According to market research conducted by the automobile industry itself, fear of crime is a critical factor distinguishing purchasers of SUVs from demographically indistinguishable purchases of minivans.<sup>24</sup> SUV's are marketed to invoke a wilderness adventure life-style that clearly appeals to many contemporary Americans and is itself related to the emergence of neo-liberalism, but this adventure imagery is also designed to invoke the challenges of urban/suburban life including overcoming crime threats directly but also the tasks that are themselves derivative of surplus crime fear in society like the need to ferry children to all manner of managed after-school care.<sup>25</sup>

Another important contemporary object whose growth tracks governing through crime is the cell phone. In fact, cellular telephones have grown explosively in popularity around the world. There is a big difference however between their popularity in the U.S. and almost everywhere else. In Europe, the Middle East, and elsewhere, affluent consumers turn to cellular phones to escape state monopolies controlling access to wired telephone communication systems resulting in long waits for expensive and poor service. In the U.S., however, the wired phone service was always far more efficient than its counter part in other nations and became arguably more so after de-regulation in the 1980s opened up considerable competition for long distance and now local phone service. In the U.S., instead, fear of crime has been the major vector for popularizing cell phones beyond the class of business users (generally sales people) for whom the very

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<sup>24</sup> Keith Bradsher, Was Freud a Minivan or S.U.V. Kind of Guy, The New York Times, Monday July 17, A1 & A16

<sup>25</sup> Paul Roberts, Bad Sports or: How we learned to stop worrying and love the SUV, Harper's Magazine, April 2001, 69. According to Roberts Ford's publicists produced an advertisement showing a time line to celebrate the 10 year anniversary of the Explorer marked with terrorist incidents, serial killers, and urban disorders.

expensive and bulky phones of the early 1980s were already attractive. Once in use, to be sure, cell phones find all kinds of uses (and the companies are not shy about suggesting new ones) but fear that they will someday need to summon the police for assistance is major factor in pushing consumers to commit to what is often a shockingly expensive supplement to wired phone systems that consumers continue to pay for.

A recent television advertisement for *McDonald's* restaurants provides a glimpse of how central crime has become to the *habitus* of late modern America. In the ad we follow a father driving an SUV. He and we are hearing his childrens' voices. He is smiling. At first we cannot see where they are coming from. Are they in the back seat of the SUV, secured behind steel doors and buckled into child restrain seats? Than it is clear that they are even safer, at home in their cul de sac. He is speaking to them over his cell phone (but to be sure safely, with hand set resting in an arm-rest port with the speaker function on). He pulls up to a McDonald's drive up ordering station. The clear voice welcomes the father and asks for the order. The father picks up the cell phone and extends it toward the ordering station. The kids order for themselves. Their desires appear instantly in written form on a large television screen at the ordering station. We then see the father pull up to a "pick-up" window where he pays for the meal, is handed a clean white bag that he stows carefully in the capacious empty seat beside him.

The whole transaction takes only a few moments. We see only the outside of the restaurant, its entranceways and parking lot. It is night outside and lit in a vaguely menacing documentary style that suggests that anything could happen to someone who had to move through this environment without being wrapped around by a large S.U.V. and connected instantly to emergency assistance with the cell phone.

A number of things are being marketed as a package or lifestyle in this advertisement but not hamburgers. A prominent place is given to technology. There is the SUV itself, the cell phone, McDonald's new high-tech and acoustically satisfying order station. The primary theme, although never explicitly mentioned, is crime and insecurity. Why have drive-up windows, included in fast-food restaurants as an after-thought, become the fastest growing segment of the market? The threat here is not a collision with an unsafe driver or errant suburban deer. What menaces someone parking and walking inside a restaurant is a human threat, crime, a confrontation with a violent criminal bent on robbery or worse mayhem of some kind. Going to a restaurant, being in a public that is unmediated by the architecture of personal control, has become fundamentally frightening to people, and the people who sell restaurant meals and cars know it.

Despite the obvious disadvantages to eating in one's car people feel more secure behind the wheels of their car than practically anywhere else (including their home). This is especially true of SUV's which are designed to give the driver a strong feeling of security. Yes the cars are sold because people fear the crime, but the fear they experience in places like parking lots is increased by its contrast with the sense of security created by the design of the SUV.

The cell phone presents another kind of technological response to and driver of fear of crime. The cell phone in this regard is attached to the car as security space. What makes the car feel safe is the ability to immediately separate yourself from a "public" that is acting threatening and unreliable. The cell-phone perfects this aspect of the automobile fantasy of security.

Launched in his lunar landing module, father can effortlessly reach out in various directions in response to crime, toward those who govern, like the police, or to those he must govern, his children who can be instructed on any security steps they should take. In the advertisement the phone is suggestive of several

things. First, it allows the father to be in constant surveillance of his children from a distance. They are, after all, the supposed primary beneficiary of this whole life style of suburban living, SUV's, McDonald's, its all for them. Its for them in a vary particular way. Its for them to keep them safe from the danger of crime and violence that would have awaited them had they stayed in the city, and which is always waiting to explode in to the only partially securable middle class suburbs. Hence the phone becomes a way of constantly making sure that those children, the whole reason for the trip being made are in fact fine and do not need immediate rescue. The phone is also a way of assuring that father is ok if someone should attack him while he is negotiating the terrain between home in a secure cul de sac, the order station at the entrance to McDonald's and the pick up window.

The order station is mainly there to interact with the SUV and the cell-phone which together form a kind of cyborg shell. It does however introduce a number of elements of its own. First it deliberately contrasts with the scratchy two-way radios baby-boomers remember from the first generation of drive-up meals and movies where you heard something that sounded like waves of static (think street announcements on subway cars) and had no idea whether they heard your order or not. The new high-tech order stations present the consumers choices in an immediately visible textual analog to the real-time interaction (something that has become a familiar kind of procedure for most people from their computer and internet usage), and acts to assure us that we are not at risk even of the relatively trivial embarrassments or inconveniences of a miscue in ordering.<sup>26</sup>

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<sup>26</sup> The terrain of Goffman's sociology of behavior in public and the movie *Five Easy Pieces*. It is not lost on a Floridian that ordering a Big Mac has become far more error free than voting for President.

Having the kids order over the phone demonstrates the clarity of the sound system and the reliability that will assure you bring home exactly what the kids wanted and that if something should happen to them or your while you were order, McDonald's could probably patch you right through to 911. It is also a warm experience. The father is showing off his cute kids to the probably cute young woman who is on the other end of that high quality sound system. It invokes something satisfying but completely safe, there is no danger of flirtation or unwanted exposure between father and service worker (note the comic reversal of this in *American Beauty*).

The food is never mentioned or shown, accept abstractly in the white bag. We know what is in there, of course, and we think of these high calorie, high profit margin items like hamburgers, French fries and carbonated drinks as "comfort food." The advertisement is striking in its subtle but articulate suggestion that it is not the food that brings comfort to the environment but the carefully managed security environment that invests the food with comfort.

#### E. Subjectivities

Crime in this sense is just as important for the forms of subjectivity it enables, the mentalities, vocabularies, and gestures it authorizes then for the forms of power it mobilizes. We are no longer addressing primarily the legal subject of criminal law, although this subject remains important in a myriad of ways. We are also addressing the far larger population who find themselves symbolically enaged with the claim of victimization, the excitement of criminal aggression, or the demand for vengeance.

Crime and punishment are a vast archive of political subjectivities from the formation of a "bad boy" Devere-Smith (1993, 100) or "bad ass" (Katz 1988) subjectivity necessary for survival in certain neighborhoods (Anderson 1998), to

learning how to be a “confidence man” as a defense lawyer (Blumberg 1967). Crime is a genre, in the dramaturgical sense. It comes with certain kinds of roles, vulnerable victims, willing offenders, vigilant prosecutors, and harsh but fair judges (and all the deviant variations those set up). When we govern through crime we pass out these scripts to hundreds if not thousands of real people with little in the way of an audition and no accountability for the consequences.

#### F. Race, Racism, and Crime

To those Americans who worry about the growing size and influence of criminal law and penal institutions perhaps the single most disturbing set of issues involve race and racism. This is really a bundle of different concerns. One is the staggering history of racism in American criminal justice. Criminal justice institutions were integral parts of the slavery system and the control of succeeding regimes of minority group control in America. During the civil rights era in the 1950s and 1960s, dog wielding police, all white juries, and southern jails became emblems of deep resistance to change. The emergence of the “racial profiling” controversy in the late 1990s bears witness to the enduring suspicion that this has not changed. Today some describe the prison system as the hub of a contemporary system of racial subordination. Where once crime and punishment enforced a racially organized system of labor extraction, they now define the very core of a racial economy in which black criminals and prisoners provide not labor power but a threat whose management generates economic activity for a vast array of interests.

Another is the image of black crime, which since slavery times has operated as a key element in the ideological rationalization of state racism. The specter of young black men as muggers and rioters in the late 1960s seemed to convince a generation of urban white middle class parents that racial integration

was not a feasible project. But where race provided a meaning to crime “black crime” today it is crime that codes race so that a black person or even a black object can express criminal danger in the condensed world of marketing. In a recent ad for the market leading Ford Explorer SUV a couple is shown leaving their SUV and hiking through the woods. The camera focuses in on a turtle shell as a very large black crow or raven lands on it. The focus pulls in to show the crow probing deep into the openings of the shell. When the couple who have nervously eyed the crow themselves get back to their SUV and open the door they find a computer cartoon image of the shell-less turtle already strapped in an comfortable. The message, nothing beats an SUV when it comes to making you feel safe not in the woods, but in an urban and suburban terrain in which threatening black predators can easily seek to intrude into the privacy of ones home or car.

The governance perspective taken in this book only complicates this story. The genealogy of contemporary crime legislation (chapter 4) reveals roots in the reaction of whites to riots in black urban neighborhoods in the late 1960s but also to the civil rights tradition. The great crime panic of the 1960s was fed by the attention liberal government was placing on the crime situation in the racially segregated inner city neighborhoods. It was Robert Kennedy’s Department of Justice that made juvenile crime a primary foci of the federal government’s growing role in solving urban problems. Mandatory sentences and zero tolerance rules that have contributed to the size and racial character of the penal system, were explicitly adopted to provide the transparency and formal equality that many believed would be necessary to protect minorities from prejudiced judges and parole boards.

## **II. What Rough Beast? Criminal Justice at the end of the 20<sup>th</sup> Century**

It is important to recognize that governing through crime does not ordain the dominance of a narrow and determinate set of ideas and techniques. Some features of crime and the legal response to it are relatively enduring, the notion of a victim, an offender, a judge. But the very nature of those subjects has changed radically over the centuries and within the lifetime of many of us.

At various times in the last two centuries American penal reformers with a claim to being close to the heart of democratic renewal in their time have cast offenders as lost souls in need of penitence, broken machines, evolutionary throwbacks, abnormal psychological subjects, and strategic seekers of advantage. Likewise victims and judges have seen their prestige change dramatically over time, with judges lately on the sharp decline and victims on a sharp rise. Making crime a central problem for imagining government has rather different consequences depending on how those subjects are constructed at any particular time. It is most alarming to me, that the rising cultural prestige of criminal law comes at a moment when its basic meanings have undergone their most radical change in several centuries.<sup>27</sup>

From the end of the 18<sup>th</sup> century on, criminal justice in the United States developed around a set of themes framed in the Enlightenment including the humanity of the offender, the positive law nature of criminal liability, and the potential for punishment to repress criminality. These ideals were often mere aspiration as conscience was dominated by convenience (in David Rothman's resonant formula), but they framed a broad understanding of the purposes of criminal law that defined the direction of future progress. American criminal justice today moves in a different orbit and its growing influence as a source of

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<sup>27</sup> Thanks to Joseph Hoffman for pointing out the importance this has for normative evaluation governing through crime.

strategies, technologies, and mentalities for governing American institutions brings a distinct cast.

A. The Prisoner: From Penitent to Toxic Waste

From the early 19<sup>th</sup> century until the last third of the 20<sup>th</sup> century, the dominant assumption among professional penologists was that the right scheme of penal discipline could produce fundamental transformation of the criminal subject. This only had an intermittent effect on the shape of American prisons, which were run as patronage establishments primarily into well into the 20<sup>th</sup> century. During this long period the dominant models of penal practice and the forms of expertise that defined the prisoner as a subject of intervention shifted somewhat from more religious to more psychological notions of transformation. Beginning with the creation of juvenile courts at turn of the 20<sup>th</sup> century, official penal policy became steadily more focused on the prisoner as an individual to be known in their full biological, psychological, and sociological complexity, and to be reintegrated by a state capable of wielding advanced technologies from all three sciences.<sup>28</sup>

The science and technology remained remarkably thin but at its advanced sectors penal modernism achieved a coherent narrative of rehabilitation through intensive investment in the subjectivity of offenders. For example, Eric Cummin's study of California's radical prisoner movement argues that its leaders, famous literary inmates like George Jackson and Caryl Chessman, represented real results of serious effort to invest the inner life of inmates with regulative importance through reading, writing, and therapy. While the results were often

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<sup>28</sup> David J. Rothman, *The Discovery of the Asylum: Order and Disorder in the New Republic* (Boston: Little Brown, 1971).

not what prison managers wished for, they do suggest that these technologies of power were effective mobilizing self investment in interiority for many inmates.<sup>29</sup>

The attack on the rehabilitative approach in the 1970s seemed to signal a shift back to earlier models of deterrence and rational retribution but something else has emerged that could be called a waste management model. Offenders, from this perspective, form a kind of toxic waste that cannot be changed and threaten to impose intolerable costs on the community. The classic early 20<sup>th</sup> century issues of causation and responsibility have given way to a kind of pragmatism that seeks to minimize risk to others even if doing so imposes a substantial risk of harm to the person deemed dangerous. Prisons are perceived as toxic waste dumps that can at best contain but never improve those sent there

When state authority presents the prison as a major technology for solving social problems and for asserting its own technical and political competence it matters that the toxic waste dump rather than the educational therapeutic clinic is the reigning ideal. An effort to channel a large part of the urban youth population through prisons operated under even a flawed version of the clinic would have created all kinds of contradictions for state policy, some of them might have had salutary effects (like coerced education at a time when school policy was actually abandoning a commitment to socialization of students), others might have set real limits to penal growth (delivering even thin individualization to a mass audience).

Governing through prisons at the height of the toxic waste dump moment is an entirely different matter. The technical and political competences involved in rapidly building prisons expected to do no more than contain prisoners are easily assembled and oriented toward growth. Many economic interests are benefited by such a project (correctional workers, suppliers, etc.) while few power

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<sup>29</sup> Eric Cummins, California's Radical Prisoner Movement

holders are challenged to accomplish anything. The results in terms of the externalities produced by the prison are even more consequential.

The stigma of the prison in the clinic era had an open ended quality. The prison was one among many disciplinary institutions that defined failures of various sorts for men in the lower classes. The emphasis on treatment and education created at least an official theory of reintegration. In contrast the toxic waste dump prison can only make its products more toxic. All the benefits that the prison promises, mainly to deliver a painful experience and to make the community safer by holding more of its predators in confinement, tend to make the returning prisoner presumptively more dangerous and defective. Thus while prisons may result in short term reductions in reported crime (keeping much prison crime hidden) they also increase the level of fear generally and that specifically attending to the inevitable release of a larger and ever-more toxic prison population.

#### B. The Powers that Punish: From Professionalism to Populist Punitiveness

The criminal law enforcement function of government was a critical issue at the birth of the American republic. A powerful law enforcement and prosecution function to government was both a dangerous residue of monarchy and a fundamental premise of responsive democratic government. For a long time that problem was rationalized under the general sign of professionalism. Police, for example, were professionalized in the 20<sup>th</sup> century by separating them from the influence of political machines, creating military forms of discipline, and utilizing technologies like the automobile and radio to establish a non-popular circuit of knowledge.<sup>30</sup> Prosecutors were professional by virtue of their legal training and

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<sup>30</sup> Samuel Walker, *Popular Justice*

status as arms of the courts. Executive authorities, especially governors had a complex and uneasy relationship to the power to punish. On the one hand it played into their role as leaders of a network of party loyalists by providing them a ready set of goods and services.<sup>31</sup> Riots and crimes by parolees provided a constant potential for embarrassment and expose. In the second half of the 20<sup>th</sup> century, New Deal style governors tried to recast the penal system as an arena of administrative competence and optimism that a mastery of technological governance could work there.

All of that has shifted in favor of what might be called “punitive populism” or “authoritarian populism.”<sup>32</sup> Police are increasingly being restructured around themes of “broken windows”, “community policing”, “problem solving policing. While these include a wide variety of different features they share a rejection of the 20<sup>th</sup> century model of professionalism. Prosecutors increasingly position themselves as the voice for community rage, insecurity and vengeance seeking.<sup>33</sup> Governors and other executives seeking very much to identify themselves with the office of prosecution, sometimes even to the point to displacing the prosecutor (chapter 3). The crime legislation being produced by the states and the federal government downplays older images of technological competence in favor of populist appeals to public mistrust and frustration with government itself (chapter 4).

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<sup>31</sup> Charles Bright, *The Powers That Punish*

<sup>32</sup> Stuart Hall, *Policing the Crisis*; Anthony Bottoms,

<sup>33</sup> Robert J. Lifton and Greg Mitchell, *Who Owns Death: Capital Punishment, the American Conscience, and the End of Executions* (New York: Morrow 2000).

C. Victim-ology: Law making in the name of the Victim

The rise of the victim as key political identity in contemporary American politics has been widely observed by political theorists and cultural critics.<sup>34</sup> As David Garland has recently pointed out, it is the crime victim that has become the representative citizen in America at the end of the 20<sup>th</sup> century.<sup>35</sup> As such they come to define the governable interests of the people producing enduring political alliances, new pathways of knowing and acting on society, and the reproduction and widening of the now privileged victim role.

Victims have rarely been important political subjects. Their emergence as a primary subject of governmental power in the United States may have begun with the American reception of the Israeli trial of Nazi war criminal Adolph Eichman in 1957. Eichman was sentenced to death (a sentence never since repeated by an Israeli court) at a trial featuring many things that have become common features of American justice (including the death sentence). Most importantly, the Eichman case placed survivor testimony at the heart of the evidence even though most of it was tangential to the prosecution of Eichman who was accused of being the technical administrator of the Nazi's "final solution", i.e., the systematic deportation and murder of the Jews in Nazi occupied Europe.<sup>36</sup> Violence, sometimes lethal and often spectacular, against civil rights workers in the 1950s and 1960s may have been an independent reason for the political investment of victimization. In any event holocaust victims became the first of a number of victim groups since that have come to occupy a special place in the national political imaginary of the United States including African

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<sup>34</sup> Wendy Kaminer, *All the Rage*; Wendy Brown, *States of Injury*, Martha Minow,

<sup>35</sup> David Garland, *The Culture of Control* (Chicago: University of Chicago Press)

<sup>36</sup> Shoshana Felman, \_\_\_\_\_, *Yale Journal of Law and the Humanities* (2001)

Americans from the South (and the black and white civil rights workers that supported their cause), Native Americans and women.

Since the 1980s it has been crime victims that have emerged as the most dominant emphasis of victim oriented politics. Crime already formed an important element in the symbolic status of all three. Holocaust victims gained political strength from the fact that unlike earlier genocides (such as the Turkish massacres of Armenians in the 1914 --- 1920 period) the Nazi genocide was specifically treated as a crime by the victorious allies. Blacks from the Jim Crow South gained a status a special status as victims of racism because the forms of oppression they faced became visibly illegal after 1954 such that continued direct white resistance to reform began to merge into criminal conspiracy.<sup>1</sup> The contemporary women's movement had an early alliance with the decriminalization approach in the form of abortion law, as well as historic ties to labor and poverty activism, but after *Rowe v. Wade* in 1973, rape became the dominant focus of feminist mobilization, to be followed by sexual harassment, domestic violence, and related issues.

The shift in focus from victims of criminal violence carried out as systematic political acts, to victims of criminal violence in general (and often just to victims of crime *qua* crime) produced a number of important effects. First, it generalized the status of victimization as a political subjectivity from those people whose victimization represented deep truth(s) of the political system in which they lived (holocaust survivors, victims of racial, ethnic or religious hatred, victims of misogyny), to people whose victimization was a tragic but rather contingent fact of the political system in which they lived. Second, it fundamentally changed the relationship of the victim as political subject to governmental actors (state actors but also private governors) from one where the governing agent is the source of danger (to be countered by other governments or by forms of popular resistance), to one where the governing actor is the obvious

source of protection. Third, it transformed the orientation of plausible remedial strategies from political reconstruction and guarantees of human rights to retribution and vengeance.

The vindication of victims has long been thought to play a role in producing social solidarity. A society experiencing powerful centrifugal pulls of economic inequality, high immigration, and individualistic consumer culture experiences enormous anxieties about the cost of all this anomic mobility, an anxiety embodied in horrible crimes. Laws like 3-Strikes seem to find support not among those who are most at risk for crime but among those who have sense that shared moral bonds are weakening and need to be strengthened. Indeed, sensational crimes like the murders of Polly Klas and Megan Kanka in the 1990s have produced tidal waves of public sentiment often resulting in astoundingly fast and harsh legislation.<sup>37</sup>

What is clear is how much stress such a model of solidarity places on the real class and ethnic differences that the transformations in the economy and demography of the United States have produced. While many Americans clearly believe that strengthening criminal law is a straight-forward method of strengthening society, more often criminal law operates to render such a rigid model of society as to prevent any effective regulatory approach to contemporary problems. As legislatures have increasingly taken up the mantle of crime legislation they have made it more difficult for themselves as institutions to operate with the kind of interest based negotiations that once dominated the American style of legislative government. Not surprisingly, this has gone along with a radical reduction in public expectations about what government can accomplish.

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<sup>37</sup> Tom Tyler and Robert Boeckman, \_\_\_\_\_, Law and Society Review

Crime also has attached itself to the government systems of the 20<sup>th</sup> century that contributed so much to building a sense of modern solidarity. Accounts of welfare and workers compensation fraud have helped delegitimize these institutions that directly and practically produce social solidarity by distributing risk across large social units. The experience of victimization itself is one of profound distancing from community. Fear of violent crime has increasingly motivated life style changes designed to make families less dependent on the generalized other for protection, including gated communities, SUVs, cell phones, etc., all of which in turn undermine existing systems of common protection. In constructing the victim as a kind of idealized model of the subject we lay the foundation for a failure of democratic will formation.

#### D. Judgment: From Individualized Justice to Zero Tolerance

Most people associate law with rules, but as law students in their first year become all too familiar with, laws vary in their reliance on strict rules as opposed to broad standards. For much of the 20<sup>th</sup> century, criminal law jurisprudence was in fact characterized by a shift toward standards,<sup>38</sup> but in popular consciousness criminal law is invariably assumed to be strict and rule oriented. As legislation itself tilts in a more populist direction, new criminal laws reflect this rule orientation. Indeed, the very name of popular new laws like “Three Strikes” and “10-20-Life,” reflects the presumption that they will be enforced with little room for interpretive judgment.

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<sup>38</sup> Contemporary manslaughter statutes are almost always framed in terms of whether the defendant experienced something that would strongly move a reasonable person toward an act of lethal violence whereas the common law tradition focused on certain specific situations that mitigate homicide from murder to manslaughter like the sight of one’s spouse in an adulterous liaison.

The model of criminal law that is being embedded in governance today is one that is almost a satire of rules, something I call “rule by rule.” At the heart of rule by rule is a deep mistrust of discretion exercised by those defined as neutral or professional (e.g., judges, parole boards).<sup>39</sup> The explosion of mandatory sentencing laws reflects a profound disenchantment with judges and all those professionals who have seized part of the judicial function over the years, especially psychological experts.<sup>40</sup>

This aspect is especially acute in the most influential version of “rule by rule,” namely “zero tolerance.”<sup>41</sup> Zero tolerance is precisely about rule by rule. Zero tolerance means hard wiring a punitive response to whatever harmful action is targeted (using drugs, bringing a pocket knife to school, etc.) with no room for judgment or discretion. Our contemporary understanding of crime has been shifted by zero tolerance so that it operates as an iron curtain severely dividing the world into subjects whose life and well being are the highest consideration of the institution and those who are only threats. As we witness in our quadrennial process of naming new federal officials the taint of a crime, even if it is as common as not paying proper taxes on domestic employees makes the wrongdoer a close kin to the murderer, robber, or rapist. Those who have not committed crimes, in contrast, are presumed to be people of good will even if they have pandered to simple racial prejudice and practiced character assassination on political enemies. Linda Chavez became an indefensible nominee for labor

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<sup>39</sup> But not, to be sure, the discretion of police or prosecutors. I think this is primarily because these agents purport to exercise their discretion in an authority premised on the community’s retributive sense. More on that in chapter 3 of my book.

<sup>40</sup> Kate Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press). In this sense, while I strongly appreciated Justice Steven’s dissent in *Bush v. Gore*, I think he underestimates how much the status of the judge has already been diminished in American society well before the Majority’s “knee capping of the Florida Supreme Court.

<sup>41</sup> How such a term could arise as a positive title reflects just how powerfully governing through crime has altered our political culture. Since Locke tolerance has been a good word.

secretary after it was revealed she had possibly violated relatively minor tax requirements for domestic helpers. John Ashcroft, in contrast, was considered worthy for his post because there was no record of law breaking (no matter how trivial).

The way zero tolerance shifts risks and responsibilities when allowed to operate unimpeded is forecast by the example of so called “criminal aliens” under contemporary federal law. Since 1996 federal immigration policy has required the deportation (and pending that the mandatory detention) or aliens who have committed aggravated felonies. Such “aggravated felons” must be deported notwithstanding any equities or even asylum claims in their case. These aggravated felonies include not only serious crimes but dozens of minor drug and public order offenses that would be very low key misdemeanors under state law.

### **Conclusion**

There are times and places where mass incarceration and criminalization may indicate the consolidation of power of an authoritarian and centralizing state. The English Whig’s of the early 18<sup>th</sup> century on one interpretation used crime and the rituals of criminal justice to mobilize their state building.<sup>42</sup> The mid-20<sup>th</sup> century totalitarian states borrowed amply from the rhetoric and gestures of modern penology in building their respective “police states.” Some suggest that something similar has been happening since the 1960s.<sup>43</sup> Crime has undeniably become a language of delegitimation to the modern welfare state as practiced in the United States during that era and the investment in prisons and police forces has often been tied to a reassertion of state authority.

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<sup>42</sup> E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon 1975).

<sup>43</sup> Parenti, Christian (1998) *Lockdown America: Police and Prisons in the Age of Crisis*

This book suggests that we need to rethink the relationship of crime and governance from outside the historic legacy of the “police state.” Counter intuitive as it may seem, the reader will be asked to think about mass incarceration and criminalization as part of an ongoing struggle to define a way of practicing freedom in liberal societies. This goes for our normative project as well as our descriptive one. If we oppose governing through crime it should not be in the name of a naïve libertarianism that objects to an expansive criminal law as usurpation of freedom and an invasion of the much vaunted and ever illusive privacy of the individual. Such a defense posits a false dichotomy between power and freedom, between coercion and autonomy and ignores the degree to which the expansion of coercion is intertwined with the construction of new forms of freedom.

Instead let us pose our objections in terms of the kinds of governance that governing through crime authorizes. A crucial starting point for our criticism seems to me to be the growing gap between the stated aspirations of the new freedom and the way shape of penal state and the gated civil society we are building by governing through crime. If the ideal posture for the governable but free subject is to have a balance between risk and responsibility, it is important that governing through crime despite invoking the language of responsibility subverts this ideal. The punishment of offenders is less and less about responsibility as shown by evidence of knowing and intelligent behavior, and more and more about vengeance for the consequences of criminal events. The counter-balance is that the community is invited to view its risks as wholly resting on the responsibility of violent offenders while

If the ideal posture for government is one of an auditor that establishes an objective standard for performance and then monitors the success of others in achieving that objective standard, governing through crime builds a reactionary counter weight to the smaller and more efficient government both liberals and

conservatives talk about today. The expansive penal state itself is a grotesque satire of the liberal state at its most excessive, a swaggering unionized labor force swaddled in due process operates a plant of incredibly expensive utterly inflexible capital investments that are just as expensive to run as they are to build and which have few if any alternative uses (they might eventually become real toxic waste dumps in a society more preoccupied with chemical risk and cancer than crime).<sup>44</sup> The gating of the private sector toward a lifestyle built on fear of crime as an operative value has deformed the self-governing capacity of communities.<sup>45</sup> The society of gated subdivisions and SUVs depends more than ever on a command and control police state to enforce norms of civility.

The ultimate test of governing through crime is its ability to make democratic society more governable. That is its promise. A society of harsh penalties, massive privacy intrusion and zero tolerance judgment is supposed to recreate the security that supposedly supported a more productive public life in a golden age before penal modernism confused the messages. Does creating a society with lots of prisoners and lots of victims in its midst raise or lower the costs of social coordination? Do leadership programs that emphasize punitiveness make power more or less accountable? Does fortifying the nuclear family by wrapping it in technological armor designed to exclude intolerable risks of violence, viruses, and drugs lend itself to collective acknowledgement of irreducible risks in late modernity? My conclusion, supported by a detailed look at how the pathways of knowing and acting on the population are being produced around the problem of crime, is that governing through crime erodes democratic capacity by destroying social trust and capital.

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<sup>44</sup> As we shall see crime and chemical risk trade have been competitors for the status of master risk in American society over the last two generations. See Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on Risk Selection* (Berkeley: University of California Press 1982).

<sup>45</sup> Duany, Plater-Zyberg, and Speck, *supra* note 23.

In this regard my polemic with governing through crime is one that I believe should win assent from both liberals and conservatives within contemporary American political ideology. In discussing crime both sides typically prefer to emphasize the values issues that each side has at stake in the always symbolically rich territory of crime and punishment (depending on your values: the murderous children of welfare families, police brutality, or the carnage of under regulated assault weapons). The value of the governing through crime perspective is that it forces a different kind of discussion.

Once they confront the effects of governing through crime on the governability of the governed both liberals and conservatives will recognize the danger to their preferred visions of governance. Liberals will find most disturbing the hardening of inequality formed by governing through crime whether in its racially concentrated prisons or its gated communities. Conservatives will find that across a whole range of dimensions governing through crime creates subjectivities and power centers that resist the mandate of responsible independence at the level of the firm and family.

Every way of governing shapes the subjects whose conduct it seeks to influence in ways that ultimately alter the subject's own response to power. When that influence is productive we call it things like synergy and witness rapid growth and increasing capacity. For example the New Deal of the 1930s encouraged the formation of unions, and unions in turn produced political subjects supportive of the New Deal and its style of governing. When that influence is disruptive we call it things like resistance and witness increasing instances of failed exercises of power. For example the efforts of the Great Society to reshape cities through urban renewal, school desegregation, and anti-poverty programs, ultimately produced suburban residents whose life style and voting habits both came to oppose the Great Society programs and the Democratic Party.

It is not far off to suggest that virtually everything we have come to value in the post-World War II generations, our physical health, our environment, a racially integrated society and economy, a great deal of individual freedom to innovate are all endangered by the aggregate effects of governing through crime even though many of us as individuals and groups may benefit from some part of another of the whole. It is not that governing through crime is covering up some other more rational and transparent way to govern, like for example, socialism. Any way of governing produces byproducts in the subjectivities of its clients and in the object field of its interventions. One needs no conspiracy to trace how crime based interventions produce a civic landscape in which the byproducts of crime are increasingly over represented. The real question is the consequences of any particular way of governing. That's a question that will (I believe) take a book to answer. As a first pass at such an answer this chapter has aimed at expanding the field that must be considered in evaluating such a proposition.

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<sup>i</sup> In most states a conspiracy to violate some one's rights under civil law becomes a crime even though the violation of that right (say by breaching a contract).