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Consuming Obsessions: Housing, Homicide, and Mass Incarceration since 1950

Jonathan Simon†

When we think about the relationship between crime and the economy, the nexus most likely to come to mind is employment.¹ In this Article I propose a very different framework for thinking about the economic context of crime—one based on housing. Like the employment-crime nexus, the relationship between housing and crime can point to a multitude of different dynamics, concerning the incentives to commit crimes and the incentives of the public to react to fear of crime. Here, I focus on just one dynamic: many Americans switched from renting to owning their homes during the second half of the 20th century, and this shift, I will argue, made the public more fearful of crime and thus more inclined to support aggressive law-and-order policies. Alongside the well-documented rise in violent crime (homicide in particular) in the early 1960s,² the post-WWII trend of

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² Economists, sociologists, and criminologists have identified no shortage of links. During periods when jobs are scarce, the potential gains from crime may become more attractive. See Richard Freeman, Why Do So Many Young American Men Commit Crimes and What Might We Do about It?, 10 J Econ Persp 25, 31 (1996) (noting that rewards of crime appeared to be rising in the early 1990s). Periods of unemployment might also lead to changes in the social networks and social capital of the unemployed, changes that may be associated with deviant behavior and ultimately criminal behavior. See John Hagan, Social Embeddedness of Crime and Unemployment, 31 Criminol 465, 469 (1993). Long-term unequal stratification of opportunity (class) may produce structural incentives for crime, as those with significantly fewer opportunities attempt to fulfill general cultural goals of success without access to the approved institutional means necessary to achieve those ends may turn to antisocial means to do so. See Robert K. Merton, Social Structure and Anomie, 38 Am Sociol Rev 672, 674 (1938). In periods of growing economic inequality, governments may face populist demands to respond to crime with harsh punishment as an alternative to welfarist policies ruled out by the logics of neoliberal political economy. See generally Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Insecurity (Duke 2009). Meanwhile, the punishment of crime through incarceration clearly reduces the economic opportunities of the formerly incarcerated, predisposing them to all the risks of the unemployment-crime nexus. See Bruce Western, Punishment and Inequality in America 109 (Sage 2006).

² On the rise of violent crime, see generally Franklin E. Zimring, The Great American Crime Decline (Oxford 2007); David Garland, The Culture of Control: Crime and
suburbanization\(^3\) helped to lay the foundation for “mass incarceration.”\(^4\)

Since the 1960s, violent crime has been a central issue for government at all levels.\(^5\) The crime surge of the early twentieth century did create governmental responses at all levels, including the federal government.\(^6\) However, the scale and duration of the government’s response was qualitatively different. In the 1920s and 1930s, states and the federal government built new prisons and engaged in escalated rhetoric about crime. Since the 1970s, states and the federal government have engaged in an unprecedented program of prison building and tougher penal policies, producing a more than six-fold increase in the incarceration rate since the mid-1970s\(^7\) (compared to about a 90 percent increase in the 1930s over the previous period).\(^8\)

As I explain in greater detail in Part II, fear of violent crime, and especially homicide, has played a crucial role in conceptually and materially re-spatializing American capitalism from an urban industrial base to a new suburban base anchored in real estate and the kind of personal consumerism associated with the (until now) ever-expanding American home. In return, the

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\(^4\) Sociologists have used the term “mass incarceration” to highlight two features of contemporary imprisonment in the United States: (1) its quantitative scale, which is a marked departure from historical patterns, and (2) the tendency to use imprisonment in a much more wholesale manner, on whole categories of criminal offenders, rather than in the more individualized manner in which the penalty of incarceration has been historically applied to its subjects. See generally David Garland, *The Meaning of Mass Incarceration*, 3 *Pun & Soc* 5 (2001). See also Bruce Western, *Punishment and Inequality in America* 11–33 (Russell Sage 2006).

\(^5\) See generally Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford 2007), where I argue that political elites in both parties pursued crime as a privileged social problem to focus their different policy agendas. In this Article I am not abandoning this political view of mass incarceration so much as attempting to understand the cognitive and cultural conditions that made the US such productive ground for developing what Garland calls the “culture of control.” See Garland, 3 *Pun & Soc* at 5 (cited in note 4).


movement of the American middle class to a new domestic platform, positioned in the suburbs, based on a model of physically separated single-family homes, and the anchoring of the American economy in the continued growth of this real estate consumption cycle, helped to create a distinctive risk sensibility about violent crime as a threat to the home (and home prices) that drove the war on crime to a far greater influence than it might otherwise have had, and influenced many of the precise forms through which this war materialized. Consider that we also had wars on cancer and poverty in the late 1960s and early 1970s, each of which picked up on a historically potent topic for personal and collective mobilization in America but none of which had the broad impact of the war on crime, and none of which had the distinctive focus on American house prices that violent crime did.

More specifically, I suggest in Part II that the rise of suburban home ownership in the 1950s provides an explanation for a number of distinctive features of contemporary penalty:

(1) The enormous expansion in the use of incarceration, its shift toward a categoric (or mass) orientation, and the relative lack of growth of public policing (compared to both prison and private policing).

(2) The persistence of capital punishment in states where executions rarely occur.

(3) The importance of guns to the politics of crime in America.

The expanding suburban home ownership market provides a good example of both the specificity of these features and the historical pattern of their unfolding. Briefly, I compare the fit of this explanation to other plausible economic and noneconomic explanations, including labor market dynamics, the reassertion of political control by capitalism (a process often described by sociolo-
gists and others as "neoliberalism"), and a backlash against the gains of the civil rights movement.

In conclusion, I consider our present conjuncture in a bit more detail. Homicide and violent-crime rates remain low relative to the highs of the 1970s and 1980s. Most importantly, the combination of growing fear of a global climate crisis and the deep economic crisis that began in 2008 has temporarily collapsed the real-estate-based finance bubble and suggested that it cannot be sustained in its recent form. Could a long-term shift away from home ownership and suburbanization and towards renting and higher-density urban-style neighborhoods (whether inside city limits or not) be underway? Could that lead to the emergence of a new risk sensibility, one that would disfavor the prioritizing of violent-crime risk and solutions based on mass incarceration? The concluding section offers a necessarily speculative analysis.

I. HOME OWNERSHIP, HOMICIDE, AND RISK ASSESSMENT

It might seem self-evident that homicide is such a particularly vivid and comprehensive risk that it needs no amplification. If homicide rates in a given society go up by 200 or 300 percent, as they did during the 1960s, popular demand for tough measures may not seem to require much explanation; however, both historical and comparative studies suggest that changes in crime by themselves underdetermine the form of policy response. Indeed, we have already noted that comparable increases in violent crime in the 1920s and 1930s failed to generate as powerful a political reaction against crime as the period since the 1960s.

11 See Wacquant, Punishing the Poor (cited in note 1).
17 Incarceration rates rose in response to Prohibition-related arrests as well as violent crime. See James Austin and John Irwin, It's about Time: America's Imprisonment...
Highlighting homeownership as a factor in risk assessment does not disregard, in any significant sense, the rationality of the subject. People may indeed act rationally, but they do so from a context. In ways that have been under-discussed (at least among legal scholars and criminologists), people who own their homes assess risk from a very different context than comparable people who rent their dwellings.

A. Housing, Risk, and Knowledge about Crime

Home ownership in any economy ties the owner to a particular location in a nontrivial manner. As we are painfully reminded today, housing markets are not always highly liquid. Once a measure of concern about security is raised about a neighborhood, real estate in that neighborhood is likely to become substantially less liquid. It is important, in this respect, that violent crime has for decades been associated with neighborhood-specific risks (rather than being seen as a free-floating risk that could occur anywhere with equal probability). Sometimes this association is largely a function of stereotype and prejudice; in other instances, it can be shockingly accurate.

While a renter may rather move his or her family to a different neighborhood in response to real or perceived risk, the homeowner has greater exposure in both a personal and a financial sense. Homeowners may be especially fearful of burglary, a felonious theft focused on the home, rather than robbery, which although traditionally more feared and punished, is associated

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19 In an innovative study using Megan's Law information on the location of sex offenders to estimate the impact of a sex offender moving to a home on adjacent property values, the investigators found that the home adjacent to a sex offender goes down 12 percent in value, while the closest home to sell goes down an average of 4 percent, with no effect beyond one-tenth of a mile. See Leigh Linden and Jonah E. Rockoff, Estimates of the Impact of Crime Risk on Property Values from Megan's Laws, 98 Am Econ Rev 1103, 1103 (2008).

20 A number of serial killers have operated in very specific geographic locations. In one notorious Florida case Eddie Lee Mosely, who terrorized the African American section of Fort Lauderdale, Florida, in the 1970s, was identified when investigators realized the locations of the victims' bodies were closely situated in a portion of the neighborhood. The killer turned out to live with his parents in a house close to the center of the small zone in which he killed. See Jonathan Simon, Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security, in Charles J. Ogletree, Jr. and Austin Sarat, eds, When Law Fails: Making Sense of Miscarriages of Justice 115, 125–34 (NYU 2009).
more with streets and public encounters that homeowners can (and in the suburban model of home ownership do) choose to avoid.\textsuperscript{21} It is the violence that enters the home, or threatens to enter, that is particularly threatening.\textsuperscript{22} The homeowner is also exposed to the danger that her investment in the home, which is often the primary vehicle for retirement savings, will be damaged by the reputational harm to the neighborhood associated with the perception of growing crime risks.

This differential risk exposure of owners and renters should tend to incline them toward different sensitivities to crime risk and thresholds of action (the owner should sell well before the renter decides to move), but perhaps even more importantly, it inclines them toward different information streams, or knowledge pathways, about crime. Both renters and owners have access to two distinct streams of knowledge about crime: (1) local knowledge, their own perception of how dangerous their area is (perhaps informed by other local friends and neighbors), and (2) virtual knowledge, the mediated representation of crime in the fictional and news programming about crime. But while renters can place as much or as little significance as they choose in the virtual knowledge of crime, owners have strong reasons to care how their own neighborhood is represented in that virtual crime picture. Because the virtual representation about crime is almost always more alarmist than local knowledge, we can expect the owner to have not just more sensitivity but a heightened awareness of and understanding of crime.\textsuperscript{23} The mass production of homeownership in the United States in the decades following the

\textsuperscript{21} One of the perverse effects of California’s “three-strikes” law, from a traditional purposes-of-punishment perspective, was flattening the difference between robbery and burglary for felons with multiple convictions (on the third strike it will not matter). See Franklin Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You’re Out in California 195 (Oxford 2001).

\textsuperscript{22} Of course the repressed element for a long time was the domestic violence within the house. See Simon, Governing through Crime at 177–206 (cited in note 5).

\textsuperscript{23} Since the 1970s criminologists and sociologists have believed strongly that public attitudes about crime are disproportionately shaped by media coverage and that media coverage of crime is considerably more sensational than the overall crime situation. It turns out that empirical research in support of the former has been difficult to sustain convincingly, but that evidence for the latter is strong. See Jason Ditton et al, From Imitation to Intimidation: A Note on the Curious Relationship between Media, Crime and Fear of Crime, 44 Brit J Criminol 595, 598 (2004) (reporting that evidence of sensationalism in the selection of crime news by media is solid, only about 41 percent of studies have found a positive association between media exposure and fear of crime, but observing that the complexities of personal interpretation of news make linear relationships difficult to establish). For our purposes it establishes that homeowners may pay more attention to a source of knowledge that certainly increases the availability of alarming information about crime.
1960s has enormously expanded the portion of the population subject to this heightened awareness and understanding.

I argue that there is a risk mentality specific to the intersection of homeownership and homicide, one that may exist in any time, but which became disproportionately important in the 1960s and 1970s, and remained so for the next three decades. The risk of being killed, or having a loved one killed, by a stranger who either invades the home or lurks nearby to attack during the inevitable passage to and from home, however brief, is logically one that stands out in this regard as one risk that is singularly hard to prevent by either public law enforcement (because it is happening off the streets) or private choices to discipline behavior for crime safety (say, to avoid the streets, bars, downtown shopping streets, or other public places).

While this risk mentality may be a broad feature of human experience that incorporates a wide range of residential patterns, I would argue that there are a number of features of the post-WWII suburbanization and the accompanying housing boom that exacerbated it. It was in this period that home ownership, as opposed to renting, began to be valorized as a norm for American middle-class families and associated with all manner of private and public virtues. The federal government subsidized this new norm beginning in the New Deal by allowing taxpayers to deduct their mortgage interest from their income in determining their tax liability.

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25 The one great and highly controversial exception being through private gun ownership. I would expect to find that careful qualitative research into the reasons people have for supporting a personal right to gun ownership would show that it is linked to a sense of being vulnerable to violent attack in or around their home. I am not aware of any direct empirical evidence on this point. There is empirical evidence that fear of crime is associated with support for gun ownership. See R. Lance Holbert, Dhavan V. Shah, and Nojin Kwak, Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership, 81 Journalism & Mass Communication Q 343, 351 (2004) (finding that fear of crime increases positive attitude toward gun ownership).

While the tenancy of ownership can apply to all kinds of residential structures (including apartments through the vehicle of condominiums), the post-war suburban boom involved the marketing of single-family homes physically separated from one another by expanses of yard and often fences, in a setting ideally removed from traffic, commercial life, and workplaces. While there were many virtues associated with this pattern of development (including health, community, and aesthetics), none had higher priority than the idea of security. This kind of household was held out explicitly as the best way to keep families secure from crime. In short, the new housing pattern was offering not simply shelter, or lifestyle, but a lifestyle based on security through physical separation from the public space, and especially urban public space.

This new pattern of housing became increasingly ubiquitous in the decades following 1960, but it was concentrated in the booming Sun Belt states that began to experience major population growth at the expense of the Midwest and Northeastern states. From Georgia and the Carolinas to Arizona and California, a forty-year boom anchored in a warmer climate, nonunion workforces, and affordable suburban housing began after World War II and has continued with varying degrees of intensity until the present economic crisis.

Geographers, historians, and political scientists have begun to explore the relationship between this new suburban residential pattern and the conservative politics that began to mobilize in the 1960s. Lisa McGirr’s study of California’s Orange County

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27 Nicolas Paul Retsinas and Eric S. Belsky, eds, Low-Income Homeownership: Examining the Unexamined Goal 10 (Brookings 2002) (it is commonly believed that higher home-ownership rates mean lower crime rates).

28 For the classic statement of the relationship between spatial design and crime security and advocating the creation of personal responsibility over space as the key to preventing crime in urban settings, essentially bringing the suburban model of housing to the city by privatizing space, see generally Oscar Newman, Defensible Space: Crime Prevention through Urban Design (Macmillan 1972).

29 See Thomas J. Sugrue, The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit 259–71, xviii (Princeton 1996) (describing how deindustrialization and racial strife created blight and insecurity long before the riots or crime become objective problems). In the early stages of that Sun Belt boom, manufacturing jobs, which moved there from the more unionized Midwest beginning after World War II, were also a big part of the attraction. Since the 1980s, however, the greater economic magnet throughout these regions has been real estate itself and related enterprises.

30 On job movement to the Sun Belt, see id; Roger Waldinger, Immigration and Urban Change, 15 Annu Rev Sociol 211, 216 (1989) (describing the pattern of declining cities in Northeast and Middle West, and the rise of Sun Belt cities).

31 See generally Mike Davis, City of Quartz: Excavating the Future in Los Angeles (Verso 1990); Mike Davis, Ecology of Fear: Los Angeles and the Imagination of Disaster
suggests that the very style of residential development encouraged conservative values:

The result of development along these lines, . . . was spatial isolation and an absence of community, which, in a complicated way, helped to reinforce a conservative ethos. One Santa Ana resident, for example, who in 1961 criticized the lack of neighborliness in housing developments and called for “more community recreational activity . . . where people can get to know one another,” linked the depletion of community to government centralization.\(^{32}\)

But the very same ethos that supported conservative political ideology also cultivated a model of home security based on physical separation from public space, and with it the creation of a larger space of recreation and intimacy within the security of home that had an appeal far beyond that ideology. As home purchasers were encouraged to invest not simply in shelter but in security, Americans found themselves in something like a security paradox. Under these conditions the expansive promise of the home as security zone grew in tandem with a sense of exposure to those who might attempt to penetrate that zone with the intent of doing harm, what I will call, for the sake of brevity, “stranger danger.” The very suburban development pattern that offered more distance from the menace of the city also created more isolation. City life meant proximity to potential criminals, but also proximity to neighbors and police. Suburban life had a soft white underbelly. If a malevolent stranger were to penetrate the geographic divide, the individual homeowner would be largely on his or her own. This was the nightmare captured in real crimes like the Manson family murders and countless fictionalized ones. Any fan of American films can identify many examples of movies that celebrate exactly this paradox.\(^{33}\)

As David Garland argues, the suburbs came to seem even more vulnerable to their security-seeking residents when women began to enter the workforce in droves.\(^{34}\) A residential pattern that had relied on full-time homemakers to create a community out of the islands of backyards and cul-de-sacs came to seem

\(^{32}\) McGirr, Suburban Warriors at 42 (cited in note 31).

\(^{33}\) See, for example, The Desperate Hours (1955); Straw Dogs (1971); The Last House on the Left (1972).

\(^{34}\) Garland, The Culture of Control at 154–55 (cited in note 2).
haunted as new economic conditions forced middle-class families to rely on two jobs.


For reasons quite independent of crime or punishment, American political institutions began to promote mass homeownership as a foundation for the American middle class beginning in the 1940s. Over the next sixty years this program shifted urban America from a society largely composed of renters living in apartments and closely spaced town houses to a society largely composed of homeowners living in houses physically separated from one another and, to varying degrees, from public spaces, avenues, and transportation.

Historically the key year of the transformation of Americans into homeowners was 1950. It was the census taken during that year which marked that for the first time a majority of occupied housing units in the United States were owned rather than rented. The most rapid period of expansion for homeownership was between 1940 and 1960 when the percentage of owner-occupied housing units went from around 44 percent to around 62 percent. Ownership levels remained stagnant in the 1970s and 1980s, but began to grow more vigorously again in the 1990s, reaching a twentieth-century high of 66 percent in the 2000 census.

As suggested above, this policy of promoting homeownership had the presumably unintended effect of forging an American public with heightened sensitivity to crime risk and alarmist knowledge streams about crime. This demographic transformation interacted with the unfolding of a wave of crime and fear of crime, both real and imaginary, that began in the 1950s and continued, with episodic peaks and valleys, until the middle of the 1990s, when steep reductions in violent crime (indeed most categories of crime) began.

36 Id at 125.
37 Id. Home ownership in the first decade of this century probably peaked around 2007, before foreclosures forced many out of owner-occupied housing.
CONSUMING OBSESSIONS

1. 1950s: Fear before the crime.

The 1950s were a decade of growing public unease about crime. Distinct foci of concern (something criminologists often call “moral panics”) formed around sex offenders, heroin users and dealers, and youth gangs. But over all there is little evidence that crime was becoming more of a threat. While reported crime series from this period are generally not considered reliable, homicide reports are more so, and show no discernable trend for the decade. 39

The focus of public discussion of crime was increasingly on cities. In September of 1957, a year which would see the decade’s lowest homicide rate, Life Magazine devoted its cover to a “Major Life Series” on “Crime in the US.” 40 Despite the title, the focus of the first article was on urban crime. On the cover were an artistic rendering of young men in apparent gang attire (much of which looks more Hollywood or Broadway influenced than criminological) and the phrase “a New York street gang.” Inside, grainy photos showed Chicago police operating in dark apartment hallways and shadowy streets as they pursued criminals.

But if the face of American crime was increasingly depicted as an urban (and minority) one, the growing role of crime fear in American popular culture was focused elsewhere, on suburban or even rural homes, where relatively privileged white families living lives of apparent security might nonetheless find themselves confronted with criminal violence.

The theme appears in movies like The Desperate Hours (1955), which starred Humphrey Bogart as an escaped murder on the run. Based on a 1954 novel by Joseph Hayes, the film depicts a middle-class suburban family beset by a gang of escaped prisoners. The criminals have deliberately avoided the city, where police might be looking for them, turning to the presumptively safe, but vulnerable and softly defended suburb. In a theme that would be repeated across the next several decades, the suburban family, led by its male head of household, must learn to fight back with every means at its disposal. Released in the midst of the relatively crime-free 1950s, The Desperate Hours

39 Bureau of Justice Statistics, Homicide Trends in the US (DOJ 2010), online at http://bjs.ojp.usdoj.gov/content/homicide/tables/totalstab.cfm (visited Sept 15, 2010) (In 1950, there were 4.6 homicides for every 100 thousand in population in the United States. The rate drifted down to as low as 4.0 in 1957, before rebounding to 4.9 in 1959.).

40 Robert Weaver, illus, Youthful Gang Members, Wearing Characteristic Jackets, Congregate Near a Street Corner in New York, Life Magazine, cover (Sept 9, 1957).
rehearses the posture that fearful and angry citizens would take toward tough-on-crime measures in the coming decades.

What became known as the crime wave of the 1960s (and 1970s) would not commence in any statistically visible way until the middle of the decade. Anxiety about crime, however, built throughout the 1950s, shifting across a variety of now-familiar "folk devils," sex offenders, drug pushers, and gang members, all the while focusing more and more on the dyad of dangerous cities and vulnerable suburbs. The efforts of political elites to focus on crime as a threat to America were already very clearly beginning in this decade, particularly among southern politicians attempting to defend the increasingly indefensible institution of Jim Crow segregation. The mass media, particularly the new media of television, seemed drawn to urban violence and the threat to life and property in many of America's great cities. Moreover, the media tended to treat violence on the streets as a new phenomenon in the 1960s, as if it had no history in those same cities. Both factors help explain the salience of crime before the emergence of objective evidence of an increasing crime threat. But what made the American public so ready to be alarmed and entertained by the prospect of violent crime? The passing in the 1950s of the watershed between a renter and a homeowner society and the rapid increase of home ownership in that decade, spurred by both government efforts and increasing affluence, provide an explanation at the level of individual preferences and also one that fits the historical pattern.

2. Kitty Genovese and the undoing of urban security in the 1960s.

The emergence of violent crime as a central public concern during the 1960s has long fascinated sociologists and political scientists. By 1968, when Richard Nixon won a closely contested election with a campaign promising “law and order,” a combination of riots, assassinations, and increasing reports of violent crime had become the dominant frame for discussing the nation’s

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41 See Stanley Cohen, Folk Devils and Moral Panics: The Creation of Moral Panics 1–2, 8 (Blackwell 3d ed 2002) (“folk devils” are individuals or social categories in whom the community, generally led by the media, impute a far greater threat than a rational assessment might suggest, primarily because their conduct or character challenge the normative or power structure of society).


43 On the media focus on crime, see id at 60–64 (describing influence of media in disseminating a law-and-order message about crime in the 1960s).
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cities and social problems generally. A result, widely discussed at the time, was an increased flight of middle-class families from cities to surrounding suburbs. As we have seen, by the mid-1950s, a sense that America's large cities were dangerous was beginning to spread. In between, it is not hard to identify distinct moments when the sense of urban security received serious blows even if it is impossible to show that at one point it became fundamentally undone for a generation of Americans with means (especially those with families).

One moment that may well have had an outsized influence on public sentiment was the murder of Kitty Genovese on March 14, 1964. Genovese was not a celebrity. She was one of a growing number of ordinary persons murdered in the city limits of America's great cities in 1964 (the second year of a rise in homicides that would continue for the next fifteen years). Her killing (a vicious assault with a knife) and sexual assault, initially noted on page 26 of the New York Times, came to be famous from a series of factors amplified by a second investigative feature story that appeared in the Times more than a week later on March 27, written by Martin Gansberg and titled 37 Who Saw Murder Didn't Call the Police.

As reframed by the Times, the central fact of the murder was that it took place in public, as witnessed by some thirty-eight neighbors in Genovese's apartment building and nearby, over a prolonged period of time, and that while all of those people were aware of her peril, none of them alerted the police.

Miss Genovese screamed: "Oh, my God, he stabbed me! Please help me! Please help me!"

From one of the upper windows in the apartment house, a man called down: "Let that girl alone!"

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45 For example, the Watts riot of July 1965, the Detroit riot of July 1968, the mass murder of eight young nursing students in a Chicago apartment by Richard Speck, also in 1968. See generally, Rick Perlstein, Nixonland: The Rise of a President and the Fracturing of America (Scribner 1968), for a discussion of all of these events and their influence on American politics.


The assailant looked up at him, shrugged, and walked down Austin Street toward a white sedan parked a short distance away. Miss Genovese struggled to her feet.

Lights went out. The killer returned to Miss Genovese, now trying to make her way around the side of the building by the parking lot to get to her apartment. The assailant stabbed her again.

"I'm dying!" she shrieked. "I'm dying!"

Windows were opened again, and lights went on in many apartments. The assailant got into his car and drove away. Miss Genovese staggered to her feet. A city bus, 0-10, the Lefferts Boulevard line to Kennedy International Airport, passed. It was 3:35 A.M.

The assailant returned. By then, Miss Genovese had crawled to the back of the building, where the freshly painted brown doors to the apartment house held out hope for safety. The killer tried the first door; she wasn't there. At the second door, 82-62 Austin Street, he saw her slumped on the floor at the foot of the stairs. He stabbed her a third time—fatally.

It was 3:50 by the time the police received their first call, from a man who was a neighbor of Miss Genovese. In two minutes they were at the scene. The neighbor, a 70-year-old woman, and another woman were the only persons on the street. Nobody else came forward. 48

The paradox immediately intrigued social psychologists who saw in it a potentially far more general dynamic, and one with plenty of social-policy consequences. What some called the "bystander effect" predicts that as the number of potential rescuers grows, the likelihood of any individual stepping forward to help someone declines. 49 The person whose victimization is widely visible, like Kitty Genovese, may, counterintuitively, be in more trouble than a victim whose peril is known only to a few.

The background features of the case also helped determine that the young woman's murder would be remembered for de-
The victim was, indeed, a young unmarried female, a category of victim with powerful resonance in our culture. The victim was returning from work late at night, a situation of vulnerability that seems particularly intolerable because it is a necessary consequence to work itself, and not a hazard undertaken voluntarily in pursuit of adventure or pleasure. (Ironically, Genovese was returning from a bar where she worked. Had she been returning from a bar where she had gone to drink, she might not have proven as sympathetic a victim.) The murder was violent and prolonged, unfolding much like a scene in a horror movie or nightmare, with Genovese's slow, painful effort to crawl to safety and the killer's search to find her.

If Gansberg's article was not enough to turn the Queens rape and murder into a national parable about urban insecurity, New York Times editor Abe Rosenthal magnified the impact by publishing a widely discussed book about the case later that year, titled, after the article, Thirty-Eight Witnesses: The Kitty Genovese Case.50

While some now contest the accuracy of the Times' original reporting, Rosenthal's theory that witnesses in mass housing settings would never feel responsible for acting became a quasi-scientific gospel among educated middle-class readers, people also acutely aware of increasing concerns about urban crime (which as we have seen had been framed as a problem in the media since the mid-1950s).

The murder of Kitty Genovese seemed to confirm a sociological premise running back at least a century, blaming urban conditions for increases in reported crimes, but careful historical reconstruction suggests that this association was largely a myth, a function of improving detection of crime and apprehension of criminals and bias against the social and moral features of urban life.51 Hidden behind modernist fear of cities was a very old logic by which towns and cities were for centuries considered safer against crime then rural settings. It was on the highways and on isolated farms that a person was vulnerable to violent crime.52 In town neighbors, supported by the civil institutions of mutual aid

51 For a summary of the debate and evidence from 19th century Germany that cities were not more dangerous in terms of crime, see Eric A. Johnson, Cities Don't Cause Crime: Urban-Rural Differences in Late Nineteenth and Early Twentieth-Century German Criminality, 16 Soc Sci Hist 129, 144 (1992).
52 Id at 145.
and later by professional police, provided help against criminal assault. Genovese's death struck at both these sources of security: if thirty-eight watched and no one felt responsible to intervene, then the promise of rescue by police was futile.

As a piece of popularized social science with a highly problematic empirical base, Kitty Genovese's case and the bystander effect might be compared to the highly influential "broken windows" theory about the effects of increasing enforcement of minor public-order laws, except that instead of influencing mayors and police chiefs, the Genovese case was a "broken windows" theory for middle-class families, one that constituted a powerful advertisement for moving out of urban apartment buildings and into suburban cul-de-sacs.

3. Helter skelter to gimme shelter.

If events like the murder of Kitty Genovese helped to mark cities as places of violence and danger and encourage flight to the suburbs, they did not yet define mass incarceration as a necessary solution. To many contemporaries, the solution was to improve police response abilities. Kitty Genovese had tried to reach a police call box when she first saw the suspicious stranger who attacked her, and overall the assault took as much as a half hour, with many moments when a police intervention could have saved Genovese's life (she was alive when they arrived but died soon afterwards). Indeed, the main thrust of anti-crime policies in the late 1960s was mostly focused on enhancing police capacity.

All along the suburban home was shadowed, at least in the imaginary world of popular culture, by the possibility that crime and violence might find their way from the city (or from prison) into the presumably safer but easily penetrated suburb. Once attacked in the home, movies like The Desperate Hours suggested, survival would depend on self-help and the homeowner's internal masculine capacity to defend the home. The same theme was presented brilliantly in Truman Capote's best-selling book, In Cold Blood, which told the "true" story of two young ex-prisoners who invade a Kansas farmhouse and kill the entire family in 1959.53 While the crime itself took place before the crime wave of the 1960s can be said to have begun, the book was published (and became a huge bestseller) in 1966, and a very

popular movie appeared in 1967, right as consciousness about homicide as a social problem was rising (and in the midst of the assassinations and riots).

But it would not be long before reality far outstripped the ability of popular culture to embody the fear that was forming as a shadow alongside the security of the home. Between sunset on August 8th, 1969, and sunrise on August 10th, seven people were brutally murdered in two expensive suburban-style Los Angeles houses. The murders were initially known as the Tate-Labianca murders after movie star Sharon Tate, who died along with four others in the Topanga Canyon house, and Leno and Rosemary Labianca, owners of grocery stores and other businesses, who were murdered in their home in the Los Felice neighborhood of Los Angeles. Eventually, the murders were blamed on Charles Manson and four other individuals (three women and one man) said to be members of a virtual murder cult surrounding Manson and known as “The Family.” Manson and the four were convicted of the seven murders and sentenced to death in March of 1971.

The Manson Family murders of August 8th and 9th, 1969, remain among the most widely known mass murders in American history. Typically, they are treated historically as a closing chapter on the “flower power” phase of the 1960s, but they also belong to a history of criminal violence in the late 1960s and early 1970s that is rather astounding. As with the murder of Kitty Genovese, the Tate-Labianca killings were well placed to crystalize and disseminate a compelling picture of the violent-crime risk. They took place in Los Angeles, the media capital of the nation. They involved a movie star and several lesser celebrities. The crimes themselves were extraordinarily horrifying. In each case the killers were young people who attacked the victims with no intent other than slaughtering them (on Manson’s orders). Scores of books and movies have kept the horror of the crimes going for intervening four decades.

As with Kitty Genovese’s murder, the Tate-Labianca murders are also about housing and the relationship of homicide to housing. If the Genovese case marked urban neighborhoods as death traps, Tate-Labianca carried a chilling message for those who had sought greater security in more secluded suburban-style housing; in the suburbs, “no one can hear you scream.”

55 In both the August 1969 murders, the killers relied on knives to stab most of the victims to death. Despite what must have been terrifying screams from the victims, no
there was no bystander problem. Had any of the neighbors heard screams, they may well have called the police, but due to the privacy-oriented layout of the two houses, no one heard. The Manson Family murders came to embody a risk of terrible violence that can strike any person, even if they have taken the precaution to locate themselves far from urban centers. Manson's murderous disciples did not conform to dominant images of threat. The murdering gang that descended on Sharon Tate and her friends included three white women and a white man, all in their twenties, all appearing in the "hippie style" then popular throughout the southern California middle classes. The victims in both houses appear to have had no idea how much of a threat they were under and put up little resistance until well into their encounters with their killers.

As with the Genovese case, there were lessons to be drawn here for the ordinary person, and few even needed to wait for the plethora of books that were written about the Manson murders to draw them. Within days of the murders gun stores in LA were sold out of virtually all firearms. The price of trained attack dogs reached $1500 (in 1969 dollars).\(^5\) Against such a risk there is no defense of better police, or of moving to a safer neighborhood. Manson as a security problem points in two directions. In terms of private action, the Manson murders suggest that homeowners need to be able to rely on themselves to achieve security through the purchase of better alarm and security systems, as well as firearms.

In terms of public action, the Manson murders point toward harsh incapacitative punishments designed to permanently remove from society those who pose a risk of violence to others. When, less than a year after Charles Manson and his associates were sentenced to death, the California Supreme Court held the death penalty unconstitutional (two months ahead of the US Supreme Court),\(^6\) the outraged reaction by the state's political leaders placed the Manson Family as the primary examples of the threats that would now be eligible for parole.

In an interview with a reporter just after learning of the California decision, Assistant Attorney General Ronald George (now Chief Justice of the California Supreme Court) was quoted as follows:

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\(^5\) People v Anderson, 493 P2d 880 (Cal 1972); Furman v Georgia, 408 US 238 (1972).

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one called the police, who were alerted in both cases only after the bodies were discovered by family members or employees. Ed Sanders, *The Family* 222 (Thunder's Mouth 2002).

\(^6\) Id.
They [the Court] made no mention of that, so the sentences become simple life sentences. That could mean that people like Charles Manson (convicted in the seven Tate-Labianca murders) and Sirhan Sirhan (murderer of Sen. Robert F. Kennedy) could be on the streets in seven years.\textsuperscript{58}

In the same story, LA Police Chief Ed Davis (future candidate for governor) described the threat to ordinary citizens in the most alarming possible terms:

Murderers sentenced to life imprisonment are eligible for parole, back on the streets, after seven years . . . The decision of the “San Francisco Court” is bound to result in the slaughter of many California citizens by an army of murderers who have been waiting for years in Death Row for such an unrealistic judicial judgment.\textsuperscript{59}

Tate-Labianca seared into the consciousness of a generation a vision of fear that linked homicide and houses in a scenario that had been already rehearsed in popular culture, but would now be magnified by the formal processes of justice (four death sentences at the original trial, including three women), and reinscribed by further trials, appeals, parole hearings, and numerous books and movies. In 1969, a year in which war, revolution, and even the apocalypse seemed likely to many, Manson helped define violent crime as at least one of the major components of that apocalypse. \textit{Gimme Shelter}, Mick Jagger and Keith Richard’s ominous anthem about the gathering fear of that period, first recorded only a few months after the Tate-Labianca murders, seemed to capture this new balance of terror perfectly, and to link it permanently and problematically to the idea of shelter.

\begin{verbatim}
Oh, a storm is threat'ning
My very life today
If I don't get some shelter
Oh yeah, I'm gonna fade away

War, children, it's just a shot away
It's just a shot away
War, children, it's just a shot away
\end{verbatim}


\textsuperscript{59} Id at 26.
It’s just a shot away...

Rape, murder!
It’s just a shot away
It’s just a shot away...

The shelter that the song pleads for was not love, however; it was a home secured against the malevolent stranger that could be waiting in the darkness outside the house no matter how “safe” the surrounding community was. Shelter, an idea with an increasing measure of security built into it, now had a rather specific meaning: it was a house that Charlie and his creepy crawling minions could never penetrate.

4. The gated community.

While the economic travails of the 1970s (oil shocks followed by hyper-inflation) would stall the expansion of the American home-owning class for a decade, they would not reverse the tectonic shift from renting to owning accomplished between 1940 and 1970. Once interest rates came down in the deep recession of the early 1980s, home sales rebounded, and the portion of Americans who were homeowners began to grow again in the late 1980s and more rapidly still in the 1990s. The homicide rate began to turn down in most of the United States during the 1970s. Combined with the stalling and even shrinkage of the home owning portion of the population, this may help explain why incarceration rates remained low in the 1970s despite the ratcheting up of law-and-order rhetoric. Homicide would spike again in the late 1980s and stay high through the early 1990s, the same period in which homeownership growth had recovered, and with it, enhanced crime insecurity. Ironically, deep declines in violent crime began to become visible by the end of the 1990s. In the most dramatic cases, like New York City, homicide rates dropped to levels unseen since the early 1960s, a trend which has continued in the first decade of the twenty-first century.60

In the meantime, the linkage between homes and fear of violent crime has become ever tighter (notwithstanding the crime decline). The threat of violent crime reaching the occupants of homes, particularly children, continues to be the most politically

productive source of crime policies. Consider two crimes of the
1990s that have continued to shape current crime policies, the
murders of Megan Kanka and Polly Klaas. Both were young girls
taken near their homes in secure suburban areas and murdered
by released prisoners with a record of violent crime.

Polly Klaas was twelve in 1993 when she was kidnapped
from her mother’s home in Petaluma, California, and murdered
by Richard Allen Davis, a paroled felon with a long record of bur-
glaries and assaults. Public outrage that Davis had been released
from prison numerous times following parole violations and crim-
nal convictions led to the adoption of the nation’s most severe
“three-strikes” law aimed at assuring that persons with repeated
violent (or serious) crimes can receive enhanced prison sentences
(including twenty-five years to life on a third felony conviction for
someone with two violent or serious crimes).61

Megan Kanka was seven when she was lured into a house
near her Hamilton Township, New Jersey home by Jesse
Timimindequas, a released felon with a record of sexually molesting
children, who raped and murdered her in 1994. Following her
death, New Jersey adopted a law requiring sex offenders to reg-
ister with authorities and requires authorities to alert neighbors
and children’s facilities to the presence of sex offenders in their
vicinity.62 Registration and notification laws were soon adopted
by many other states63 and then made into a requirement for
states to receive federal subsidies for law enforcement.64 More
recent laws have banned sex offenders from living within a spe-
cific distance (typically two thousand feet) of a school, park, or
other child-intensive-use facilities.65 The result has been to red-
line whole neighborhoods and some whole cities for those convicted of a sex offense.66

It was also in the 1990s that the gated community became the model style of new housing units being built in the United States. The now-ubiquitous style generally involves a gated security post at any street entering the subdivision. Although there is tremendous variability in how much security such posts actually provide (if they are even staffed at all), the fact that a large portion of new homes across a wide range of class levels are generally equipped with gates shows how much it has become part of the signature of security, and therefore of homeownership itself.

The gate, whether staffed or not, is only symbolic of the multiple layers of security Americans now consider as part of the common-sense vision of the home. Some of those layers are purely private—for instance, the gun in the nightstand. Some belong to the semi-public realm of homeowner associations and private police.67 Others, like three strikes, Megan’s Laws, and the death penalty are public policies made in the image of private insecurity. It is this “security” home with its real and imagined layers of protection, and always the penumbra of insecurity, that provides the real context in which the often criticized and lampooned American fear of crime is, in fact, a rational response to their specific spatial imaginary. While actual victims of violent crime tend to be poor and are unlikely to own their homes, the citizen as potential crime victim that now forms the idealized subject of our time is implicitly a homeowner.68 In the following Part, I will suggest that this context and the risk mentality it helps animate provides a better-fitting explanation for the specific features of crime policy and practice in the United States than the leading economic and political theories.

II. CRIME POLICY AS HOMEOWNERS INSURANCE

In the Part above I have laid out a description of a distinctive kind of risk mentality that is encouraged by homeownership

66 Marisa Lagos, Jessica’s Law Means Sex Offenders Roam Streets, SF Chron A1 (Apr 4, 2010).


and which I argue became increasingly prevalent in the United States after 1950 as expanding home ownership became a major objective of public and private policy. I have also provided a selective history of the rise of violent crime as a social problem in the United States since the 1960s. It is the union of these two trends, more homeownership and more violent crime (or at least greater availability or salience of violent crime as a subject of fear), that I argue helps explain not only the priority of crime control policies in the United States, but also the specific and even peculiar forms that those policies in aggregate have taken. While clearly not the only social, demographic, economic, or political factor driving mass incarceration and the war on crime over the past forty years, home ownership and its accompanying risk sensibilities should be seen as an important intervening variable between crime and crime policies.

A. Home Is Where the Fear Is

1. Mass incarceration versus police.

If one goes back to 1968, the original moment when the emergence of crime as an influential political framework announced itself in such forms as the Omnibus Safe Streets and Crime Control Act of that year and in the rhetoric of Richard Nixon’s law-and-order campaign for president,69 there is little to foreshadow the enormous expansion of prisons to follow, nor the evisceration of the rehabilitative penology and its individualizing model of incarceration.70 If there is an emphasis to be found in that year, it is police: providing more resources to police departments and less judicial interference with law enforcement.71 It would be another decade and a half before the war on crime became focused on expanding the use of incarceration and giving prosecutors greater power over the length of incarceration by eliminating parole release. However, even with its late start, mass incarceration has greatly outstripped the expansion of public policing. Since 1970, public spending on prisons in the United States has gone up by 375 percent, compared to just 20 percent for police.72

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69 See Simon, Governing through Crime at 41–42 (cited in note 5); Rick Perlstein, Nixonland at 238 (cited in note 45).
70 Garland, The Culture of Control at 11 (cited in note 2).
72 Justin McCrary, Dynamic Perspectives on Crime, in Bruce L. Benson and Paul R.
Doubtless this disparity is overdetermined by a number of factors. For one, despite the symbolic importance of police to the war on crime, they are not well positioned to receive funding. Police agencies are located in municipal and county governments, which almost everywhere are far more resource poor than state governments (which pay for most prison and correctional costs).\textsuperscript{73} Federal support for police has in various periods (predominantly in Democratic administrations) expanded, but since the 1980s any expansion has come on top of rather than instead of federal spending to subsidize state prison expenses. Another factor is until recently, most criminal-justice experts thought it unlikely that police could reduce crime through better tactics.\textsuperscript{74} Instead, the thrust of criminological thinking from the 1970s through the 1990s was on the ability of imprisonment to reduce crime through incapacitation.\textsuperscript{75} However, given the importance of populism and appeals to voters in the expansion of the war on crime, it is difficult to believe that prisons could have edged out police quite so dramatically, despite insider advantages, if this prioritization of imprisonment did not also fit well with the popular demand for crime security.

This differential demand for prisons over police has a lot to do with the spatial logic of police and prisons. Police have two kinds of effects on crime. First, through their immediate presence in a location they can deter crime or stop a crime in progress. Second, by arresting persons guilty of crime they can contribute to overall deterrence, specific deterrence, and incapacitation. These contributions appear to benefit the population outside the immediate neighborhood (even though the actual criminal activity of any particular arrestee is almost certainly not

\textsuperscript{73} Kirk H. Porter, \textit{County and Township Government in the United States} 93 (McMillan 1922); Richard Briffault, \textit{Our Localism, Part I: The Structure of Local Government Law}, 90 Colum L Rev 1, 32 (1990) (noting that functions including police that are funded primarily at the local level).

\textsuperscript{74} The effort to test the effectiveness of police strategies against crime in the 1970s at an early stage of both police reform and adequate social science assessment of police seemed to demonstrate that investing time and money in innovative police approaches was of little worth. See Zimring, \textit{The Great American Crime Decline} at 28–32 (cited in note 2).

\textsuperscript{75} See Stephen Levitt and Stephen Dubner, \textit{Freakonomics} 124 (William Morrow 2005) (asserting some incapacitation effect from increased incarceration in the 1990s). But see Zimring, \textit{The Great American Crime Decline} at 51–2 (cited in note 2) (suggesting that incapacitation does not explain the 1990s crime decline). As Justin McCrary pointed out during a discussion of a draft of this paper, prison-based incapacitation relies on police to effectuate the arrests without which there would be no prisoners to incapacitate. However, the public does not seem to see the police behind the prison.
random spatially). Support for more police can be hampered both by the perception that the first kind of effect will not help those who do not live where police are likely to be concentrated, and the perception that the second kind of effect is either weak or likely to be weakened by factors beyond the control of police, especially plea bargains, parole, and appellate courts.

Prisons, in contrast, promise a completely general crime control effect. Whether by deterring potential criminals or keeping active criminals isolated, prisons promise to reduce crime for everyone in the jurisdiction they serve.\(^{76}\)

The popular priority for prisons, I would argue, stems in part from the differential spatial appeal of police and prisons to homeowners as opposed to renters. New police are most likely to be deployed where the crime rates are highest. Homeowners, in contrast, are likely to try to live where crime rates are lowest. Homeowners, as suggested above, are much more sensitive to popular perception of their neighborhood as a high-crime neighborhood. We expect homeowners in a neighborhood with a growing reputation for crime to attempt to exit as early as possible before prices decline further. We would also expect that people who enter the market to buy homes seek to do so in neighborhoods not tainted with a reputation for high crime (a demand likely to be reinforced by the higher costs of loans and insurance in higher crime areas).\(^{77}\) This is one reason why building new homes in new neighborhoods has been so key to the overall housing market in America. Data from the 2000 census shows that while home ownership grew between 1960 and 2000 in both non-metropolitan areas and metropolitan areas. Within metropolitan areas, both cities and suburbs, the highest levels of homeowner-ship and the greatest growth has been in rural or non-metropolitan as opposed to metropolitan areas. And within metropolitan areas, the growth has been in the suburbs rather than in the city.\(^{78}\)

Since new police are likely to move in the opposite direction from new homeowners (police to the cities, homeowners to the

\(^{76}\) Of course the whole logic of deterrence, whether through fear of arrest by police, or fear of the prison sentence that may follow, are no more general than the underlying spatial patterns of offending. My point is that the localness of the police contribution is visible and obvious while prisons appear more general in their effect.

\(^{77}\) Linden and Rockoff, 98 Am Econ Rev at 1119 (cited in note 19) (estimating a 4 percent drop in the value of property within .1 miles of a sex offender); Arthur S. Goldberger and Richard Rosenfeld, eds, Understanding Crime Trends Workshop Report: Committee on Law and Justice (National Academies 2009).

\(^{78}\) Hobbs and Stoops, Demographic Trends at 126 (cited in note 35).
suburbs or even exurbs), homeowners as a class are unlikely to favor new spending on police. Instead, they are likely to favor prisons, which promise more general crime-control effects. Such voters are also likely to favor laws that maximize the crime-control benefits of any arrests that police are able to make by making it harder for defense lawyers to win big discounts in plea bargaining or for prisoners to win early release through parole. Both of these policies tend to produce mass incarceration.

Of course, homeowners are not indifferent to the potential of police to provide immediate crime-prevention effects. But since public spending on police is likely to favor higher-crime areas, homeowners have thrown their financial support behind private police services through homeowners associations and private security companies. In contrast to the public police, spending on private police and private security has expanded enormously during the past forty years. 79

2. Capital punishment without executions.

California was one of the first states to reauthorize capital punishment after 1972, but more than thirty years have passed since the judicially imposed moratoria on state executions ended, and despite having nearly 700 condemned persons on its death row, California has executed only thirteen prisoners.80 With a typical execution taking place nearly two decades after the crime,81 it is hard to see how deterrence would differentiate the death penalty from life in prison without parole. This is in contrast to states like Texas or Virginia, where condemned inmates can expect to die from a lethal injection in as little as five years.82 Yet despite the fact that almost everyone (including the governor

79 Sklansky, 46 UCLA L Rev at 1165 (cited in note 67) ("The American private security industry today employs far more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing.").


81 Franklin E. Zimring, The Contradictions of American Capital Punishment 81 (Oxford 2003) (it takes at least five years to obtain appellate counsel in California, which only begins the years long process of state and federal appeals).

82 Id.
and the state’s chief justice) considers it dysfunctional, no one expects California’s death penalty to be eliminated any time soon.

While California is extreme, many other states share the basic characteristic of having the death penalty, and having executed someone, but doing so rarely. Thus as of 2002, while seventy-six percent of the states had the death penalty, and sixty-two percent had executed someone since 1976, only twenty-four percent had performed more than fifteen executions since 1976. Indeed, in only a handful of states, almost all of them in the South, is the number of executed prisoners even as much as a third of the number of unexecuted but sentenced death-row inmates.

Why does popular support for the death penalty remain (even if embraced with less enthusiasm then previously) despite the fact that it is mostly a theoretical sentence? I argue that what the death penalty really represents to states like California is a way to maintain pressure on state officials against releasing persons convicted of violent crimes of all sorts (not just capital murder) from prison. Sentencing someone to death in California is no guarantee of execution, but it is a fair guarantee that the prisoner will never be released from prison. Support for the death penalty, then, at least in some states, is more a reflection of mistrust of public correctional officials to protect the public from violent criminals than it is of a cultural endorsement of execution. From this perspective, the modern death penalty, like mass incarceration policies generally, is mostly a way to demand yet another layer of security for all potential victims; a demand I have argued here is likely to be felt most intensely by homeowners. Indeed, in California, the battle over the death penalty largely left invisible the transformation of noncapital murder sentences toward de facto life sentences.

As Marie Gottschalk has argued, the most important political effect of the constitutional battle over capital punishment was to raise the political salience of homicide at a time of growing

83 "The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing." Ronald M. George, Op-Ed, Reform Death Penalty Appeals, LA Times (Jan 7, 2008).
85 Id at 75.
86 On the lengthening of life sentences, see John Irwin, Lifers: Seeking Redemption in Prison 13 (Routledge 2009).
national anxiety over that crime. The result was not just a renewal of life for capital punishment, but a general lockdown policy that has favored the incapacitation of violent and even nonviolent offenders. That this moment also coincided with the peak of the mass expansion of homeownership in the early 1970s means that the political question of how to respond to homicide (in other words, whether to retain the death penalty) was put before the country at a time when more citizens than ever before owned their own homes and were therefore especially attuned to the threat of violent crime.


One of the transformations that has gone along with America's obsession with violent crime since the 1960s has been a great increase both in gun ownership and in the political controversy about gun control. While gun ownership has historically been linked to many purposes including hunting, protection from predators, and militia service, since the 1960s the defense of gun ownership has largely concentrated on the role of guns in providing defense against violent crime. Whether or not private gun ownership actually reduces crime is much debated, but what is clear is that the idea of guns as an effective defense has at its core a specific spatial logic. The utility of gun ownership has an intuitive appeal in the space of the private home. It may be, especially with concealed carry laws, that gun advocates hope to convince Americans that with their guns they can retake the streets from criminals or protect themselves in public should they be attacked by criminals. But the key situation in which Americans want to be armed is in protecting their home against a malevolent invader.

The recent Supreme Court decision in District of Columbia v Heller marked a triumph for the movement to recognize an in-

91 128 S Ct 2783 (2008).
dividual right to bear arms in the Second Amendment. In striking down a DC ordinance that banned handguns even inside a person's home, the Court recognized this individual right in a context that highlighted the gun/home linkage.  

B. Space: The Forgotten Variable

In arguing that the transformation of the model American residence from a rental unit to an owner-occupied house (typically in the suburbs, physically separated from other homes) played a key role in predisposing Americans toward mass incarceration, I do not mean to belittle the much more commonly cited factors like employment, rising inequality, and racial fears or backlash. Instead, I hope to overcome the traditional reluctance by legal scholars and social scientists to taking the spatial dimension of social interactions into account. In this remaining Section, I comment on how these other factors play into mass incarceration and how they may be mediated by homeownership.

1. Unemployment.

Sociologists have long thought that trends in labor markets might explain variations in the quantity and quality of punishment. George Rusche and Otto Kirchheimer presented one of the first empirical studies of variations in punitiveness across the nineteenth and early twentieth centuries, looking mostly at Europe. They found that during periods when labor was in great surplus and held little value, punishments were more severe and more likely to destroy the labor value of the prisoner (through death, mutilation, or exile). During periods when labor was scarcer, or was being more profitably employed, punishments

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92 Id at 2817–18 ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster.").

93 There has always been a tradition within sociology that has explored the role of spatiality. See, for example, Robert E. Park, Ernest W. Burgess, and Roderick D. McKenzie, The City (Chicago 1925); Erving Goffman, Relations in Public: Microstudies of the Public Order (Basic 1971). But since World War II this spatial or ecological focus has been a minority approach.

94 George Rusche and Otto Kirchheimer, Punishment and Social Structure (Columbia 1939). For an effort to apply Rusche and Kirchheimer to the contemporary setting, see Christian Parenti, Lockdown America: Police and Prisons in the Age of Crisis (Verso 1999).
became more lenient and less inconsistent with labor (or in some cases, simply became a form of disciplined labor).\textsuperscript{95}

The 1970s did mark a significant increase in American unemployment rates, which remained comparatively high until the late 1980s and the 1990s. As Catherine Beckett and Bruce Western have argued, incarceration helped to reduce the official unemployment rate in the 1980s and 1990s, almost enough to replace the supposed advantages of the US economy over its European counterparts.\textsuperscript{96}

But the overall pattern in unemployment trends does not provide a particularly close fit with the political genealogy of mass incarceration. Consider that in the late 1960s, when crime began to be framed as a political priority, and cities began to be defined as too dangerous for the middle class, unemployment was quite low and the economy was inflating dangerously (as it turned out).\textsuperscript{97} When mass incarceration policies began to gain steam in the 1980s, unemployment was beginning to contract. In the 1990s, when the US enjoyed its tightest employment markets in decades, incarceration increased even as crime was dropping visibly.

The loss of the industrial manufacturing jobs that once provided a stable bridge to the middle classes for uneducated men and the collapse of the related industrialized sections of our great cities have almost certainly helped generate both crime and the appearance of blight and danger in those cities. But these losses cannot explain the transformation of American policy toward mass incarceration. Even a return to very full employment would do little to diminish the fear and insecurity ordinary citizens feel about crime.

2. Neoliberalism.

A different kind of economic analysis of mass incarceration has stressed not the labor market, but the larger political order in which economic policy plays out. From this perspective, argued forcefully by sociologist Loïc Wacquant, the 1970s marked a watershed between a relatively regulated capitalist economy aimed at producing social consensus through redistribution and

\textsuperscript{95} Rusche and Kirchheimer, \textit{Punishment and Social Structure} at 41 (cited in note 94).


\textsuperscript{97} James Q. Wilson, \textit{Thinking about Crime} 3–20 (Basic 1975).
greater economic security for ordinary people, and a newly deregulated economy in which businesses were allowed to capture greater profits while ordinary people experienced an increase in their economic insecurity. On Wacquant’s account, mass-incarceration policies are the penal parallel to tough “workfare” policies on the welfare side of the state. Both aim to govern a population expected to shoulder a greater burden of economic insecurity. The poor are governed rather directly through the imposition of aggressive policing and mass-incarceration policies. The middle class is disciplined ideologically, through the heightened threat of slipping out of legal work and into criminal activities that could lead to incarceration and permanent social exclusion.

Unlike the labor-market story, the neoliberalism account has the virtue of explaining how deregulating the economy and divesting the social insurance frameworks (at least around the poor and working classes) track the rise of mass incarceration: they both get going in the 1980s and intensify in the 1990s. This account also shares the perspective developed here in this Article, a focus on crime as part of a larger framework of insecurity. My account of the homeowner’s relationship to crime risk is a reminder that insecurity about crime and insecurity about economic interests are not discrete at all. We could improve both accounts by integrating them. Indeed, we might consider homeownership and its rise as an integral but overlooked aspect of neoliberalism. It is the value of the home as an investment that—until the very recent collapse of real estate prices—seemed to allow the careful middle-class person to achieve relative economic security even without the protections of a more regulated and secured labor market. The more a person’s future economic security depends on the value of his or her home, rather than earning capacity, the more we might expect this person to focus on factors like crime that could damage the value of the home.

3. Racial backlash.

Sociologists and political scientists have long suspected that the turn toward harsh punishment for crime as a major public policy was a strategic victory for the defeated defenders of segre-

98 Wacquant, Punishing the Poor at 1–7 (cited in note 1).
99 For the best effort to think about this larger political economic order in spatial terms with a focus on prisons, see Ruth Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (Cal 2008).
gation in the South and those in the North who wanted to prevent school desegregation orders from being carried out there.100 The 1968 Crime Act and the Nixon law-and-order campaign were both saturated with evidence that a racial backlash audience was intended. Talking about reversing the overexpansion of criminal rights and standing up for crime victims was a code for saying that civil rights needed to be checked and that white people needed more protection as whites from government.

But by 1980 when the policies of mass incarceration began to be put in place, the need for the crime issues as a coded way of opposing civil rights had passed. First, the national government had backed off of strong support for school desegregation, and opposition to pro-minority policies like affirmative action had become fully respectable, and indeed was the explicit posture of the successful 1980 Reagan campaign. Reagan also ran on his reputation as a supporter of law and order and the death penalty, but by 1980 this was part of his general appeal to voters, not part of his “southern strategy.”

That mass incarceration is, in fact, a racial strategy is evident from the stark figures on the racial disproportionality of its distribution. In 1999 just under one percent of working-age white males were in prison (itself a historic high), but 7.5 percent of working-age black males were.102 This does not prove that criminal justice policies are implemented for the purpose of producing racial inequality (the usual legal standard for discrimination), but that does not mean structural penal racism has no subjective or motivational content.103 Indeed, the insecurity about crime tied up with homeownership tactic known as “blockbusting,” was invariably framed in terms of the likely crime consequences of integration.104 Indeed, the real-estate value of whiteness turned

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100 See, for example, Beckett, Making Crime Pay at 28–43 (cited in note 12); Weaver, 21 Stud Am Pol Dev at 240–50 (cited in note 12).
101 See Clay Risen, The Myth of “the Southern Strategy”, NY Times Mag 60 (Dec 10 2006); Lou Cannon, Governor Reagan: His Rise to Power 477–78 (Public Affairs 2003). I am not claiming that Reagan did not appeal to southern whites on race themes; on the contrary, my point is that he did not need to do so through tough-on-crime rhetoric in the way a more cautious Nixon had done, partially because he could do so expressly on the ground of affirmative action, and partially because crime fighting was becoming a cross-racial feel-good issue.
102 See Bruce Western and Becky Petit, Beyond Crime and Punishment: Prisons and Inequality, 1 Contexts 37 (2002).
104 See Sugrue, The Origins of the Urban Crises (cited in note 29); Wesley Skogan,
all homeowners into racists because they invariably had a capital stake in the increasing whiteness of their neighborhood.

Rather than thinking of the politics of racial separation and the politics of crime as separate categories, we ought to see them as integral to each other within a subjective rationality conditioned by homeownership. Indeed, to this coupling of race and crime one should add a third, property taxes, which have perhaps exceeded the other two in being a source of political mobilization in the 1970s and since. All three come together as threats to the middle-class homeowner since each poses, independent of the homeowner’s employment or earning power, a threat to the major economic asset of middle class homeowners, that is, the economic value of their home. If we look at the anti-busing and other anti-integration measures, the anti-tax measures like California’s famous Proposition 13, and the many anti-crime measures enacted into law since the 1970s, we can see a coherent socio-legal project of protecting the middle-class homeowner from those factors most likely to erode the value of their home in ways uncoupled from the overall economy.

III. CRIME AND INSECURITY AFTER THE HOUSING BUBBLE

To many contemporary observers, the fiscal crises produced in many states by the Great Recession of 2008–2010 has created the best opportunity in years for states to restructure policies that have fed mass incarceration.\textsuperscript{105} While I tend to agree, the analysis offered in this Article suggests that the real promise of the present economic crisis lies beyond any fiscal pressure it may create for short-term reduction in spending on prisons. Instead, the real promise lies in the potential of the crisis to mark a turning point away from policies that have made home ownership so integral to personal security and mass homeownership integral to our economic security.

The residential housing pattern that was still accelerating at the time of the crash was based on marketing security as well as shelter (largely through physical separation). This housing pattern promoted a distinctive kind of risk mentality that has

placed stranger danger at the center of our public policies. While
the story I have outlined in this Article remains highly contextu-
al and historical, it may be helpful to identify three distinct dy-
namics that appear to have been at play here. First, while we
are inclined to think of crime risk primarily in terms of the po-
tential for actual criminal harm to occur, homeowners experience
an additional or secondary risk, that of the potentially cata-
strophic loss to property values that is caused by the occurrence
of violent crime (or sex offenses regardless of how violent they
are). This leads to the hypothesis that, at least compared to simi-
larly situated renters, homeowners will be more attentive to sig-
als about crime risk coming from the media regardless of their
own primary risk perception of the neighborhood.

Second, as a result of the first dynamic, the market for
homes will tend to prioritize security from crime risk at its very
core, in both location (thus the preference for “virgin” subdivi-
sions at the outskirts of metropolitan areas) and design (thus the
preference for separation from public spaces of all sorts). The
gated community is the ultimate expression of these logics but it
can be found in more subtle forms in every part of most metro-
politan areas. This creates a second dynamic. As the home as
asset becomes more defined by its security virtues, the threat of
crime becomes more pervasive, moving downward in scale to-
ward minor crimes, delinquencies, or even just the possibility of
exposure to people suspected of participating in any of the above
(such as urban teenagers). Those who invest in the most securit-
ized exurban homes are likely to be even more vigilant in the
well-known logic of NIMBY (“not in my backyard”) and apply it
not simply to drug treatment centers or jails but to bike paths
and bus stops. This leads to two hypotheses: that over time
homes should become more visibly security oriented and citizens
should become more sensitive to crime risk.

Third, independent of the first two dynamics, the residential
real estate market in parts of the country became superheated
beginning in the mid-1980s, and with even greater generality
and intensity after the recession of the early 1990s. In this peri-
od, perhaps as a result of government policies expressed through
low interest rates and the avowed policies of both Democratic
and Republican administrations to move more Americans of
modest means toward homeownership, home values grew rapidly

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106 This will facilitate testing the argument made here which is so contextual that it
cannot be replicated (even analogically) without some abstraction.
over a sustained period of time, giving some long-time residents in these areas extraordinary windfalls when they sold, and enticing many buyers into the market in the hopes of being able to extract enough value in a short time to purchase another home at better terms.

While these features of what we may now think of as “bubble behavior” are economic, they also may have political consequences. Specifically, homeowners inside the bubble, who experience the reality or possibility of enormous expansion of their asset value may come to see not just their long-term savings, but their ongoing social and economic security as rooted in the home itself and not in the economic relations that presumably qualified them for the home loan in the first place. This leads to the fourth hypothesis, the sensitivity of residents to crime (and support for the policies of mass incarceration that are determined by home-based crime fear as described above) should reach its strongest where bubble conditions persist over periods of time long enough to significantly reset political preferences. This very much describes America in 1994–2007 when mass incarceration deepened at a time of sharp drops in crime across the country. Does it describe the future?

Coming as it does at a time of growing media attention to and public fears of climate change, as well as related insecurity about the energy supply, the current economic crisis is causing some to question the sustainability of our current security-oriented housing pattern. Not only are many of these issues potentially far bigger than crime but what we might call (follow-

107 We are, of course, now acutely aware how weak some of those economic relations behind the loans were.

108 How long is long enough? The housing bubble may have been a relatively short-term phenomenon in many place, but in states like Florida, Arizona, and California, the real estate market had been producing dramatic climbs for decades. While a brief escalation of housing prices is unlikely to remake the political preferences of homeowners, a sustained periods of price inflation over twenty years or more is surely long enough.


110 The depth of our insecurities related to energy were tragically exposed this spring by the catastrophic leak of oil into the Gulf of Mexico from BP’s deep ocean drilling platform. The catastrophe is one of the greatest environmental disasters in US history and seems likely to prompt major changes in both energy policy and national priorities. See Peter Baker, Obama Seeks to Shift Arc of Oil Crisis, NY Times A1 (June 16, 2010).

ing Joseph Gusfield) this new culture of public problems has already had powerful, potentially narrative-changing events (like the Kitty Genovese or the Tate-Labianca murders) with massive media coverage—for example, the flooding of New Orleans after Hurricane Katrina in 2005. The enduring power of crime in our imagination of threat was reflected in the fact that lurid stories of violent crime, mostly untrue, came to dominate the media coverage of the events and some of the policy lessons. But the tabloid-like stories of babies being raped and murdered bodies piling up could not altogether hide from America the shocking lack of preparedness by governments at all levels to protect the lives or property of US residents. The media focus on crime reminds us how easy it remains (and will remain) to stampede Americans around crime fear, but it did not succeed in wiping out the uncanny sense left by Katrina.

If the current economic crisis—which is, after all, focused on the housing market and causing prolonged contraction in the lending necessary to make home purchases viable for middle class families—turns out to be a significant conjuncture in the American style of housing and asset accumulation, we may mark this moment as the end of the era of mass imprisonment. Looking back historically from that future vantage point, we can see two quite distinct governmental logics through which twentieth-century Americans were offered social and economic security, both with roots in the New Deal. From the early 1900s on, employment and social entitlements linked to employment (Social Security and later Medicare) formed an anchor of security for Americans, one which broadened and deepened during the New Deal.

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112 See Joseph Gusfield, *The Culture of Public Problems: Drinking-Driving and the Symbolic Order* (Chicago 1984) (arguing that the ascension of a particular social problem, like driving under the influence of alcohol, is a way of moralizing certain features of the social order rather than an inevitable reflection of risks).


114 Id.

their place as subordinate to employment security and the government’s paramount responsibility for managing the economy.

During the 1960s and 1970s, political returns on this employment-based security began to wane (as global economic competition put an end to ever-rising wages) and while employment remained central, gradually more Americans began to place more of their sense of security in their ownership of a piece of private property, their home, which provided at least the certainty of comfort in old age and the possibility of leaving a legacy to one’s children. This homeowner citizenship was also based in the New Deal, which thought of it as an adjunct to the working life. After 1980, however, these homeowner citizens came to view government more in terms of what it could do to protect those property values and how it might threaten them. In the 1980s and 1990s, in some parts of the country, this escalated to the point where for some citizens the home may have replaced the job as the primary source of security (even as it continued to supplement the income provided by work). The extraordinary sense of value and vulnerability associated with the home made fear of homicide and a politics of mass imprisonment a logical if not inevitable focus for government.

What is next? We can only speculate. If we think about the gated community house located at the exurban edge of the metropolitan area as the idealized housing unit for a society where housing is deeply infused with concerns for security against violence from dangerous strangers, we can ask what the idealized housing unit is for a society more focused on risks created by infrastructure failure and economic instability. The new American metropolitan ideal designed to respond to "infrastructure risks" rather than "stranger danger" will look more like the urban America that predominated before the housing booms of 1950–70 and 1985–2005: inner-ring suburb and central city rather than exurban; denser, with more mixed-use neighborhoods with apartments, workshops, offices, schools, shops, and public transportation.

There are two things to notice about the potential for this trend. First, to the extent that it takes off, the current security

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117 Some observers in the early 1980s expected environmentalism and demands to eliminate pollution from the American landscape to become the dominant political formation. See Mary Douglas and Aaron Wildavsky, Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers (Cal 1982). Pollution concerns also have a resonance to homeowners and the desire for clean air and water (if not chemical-free homes) has been an influential value.
housing stock will become significantly devalued because it will lack all of the traits made desirable by the new housing ideal. Much of the panoply of public and private investments that have gone along with security housing—including mass incarceration; underinvestment in public police; death penalties aimed at keeping violent felons, both capital and non-capital, locked up forever; and even private guns—will also suffer a substantial devaluation.

Consider that the central city renter, living in a rental unit near his or her school, job, parks, and health services, will find little reassurance in a system premised on cycling offenders back and forth between prisons and those very same central cities, or on keeping a select group of violent felons locked up through their old age (providing theoretical deterrence and layers of incapacitation protection to gated communities with their home alarm systems), as against preventive policing measures targeted at the common corridors linking the destinations of people. In dense city neighborhoods with homes and businesses nearby, race is much less likely to be an overarching code for crime risk. Urban dwellers have also proven far less enamored of private weaponry as a key to personal security.\footnote{People in cities with large police forces are more likely to support gun control. See Gary Kleck, Crime, Culture Conflict and the Sources of Support for Gun Control: A Multi-level Application of the General Social Survey, 39 Am Behav Scientist 387, 398 (1996).}

If this scenario were to play out, one could imagine a long-term shift in public-safety values, away from stranger danger and mass imprisonment (along with the other features), and toward infrastructure danger and demands for a new generation of metropolitan infrastructures, from water and power to public transit. The costs of the latter would probably quickly exceed what we now spend on mass imprisonment, but in any event would require us to rapidly dismantle much of that system and redirect future investment toward infrastructure (along with higher taxes for the middle classes in the form of reduced mortgage-interest-based deductions).\footnote{I am speaking hypothetically and aspirationally enough that I will not try to lay out the actual budget consequences, but there are plenty of current efforts. See Susan Tucker and Eric Cadora, Justice Reinvestment (Ideas for an Open Society Nov 2003), online at http://www.soros.org/resources/articles_publications/publications/ideas_20040106 (visited Sept 15, 2010).}

But there is a second thing to notice about the scenario I have imagined away from our heavy reliance on security through homeownership and homeownership focused on security: it remains extremely sensitive to crime itself. The dense multiuse
urban neighborhoods I am projecting are precisely what seemed to become unsustainable during the crime wave of the 1960s; Americans still associate cities with crime risk. The success of many major cities in luring back some middle-class population during the 1990s was partially a testament to the crime decline and remains vulnerable to a reversal of it. Moreover, even if strong enough economic incentives pull middle-class people back into rental housing in urban neighborhoods despite crime fears, the middle class may come back with housing and schooling demands fashioned to recreate the exclusionary logics of suburbanization.¹²⁰

As we move beyond the era of housing, homicide, and mass imprisonment we are not altogether helpless to influence the course of change. For those of us who prefer a move away from the late-twentieth-century model of mass home ownership and mass incarceration, the challenge is to define those interim policies that help address the major insecurities around crime that remain a feature of many central cities (although others have made remarkable progress). First, government must take the new renting middle class seriously as interlocutors in whatever new security strategies are attempted. These citizens may be far less locked into a crime-victim vision of themselves than the past generation,¹²¹ but they are not going to tolerate indifference to preventable violence that strikes families and homes (whether rented or owned). These families are likely to be very sensitive to violent crime, but also more pragmatic about solutions (this is what the public arguments about resource trade-offs between law enforcement and capital punishment are aimed at).

The fact that these families are not homeowners will insulate them from some of the NIMBY concerns that have discouraged creation of resources in the community, like drug treatment centers or mental health facilities, that would actually improve public safety even as they might reduce home prices. Moreover, once located in cities, perhaps as renters, this new middle class will be more likely to support crime-control policies based on policing, reentry, and harm reduction over mass-incarceration policies built to favor the exurbs.

¹²⁰ Once again I do not plan here to offer support for what remains an extended hypothetical but one can see versions of this in gentrification patterns of the 1990s like high-security apartment buildings and charter schools designed to exclude the children of the most disorganized poor. See Andrea McArdle and Tanya Erzen, Zero Tolerance: Quality of Life and the New Police Brutality in New York City (NYU 2001).

¹²¹ Garland, The Culture of Control at 11 (cited in 3); Simon, Governing through Crime at 77 (cited in note 5).
But they will not favor doing nothing to address patterns of preventable violence and widespread public disorder. Recent experience, especially in New York, suggests that cities and suburban communities (because it is primarily the exurbs that will shrink) can address many of these concerns through local agencies.\footnote{122 See Zimring, The Great American Crime Decline (cited in note 2).} The most obvious and by now well-tested approach is to build up the size and engagement of police departments, which as we have seen, have been the big losers in the building up of mass imprisonment. It also includes the whole panoply of county-level services ranging from probation and juvenile justice to mental health. These may not be the public policy directions favored by those who are currently leading the anti-mass incarceration movement, but they may be essential to underwriting that objective.