Crime, Community, and Criminal Justice

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American communities have been transformed since the 1970s by two trends. The first is the growing influence of the fear of crime over basic life decisions. The second is the dramatic reduction in the informal social control produced by traditional families, ethnically and religiously defined neighborhoods, and the retraction of the industrial manufacturing economy with its demanding disciplinary socialization (reinforced by unions and other collateral social organizations). These problems have been so evident in poor communities that they have even produced a new term for poverty—"the underclass." These trends feed on each other. Declining levels of informal social control increase fear of crime (and crime itself). The public's increasing fear of crime drives demands for higher levels of order and harsher measures to accomplish them, but such measures become less effective as their anchors in informal social control decline. This cycle has become so evident in poor communities that social scientists started using the term "underclass" to describe the new logic of poverty in America. Yet in kinder and gentler ways these trends have also reshaped the agenda of the middle and upper classes. The informal social control once provided by the two-parent, one-provider family in the suburbs has given way to two-worker families who must allocate most of the extra income to purchasing security in the form of gated communities, supervised child care, and
battle-ready SUVs.\textsuperscript{4}

This increasing demand for security and declining informal sources of social control have resulted in an unprecedented expansion of the criminal-justice system. Today, for every 100,000 adults free in the community, nearly 500 adults are in prison, well over four times the average rate for the twentieth century.\textsuperscript{5} Nearly three percent of the entire adult population, and more than a third of all young African American males, are in some form of correctional custody on any average day in the 1990s.\textsuperscript{6}

Incarceration and securitization are both responses to the priority that crime risks now have for all of those who govern units of our society, including parents over their families, managers over their businesses, and elected officials over the state. It is in this sense that I have tried to use the phrase “governing through crime” to describe the peculiar influence of crime over American policy and institutions today.\textsuperscript{7} We can speak of governing through crime wherever crime becomes the chief occasion and rationale of governing several quite different axes of governance. The 3% of the American public under the custody of the criminal-justice system is quite obviously governed through crime. Their criminal conviction makes them subject to detailed scrutiny and control by the state. An even larger population is exposed to official law-enforcement activities by virtue of living with a family member who is under the custody of the criminal-justice system. Indeed, the enormous expansion of incarceration has made the criminal code an increasingly privileged grammar for describing American social ills and elevating police and prosecutors to increasingly influential positions. For certain communities, particularly minority communities in poverty, they may be the most important government officials with power over the lives of residents.

If we truly consider all the ways that the problem of crime operates as the occasion and rationale for governance, we must include the millions of others who live in environments and routines shaped by fear of crime. This involves more than simply the widening of nets in our efforts to control criminal behavior. Indeed, by far the larger portion of people actively governed by crime are not criminal-law violators but persons affirmatively

\textsuperscript{4} This pattern of reshaping the built environment and the routines of life has been described by a number of authors. Mike Davis, Ecology of Fear: Los Angeles and the Imagination of Disaster 387-391 (1998); David Garland, The Culture of Control 158-265 (2001). I offer an account of this as a “habitus of fear” in Jonathan Simon, Guns, Crime, and Governance, 39 Hous. L. Rev. 133, 138-42 (2002) [hereinafter Simon, Guns, Crime, and Governance].


\textsuperscript{6} Id.

\textsuperscript{7} I am using governance here in a distinct sense to mean not the state as such but the whole range of power relations that have as their focus the conduct of others. See Michel Foucault, Governmentality, in Michel Foucault: Power 201, 210 (James D. Faubion ed., 2000).
seeking to protect themselves and their families from crime. At yet a third level we govern through crime when crime becomes a metaphor or analogy through which we apply the same technologies and mentalities established to govern crime onto very different issues, like child welfare and education, family integrity, worker security and satisfaction, and over consumption. This means that activists seeking to change conditions in any and all of these settings have real incentives to model their complaints as concerns about crime, construct themselves as victims of the willful wrongdoing of others, and invoke a prosecutorial-like response from government.

Community as a new value orientation for criminal justice, the theme of this Colloquium of the California Law Review, is the flip side of the influence crime and criminal justice now has over community life and how the role of community is problematized today. In order to see the value of this still-nascent movement it is crucial to appreciate the cost that an already well-developed practice of governing through crime is exacting on those communities. The growth of incarceration and of “target hardened” residential communities has exacerbated racial tensions and rolled back many of the gains of the civil-rights revolution. In poor and minority communities that experience the highest rates of incarceration, the removal of large numbers of adult males from the community threatens the formation of families and the reproduction of informal social order, and it may actually impede the ability of those communities to informally control crime. The securitization of American cities and suburbs has contributed to a number of social problems including sprawl, traffic congestion, desertion of public spaces and institutions, and a national epidemic in childhood obesity exacerbated by the virtual imprisonment of both poor and privileged children in the name of keeping them safer.


9. A generation ago community was being invoked in terms of civil rights and the war on poverty. Today community is invoked most commonly to discuss community notification of sex offenders, community policing, or community service as an alternative sanction.

10. For example, felony disenfranchisement laws have barred 13 percent of African American male citizens from voting. See Beckett & Sasson, supra note 5, at 192; Marc Mauer & Jamie Fellner, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States 1 (1998).


12. For a general account of the built environment influenced by the imperative of security from crime, see Joel Garreau, Edge City: Life on the New Frontier 105-06 (1991). See also Davis, supra note 4; Simon, Guns, Crime, and Governance, supra note 4.
These developments are welcomed by few and intended by no one. But unless it can be reversed, governing through crime seems likely to make American communities less able to achieve political will formation and representation and less able to accomplish the local sharing of knowledge and judgment that helps define communities. That leaves more and more of the task of producing and reproducing social order, once the province of community, to official state action and particularly criminal-law enforcement.

One reason that governing through crime is so detrimental to American social order is rooted in the particular ways we know and act on crime today. For much of the twentieth century crime was perceived as a symptom of social pathologies that required community reform. Today the dominant view characterizes crime as an expression of willful aggression or evil. The dominant theory of how to respond to crime has returned to nineteenth-century notions of simple deterrence and elimination through exclusion or execution. Likewise, the related concept of individualized justice embodied in expert judges, and supported by a panoply of normalizing professionals (psychologists, social workers, probation officers, and so on), has been rejected in favor of mandatory sentences and zero-tolerance policies.

Ironically, at the very time when crime is having unprecedented influence over how we govern American institutions, our theories and strategies of crime control reflect a shallow faith in technology coupled with a deep pessimism about our capacity to produce positive change in recalcitrant individuals. After more than two centuries in which the power to punish, and the prison particularly, has been a primary laboratory for progressive governmental techniques, it has come to stand for a dead end, a high-security warehouse with little aspiration other than secure custody and waste management.

the therapeutic community. Today, however, when investment in prisons is at an all-time high, the dominant image of the prison is as a site of secure confinement where those whose dangerousness is unalterable can be securely held for many years. Juveniles, once thought to be the most amenable to treatment and normalization are today tried in adult court for serious crimes. In a number of well-publicized crimes, thirteen- and fourteen-year-old offenders have drawn multiple life sentences because of the magnitude of the harm they caused. In some states and under some circumstances, they are treated as presumptively more dangerous than older offenders.

Crime offers a harsh and inflexible model of governance at a moment when other trends from globalization to lifestyle diversity and the rise of information economies, require a higher capacity to consider the context of individual action. Like cancer, crime is often a pathology so feared that harsh measures are necessary regardless of whether those measures are realistically likely to benefit the patient or how severe the collateral effects on the body. Once crime is defined as the central problem for communities, the defensive measures taken almost always drive up the cost of performing other kinds of conflict resolution. Once conflicting parties are defined as offender and victim, institutions are pushed into roles of judge, prosecutor, or police officer that rarely reflect their expertise and often exclude functional mechanisms of integration and order maintenance.

Perhaps the new scholarship on community and criminal justice, which the essays in this Colloquium represent a major contribution to, can begin a much-needed counter-discourse that will reinfuse community legal landscapes with a fuller set of social values than crime control, including equality, economic revitalization, and social solidarity. By its very position between individual actors and society as a whole, community complicates our dominant crime narratives. As Tracey Meares reminds us in her contribution to this volume, the space of community has long been a space for reimagining how law enforcement, community leaders, and others might act on and know crime in ways different than the traditional punitive criminal law. Shifting the practice of criminal-justice institutions and policies in ways that address community opportunities for crime control will require convincing new narratives for crime-control institutions.


18. Meares, supra note 1, at 1601-04.
themselves. Three of the Essays here provide quite different directions for theorizing a community logic of criminal justice.

In his contribution to this volume, Dan Kahan sets out to establish a theory of community policing that can compete with the dominant model of deterrence that has sustained traditional (and modern) surveillance-oriented policing aimed at simply raising the likelihood of catching and convicting criminals. Crime is largely determined by solving collective-action problems embedded in the nature of all communities. On Kahan’s account, community policing is best seen as a device for facilitating circuits of reciprocity that permit these problems to resolved without crime and often without harsh crime control.

Anthony Alfieri and Kathryn Abrams each offer interpretations of community criminal justice practices that draw on contemporary critical theories of race and gender. For Alfieri, community prosecution offers a redemptive possibility that goes to the heart of one of the most disturbing features of governing through crime: the increasing racialization of crime. Traditional models of the prosecution function have provided little reason for prosecutors to consider the role of law in constructing racial meanings. Prosecution committed to controlling crime through enhancing community capacity for order definition and maintenance inevitably confronts the way race-making practices operate to facilitate and even mandate violence.

Kathryn Abrams joins an argument about the purposes behind one of the most popular forms in which an idea of community is infusing criminal justice, that is, hate crimes. Earlier work by Kahan argued that punishments for hate crimes operate to turn around the social-meaning making of the criminals by imposing on them marks of degradation and producing disgust against them much as they sought to do to the victims. Abrams argues that fighting discrimination through using the emotional power of disgust to reassign meanings is ultimately risky to the creation of durable diverse communities. Turning to the strategies of victims of hate crimes,

19. Narratives or stories of crime control are more than just devices of deception designed to cover up repression. Narratives in crime control institutions play an important role in providing agents a broad set of clues about how to manage the institutions in ways that serve the public’s need for security and confidence. See Charles Bright, The Powers that Punish: Prison and Politics in the Era of the "Big House", 1920-1955, at 2 (1996), Simon, Poor Discipline, supra note 2, at 9.
she finds that groups that have organized for hate-crime legislation after long experience as victims reject the transfer-of-disgust model in favor of affirmative cultural programs aimed at confronting the ignorance that shelters enduring prejudices.

For more than forty years now the federal government has played a major role in promoting crime as a primary concern for state and local governments. The reach and severity of federal crime-control measures reflect in part the distance between federal lawmakers and any actual communities. State legislatures, in contrast, are generally less punitive precisely because they are closer to the costs and collateral damages of crime control on the community. Susan Klein explores the potential for federalism arguments to create more space for the kinds of less-punitive resolutions with which states are increasingly experimenting. Exploring arguments more frequently plumbed by conservatives, Klein suggests that the Tenth Amendment may limit the Commerce Clause even in areas clearly part of commerce where state law protects a minority value preference by recognizing an “independent-norm federalism” that would immunize certain behaviors legalized by state law from federal criminal law enforcement. While “agnostic” about whether such independent norms are desirable, Klein’s work offers arguments for those who would seek to limit federal criminalization precisely to protect certain kinds of communities.

There is certainly some risks on the road to community justice. In the short term it commits us to an ever-closer association with crime and its metaphors in seeking to solve other kinds of community problems. We may detect here subtle tones of surrender to the popular concern with crime. Economic decline, alienation, inequality can all get back into the discussion, but only by associating with the crime problem and its solution. In the long term, however, these Essays also point to the potential to enrich the current logic of governing through crime by moving it away from the very narrow spectrum of ways of knowing and acting on crime enshrined in our current policies and practices. By searching for new logics of crime control to replace, or at least supplement, the now dominant logics of deterrence, incapacitation, and retribution, the new research on community justice opens up the range of what can count as crime-control strategies and begins to reverse the deflation of options for addressing

destructive conduct that accompanies the war on crime. By identifying diverse sites of moral judgment and norm definition, including states, social movements, and churches, this scholarship challenges the tendency of traditional criminal law to constitute thin but totalizing claims of community protected by law. Finally, by asking how community members can participate in the construction of their own security, this scholarship counters the tendency of state criminal-justice agencies to exercise top-down power over passive subjects dependent on the state for managing risks.