THE CONSTITUTION OF COMMUNITY IN LEGAL SITES: A STUDY OF LAW, CRIME AND ITS CONTROL

by

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Abstract

This dissertation focuses on the concept of community in legal sites relating to crime and its control. It draws on three case studies: community notification of sex offenders, community policing strategies designed to address gang loitering in Chicago, and the proliferation of gated communities.

While other work emphasizes the dominance of advanced liberal governance or the rise of a preventive state, these case studies draw out diverse translations of the concept of community in law, as it is deployed for achieving governmental ends relating to crime prevention. In so doing, this dissertation treats the documents produced within legal sites as empirical representations in the history of legal ideas, and as evidence of how social issues are imported, defined, translated, and negotiated within the legal field. The case studies demonstrate that the invocation of community in these sites operates in conjunction with other operative concepts, such as risk, harm, or the material form that community may be taking. This provides insights that are missed in more general accounts, including the interplay between community and risk management, the inflections of law and community implicated in the constitution of community harm, and the spatial vision of community motivating the adjudication of boundaries between gated communities and non-residents.

This dissertation finds that governing through community is not as stable as theories of advanced liberalism suggest. Instead, invocations of "community" draw on and inform other visions alongside (or instead of) dominant political rationalities. This includes the "people's welfare" of police science, divergent visions of the "social," and an array of expert, lay, and administrative knowledges that are authorized by law in constituting risk and its management. These hybridities, in turn, have practical effects for the legal programmes and rationalities developed in creating, implementing, and adjudicating crime prevention efforts.

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Chapter One

Governing Crime, Governing Community: The Constitution of Community in Legal Sites

> Law consecrates the established order by consecrating the vision of that order which is held by the State. It grants to its actors a secure identity, a status, and above all a body of powers (or competences) that are socially recognized and therefore productive ... Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular ... A "correct" representation ratifies and sanctifies the doxic view of the divisions of the social world by representing this view with the perceived objectivity of orthodoxy. Such an act is a veritable act of creation which, by proclaiming orthodoxy in the name of and to everyone, confers upon it the practical universality of that which is *official* (Bourdieu, 1987).[1]

I. Introduction

The concept of community has taken hold in criminology. "Community" appears to be everywhere in criminal justice policy-making, from community policing to community courts, community corrections to community mediation, and community diversion programs to community notification. Community is similarly enjoying a resurgence in academic criminology, with some assessing the viability of community-based approaches and others pursuing research on neighbourhood social organization and their institutional capacity to establish and maintain social order.[2] And community is enjoying increased attention as a private response to fear of crime: gated communities, community block watches, and local community associations are all invoked as non-state solutions to dealing with crime and insecurity. In spite of a slowly emerging debate over just what community means in criminological work,[3] when

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[1]P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", trans. R. Terdiman (1987) 38 Hastings Law Journal 805 at 838-839.

[2]See R.J. Sampson, "The Community" in J.Q. Wilson & J. Petersilia, eds., *Crime* (San Francisco: Institute for Contemporary Studies, 1995) 193; R.J. Bursik & H.G. Grasmick, *Neighborhoods and Crime: The Dimensions of Effective Community Control* (New York: Lexington Books, 1993) [hereinafter *Neighborhoods and Crime*]; R.J. Sampson, "What "Community" Supplies" in R.F. Ferguson & W.T. Dickens, eds., *Urban Problems and Community Development* (Washington, DC: Brookings Institution Press, 1999) 241 [hereinafter "What "Community" Supplies"].

[3]See eg. A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (New York: Oxford University Press, 1999) [hereinafter *Local Governance of Crime*]; M. Dear, "Los Angeles and the Chicago School: Invitation to a Debate" (2002) 1 City & Community 5 [hereinafter "Los Angeles and the Chicago School"].

responding to crime "[c]ommunity seems to be the modern elixir,"[4] an "all-purpose solution,"[5] and "the policy buzzword of the 1990s."[6]

These initiatives, of course, are occurring within a general sense that *something* must be done to control crime. Although fear of crime often bears little relation to the actual risk of criminal victimization,[7] public concerns have spawned a re-invigoration of criminal justice policy initiatives, allowing crime to dominate election-year politics and turning crime control into a marker of political efficacy more generally.[8] Jonathan Simon persuasively argues that this dominance of crime on electoral agendas reflects a more general phenomenon of "governing through crime," with crime "casting a disproportionate shadow over what we primarily identify with governance, i.e., politicians and the electoral process of democracy."[9] If this is the case, then the resurgence of "community" within criminal justice may itself be instantiating broader political logics and trends.

That fear of crime needs to be tackled by "community" rather than "individualistic" strategies has become an increasingly prevalent focus of academic researchers and policy-makers alike – despite, or perhaps in light of, the commodification of security products (eg. alarms, guard dogs, pepper sprays, and armed response private security) and the proliferation of behavioural techniques for ensuring one's personal safety (eg. where not to walk, or who to walk with). Fear of crime has been compared with the economic depression of the 1930s, requiring Americans

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[4]"What "Community" Supplies" at 241.

[5]D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) at 123 [hereinafter *Culture of Control*].

[6]*Local Governance of Crime*, *supra* note 3 at 148.

[7]C. Hale, "Fear of Crime: A Review of the Literature" (1996) 4 International Review of Victimology 79; K.F. Ferraro, *Fear of Crime: Interpreting Victimization Risk* (Albany: State University of New York Press, 1995).

[8]See M. Tonry, "Introduction: Crime and Punishment in America" in M. Tonry, ed., *The Handbook of Crime and Punishment* (New York: Oxford University Press, 1998) 3. This reflects what US political observers refer to as the "Willie Horton" effect of the Bush/Dukakis presidential campaigns. See J. Simon, "From a Tight Place: Crime, Punishment, and American Liberalism" (1999) 17 Yale Law & Policy Review 853 at 855-856.

[9]J. Simon, "Governing Through Crime" in L.M. Friedman & G. Fisher, eds., *The Crime Conundrum: Essays on Criminal Justice* (Boulder, CO: Westview, 1997) 171 at 174.

to develop a sense of "common purpose" and "common challenge,"[10] and the Director of the National Institute of Justice has recently invoked the "powerful alignment" of communities and criminal justice.[11] In a remarkable inversion of 1960s radicalism, Saul Alinsky's community-oriented ideals are here presented as commensurate with the needs of the 'system':

> "It is impossible to overemphasize the enormous importance of people's doing things themselves." Saul Alinksy made that observation more than 50 years ago in writing about community organizing, and his words still ring true ... The criminal justice system has begun to recognize this power and to discover the potential for working with these communities. The philosophy of community policing, which envisions the community as a partner in problem solving, has led the way in reinventing this core governmental function. Other criminal justice agencies are following this lead ....[12]

In response to this trend, criminologists, particularly those working in a more European tradition, have begun to investigate the visions of community that are constructed through recent efforts. This is particularly evident in Adam Crawford's comprehensive study of *The Local Governance of Crime: Appeals to Community and Partnerships*.[13] Crawford provides a rich account of ways in which community is referred to in criminal justice policy initiatives, such as community as a "set of attitudes"; as a "place"; as a "defence against outsiders"; as "homogenous"; as the silencing of private dangers; as shorthand for a "moral order"; as a "resource" for fighting crime; as an opportunity for mediation; and as "obligations to others."[14] Legal academics have gone on to advocate new policing strategies in the name of community, such as bans on gang loitering, juvenile curfews, increased deference to police rulemaking, and

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[10]H.E. Figgie, *The Figgie Report on Fear of Crime: America Afraid, Part 1: The General Public* (Willoughby, Ohio: A-T-O, 1980) at 6.

[11]National Institute of Justice, *Communities: Mobilizing Against Crime: Making Partnerships Work* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 1996) at 2 [hereinafter *Communities: Mobilizing Against Crime*].

[12]*Communities: Mobilizing Against Crime, supra* note 11 at 2.

[13]*Local Governance of Crime, supra* note 3 at 148.

[14]*Ibid.* at 154-201.

order maintenance strategies more generally.[15] David Cole has since referred to this work as "the new criminal justice scholarship,"[16] and a split has emerged[17] between those who interpret conventional emphases on individual rights as "antiquated,"[18] and those who instead perceive justifications in the name of "community" as signalling a move away from fundamental gains made in restricting police powers over the past three decades.[19]

This dissertation focusses on the concept of community in recent initiatives to prevent crime, though from a unique perspective in this area. Although some attention has been paid to the discourses of community within criminal justice more generally, there has been little research on the ways in which "community" is deployed in legal sites,[20] and this is particularly the case when dealing with legal responses to crime and its control. As a result, we have little evidence of the ways in which competing visions of "community" are themselves part of the struggle in legal forums, sites which are beyond the 'everyday,' but nevertheless involved in the contestation and constitution of community. This lack of research likely stems from the fact that

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[15]See T.L. Meares, "Social Organization and Drug Law Enforcement" (1998) 35 American Criminal Law Review 191; D.M. Kahan & T.L. Meares, "The Coming Crisis of Criminal Procedure" (1998) 86 Georgetown Law Journal 1153; T.L. Meares & D.M. Kahan, "The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales" (1998) University of Chicago Legal Forum 197 [hereinafter "Wages of Antiquated Procedural Thinking"]; T.L. Meares & D.M. Kahan, "Black, White and Gray: A Reply to Alschuler and Schulhofer" (1998) University of Chicago Legal Forum 245; T.L. Meares & D.M. Kahan, "Law and (Norms of) Order in the Inner City" (1998) 32 Law & Society Review 805; D.M. Kahan, "What Do Alternative Sanctions Mean?" (1996) 63 University of Chicago Law Review 591; D.M. Kahan, "Social Influence, Social Meaning, and Deterrence" (1997) 83 Virginia Law Review 349; D. Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97 Columbia Law Review 551 [hereinafter "Police Discretion and the Quality of Life"].

[16]D. Cole, "Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship" (1999) 87 Georgetown Law Journal 1059.

[17]See generally, D.M. Kahan & T.L. Meares, eds., *Urgent Times: Policing and Rights in Inner-City Communities* (Boston: Beacon, 1999).

[18]"Wages of Antiquated Procedural Thinking", *supra* note 15.

[19]A.W. Alschuler & S.J. Schulhofer, "Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan" (1998) University of Chicago Legal Forum 215. See also A. Ashworth, "Crime, Community and Creeping Consequentialism" (1996) Criminal Law Review 220 at 224-226.

[20]Notable exceptions are R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (New York: Oxford University Press, 1995) [hereinafter *Law's Community*]; R. Cotterrell, "A Legal Concept of Community" (1997) 12 Canadian Journal of Law & Society 75 [hereinafter "A Legal Concept of Community"]; N. Lacey, "Community in Legal Theory: Idea, Ideal, or Ideology?" (1996) 15 Studies in Law, Politics and Society 105 [hereinafter "Community in Legal Theory"]; C.J. Greenhouse, B. Yngvesson & D.M. Engel, *Law and Community in Three American Towns* (Ithaca, NY: Cornell University Press, 1994) [hereinafter *Three American Towns*].

the legal questions being argued over in these sites are not – within legal analyses at least – conceived of as turning on the normative content attached to "community" or on the visions of community that are instantiated in legal decisions.[21]

Drawing on Roger Cotterrell's research in which he provides evidence for different images of "community" in legal sites,[22] this dissertation focuses on the different ways in which "community" is constituted, conceptualized and invoked in the legal regulation of three community crime prevention efforts, and how these visions of community shape the adjudication and normative contestation that take place in these domains. In so doing, I draw on case studies dealing with three "community"-based strategies: community notification of sex offenders, community policing strategies designed to tackle disorder, and the proliferation of gated communities designed to wall off outsiders. Yet, while Cotterrell relies on images of community to generate claims about different legal cultures in America and Britain – what he calls "imperium" and "community"[23] – I instead focus on the ways in which legal deployments of the community have served to structure the decision-making of legal authorities, and the mechanisms through which "community" becomes a contested site within which claims about crime and its control, as well as claims about community itself, are made. A similar interest in the intersection between legal sites and emerging social practices motivates some of Jonathan Simon's work:

> Law plays a central role in our political culture as the place wherein the rationality of social practices can be discussed ... Value conflicts are entailed in the production of social policy whether it concerns the placement of a highway or a mechanism for conscription. These choices are challenged, tested, and legitimized in the discourse produced by courts and lawyers.[24]

While I resist Simon's suggestion that "law" is produced solely by legal officials, such as

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[21]I thereby rely on these legal texts for something other than the legal categories they formally engage. In developing this approach, I draw on N. Rose & M. Valverde, "Governed by Law?" (1998) 7 Social & Legal Studies 541 [hereinafter "Governed by Law?"].

[22]*Law's Community*, *supra* note 20 at 221-248.

[23]*Ibid.* at 320-325.

[24]J. Simon, "The Ideological Effects of Actuarial Practices" (1988) 22 Law & Society Review 771 at 776 [hereinafter "Ideological Effects of Actuarial Practices"].

courts and lawyers – I demonstrate in this dissertation that a range of actors are involved in this process, both within and outside the state – his emphasis on law as a privileged site is what I invoke here. Later in this introductory chapter, I return to this point, and provide the basis for a sociolegal stance that studies the work that goes on in legal sites – what has been often dismissed as merely doctrinal, or lawyers' law, and not a worthwhile avenue to pursue within sociolegal studies.[25] For now, however, it is important to note that my interest in the discourses of community is not an attempt to discover "law's community," to develop *the* underlying logic of community that is relied on by courts, or to signal how courts ought to conceive of community within any particular legal doctrine. I am instead interested in investigating the concept of community as it is in fact deployed, envisioned, and understood – not in order to engage in an analytical critique,[26] but instead to develop an approach that is closer to the sociology of knowledge,[27] treating legal processes as observable, cultural realities that include "signs and symbols, fantasies and phantasms."[28] Although not providing evidence for community as an object of contestation in the everyday experience of individuals with the law, my emphasis remains empirical.[29] This sense of the empirical is what Nikolas Rose refers to as "an attention to the humble, the mundane, the little shifts in our ways of thinking and understanding," "places where thought is technical, practical, [and] operational."[30] I focus on legal sites as privileged locations[31] in which knowledges of community are invoked, contested,

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[25]See discussion in D. Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, MA: Harvard University Press, 1997) [hereinafter *Critique of Adjudication*].

[26]N. Rose, "Beyond the Public/Private Division: Law, Power, and the Family" (1987) 14 Journal of Law & Society 61.

[27]See also R. Levi & M. Valverde, "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness" (2001) 25 Law & Social Inquiry 819 [hereinafter "Knowledge on Tap"].

[28]A. Sarat & J. Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship" (2001) 13 Yale Journal of Law and the Humanities 3 at 19.

[29]*Three American Towns*, *supra* note 20.

[30]N. Rose, *Powers of Freedom: Reframing Political Thought* (New York: Cambridge University Press, 1999) at 11 [hereinafter *Powers of Freedom*].

[31]See also J. Simon, "In the Place of the Parent: Risk Management and the Government of Campus Life" (1994) 3 Social & Legal Studies 15 at 18 [hereinafter "In the Place of the Parent"].

and negotiated, and official truths are produced in community's name.[32]

II. Community in Criminal Justice: From Concentric Zones to the Preventive State

While this dissertation is particularly interested in the present – how the concept of community is relied on in these three legal sites, and the particular valence attached to it in each[33] – "community" in fact has a substantial history within crime control and academic criminology. Within policing in particular, community involvement in crime control has deep historical roots, with the professionalization of a State-controlled public police being a more recent development of the 19th century.[34] Throughout the 20th century, the concept of community has been alternatively invoked in two ways: either in relation to the criminogenic status caused by a lack of community, or as a black-boxed[35] alternative to the state and the formal criminal justice system.[36]

Crime and community were most famously linked by the work of the Chicago School in the 1940s, and the lamenting of a loss of community[37] identified by high rates of ethnic

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[32]M. Valverde, R. Levi, C. Shearing, M. Condon & P. O'Malley, *Democracy in Governance: A Socio-Legal Framework* (Ottawa: Law Commission of Canada, 1999) at 10-14 [hereinafter *Democracy in Governance*]; Bourdieu, *supra* note 1; "Governed by Law?", *supra* note 21.

[33]This is somewhat different than a history of the present, since I do not seek to explore how the present has come to be by relying on the evolution of a concept. For more on histories of the present, See K. Stenson, "Beyond Histories of the Present" (1998) 29 Economy & Society 333, and see *Culture of Control*, *supra* note 5 at 1-6.

[34]See *e.g.* L. Johnston, *The Rebirth of Private Policing* (London: Routledge, 1992); C.D. Shearing, "The Relation Between Public and Private Policing" in M. Tonry & N. Morris, eds., *Modern Policing* (Chicago: University of Chicago Press, 1992) 399; D. A. Sklansky, "The Private Police" (1999) 46 UCLA Law Review 1165.

[35]I draw my use of the concept of the "black box" from science and technology studies: for more on the use of 'black-boxes,' see B. Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Cambridge, MA: Harvard University Press, 1998).

[36]The following history draws closely on "What "Community" Supplies", *supra* note 4; B. Wellman, "The Community Question" (1979) 84 American Journal of Sociology 1201 [hereinafter "The Community Question"]; S. Brint, "*Gemeinschaft* Revisited: A Critique and Reconstruction of the Community Concept" (2001) 19 Sociological Theory 1; S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (New York: Blackwell, 1985) [hereinafter *Visions of Social Control*]; L. Lyon, *The Community in Urban Society* (Philadelphia: Temple University Press, 1987) [hereinafter *Community in Urban Society*].

[37]See "The Community Question", *supra* note 36.

heterogeneity and residential turnover.[38] "Community" was here distinguished from "society" – individual localities were conceived of as being engaged in "competition, symbiosis, evolution, and dominance,"[39] and these spatial areas became the core referent for understanding why some communities would suffer high rates of crime. Depending on their proximity to the central city, communities were thereby mapped into "concentric zones," engaged in social Darwinist competition with each other, and with criminogenic spaces similarly construed.[40] The *lack* of community articulated in urban areas of high "social disorganization," however, was soon challenged by ethnographic research, much of which found rich examples of "community" life in urban areas such as Boston and Chicago, often precisely in the ethnically heterogenous neighbourhoods that earlier work conceived of as disorganized.[41] These communal bonds found in ordered segmentation and street corner groups were soon backed up with quantitative evidence of local interactions[42] – which, when combined with methodological concerns over the ecological claims made by Chicago School researchers, soon ended the emphasis on social disorganization that had been a mainstay of the sociology of crime and deviance,[43] and even studying "community" soon fell out of favour among American sociologists.[44]

If linking community with the etiology of crime fell out of favour, however, *invoking* "community" as criminal justice reform did not.[45] By the early 1960s, academics and criminal

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[38]C. Shaw & H. McKay, *Juvenile Delinquency and Urban Areas*, 2d ed. (Chicago: University of Chicago Press, 1942 [1969]).This work of the early Chicago School fit well with the general mistrust of early sociologists with the city and urbanization: the concern over urbanization's effects on community bonds, characteristic of the work of Simmel and Weber, was disaggregated and operationalized by the Chicago School's concern with social disorganization.

[39]*Community in Urban Society*, *supra* note 36 at 9.

[40]See generally *Ibid.* at 32-40; "Los Angeles and the Chicago School", *supra* note 3 at 14-16.

[41]See G.D. Suttles, *The Social Order of the Slum: Ethnicity and Territory in the Inner City* (Chicago: University of Chicago Press, 1968); W.F. Whyte, *Street Corner Society: The Social Structure of an Italian Slum* (Chicago: University of Chicago Press, 1947); and see discussion in "The Community Question", *supra* note 36.

[42]"What "Community" Supplies", *supra* note 4 at 245-246.

[43]*Community in Urban Society, supra* note 36 at 8-12.

[44]*Ibid.* at 12-14, 39-40.

[45]*Culture of Control*, *supra* note 5 at 123.

justice professionals sought to invoke "community" as a move away from the state and its logics of social order and regulation.[46] This vision, what Stanley Cohen refers to as a "destructuring impulse," sought to shift criminal justice policy and the role of the state, away from experts and formal institutions, positing instead (often through the state) counter-ideologies of decentralization, decriminalization, deprofessionalization, decarceration and demedicalization.[47] This drew heavily on the language and images of "community" as an alternative to the bureaucratic and dehumanizing state:

> The talk was about the over-reach of the criminal law; the clogged up and impersonal court system; disenchantment with sentencing inequity; the need to minimize penetration into the formal system; the need for communities to assume responsibility and to mobilize their own natural resources ... All sorts of radical populist ideas – the spirit of sentimental anarchism – entered into the intellectual supermarket: small is beautiful, people are not machines, experts don't know everything, bureaucracies are anti-human, institutions are unnatural and bad, the community is natural and good ... Magic words like 'community', 'neighbourhood' and 'reintegration' rolled off the tongues of correctional administrators, guards and judges, state legislators in America, Home Office civil servants in Britain as easily as they had in the rhetoric of radical community activists, reformers or prison abolitionists ... Something was happening.[48]

Although elements of this movement lost steam,[49] the invocation of community as a black-boxed alternative to the perceived failure of state authorities did not. While academic criminology, particularly in the United States, did move away from "community" as either an explanation or a potential reform,[50] the inauguration of community programs has continued from

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[46] *Visions of Social Control, supra* note 36 at 5-8.

[47] *Ibid.* at 31-32.

[48] *Ibid.* at 34-36.

[49] Whether the elements of the system that "community" was introduced to offset were ever statist is itself contested: see eg. J. Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990* (Chicago: University of Chicago Press, 1993).

[50] Inverting the traditional question of why some individuals commit crime, Travis Hirschi's emphasis on social bonds instead sought to explain why some individuals did not engage in criminal activity. See T. Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969). Attachment to social bonds – and Hirschi emphasized family bonds in particular – was said to prevent individuals from committing crime. To be sure, Hirschi could well have argued that community bonds were critical here, rather than emphasizing social institutions such as the family. In avoiding the concept of "community," however, Hirschi was aware of the backlash that the early Chicago School researchers had experienced, and sought to develop his theory without invoking the field of the "community" as such:

the 1960s to the present.[51] I don't mean to suggest, however, that this trend has maintained a single political logic throughout this period. By the early 1980s, the invocation of "community" had in fact shifted from being conceived of as an alternative to the state (though closely allied with its goals), to one in which the state could enter into partnerships, most notably through community policing.[52] These programs continue to invoke the concept of community in a range of highly idealized ways, but now its invocation is used to legitimate strategies of order maintenance,[53] problem-oriented policing,[54] foot patrols,[55] and neighbourhood meetings between

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> I was aware at the time I wrote my theory that it was well within the social disorganization tradition ... but you have to remember the status of social disorganization as a concept in the middle 1960s when I was writing ... Had I tried to sell social disorganization at the same time, I would have been in deep trouble. So I shied away from that tradition. As a result, I did not give social disorganization its due. I went back to Durkheim and Hobbes and ignored an entire American tradition that was directly relevant to what I was saying ... I said the same things the social disorganization people had said, but since they had fallen into disfavor I had to disassociate myself from them.

See C. Bartollas, "Travis Hirschi. Sociologist" (Interviewed by C. Bartollas, New York, 1985) at 190. Quoted by K. Welch, "Two Major Theories of Travis Hirschi" (30 November 1998), online: Florida State University <http://www.criminology.fsu.edu/crimtheory/hirschi.htm> (date accessed: 9 August 2002).

Hirschi's emphasis on social institutions resonated well with broader trends in academic sociology, focusing less on the study of individuals "communities" and more on the rise of "mass society" (see *Community in Urban Society*, *supra* note 36 at 14). As such, while the causes of crime may be traced to the attenuation of social bonds, other individual-level explanations gained increased currency, such as age, social strain, or labeling theory. With the introduction of organizational systems theory, reflected in *The Challenge of Crime in a Free Society*, a report prepared for the President's Commission on Law Enforcement and the Administration of Justice, assessment of criminal justice as a system became a dominant mode of criminological research, emphasizing research based on the 'construction and manipulation of mathematical models. President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, DC: U.S. Government Printing Office, 1967) at 53-54.

[51]*Culture of Control*, *supra* note 5 at 123.

[52]Others have chronicled the range of events, within academic criminology, criminal justice policy circles, and local budget disputes, that came together to produce "community policing," See eg. "Police Discretion and the Quality of Life", *supra* note 15 at 565-578; K. Stenson, "Community Policing as a Governmental Technology" (1993) 22 Economy & Society 373 at 379-385 [hereinafter "Governmental Technology"]; and the collection of essays in W.M. Oliver, ed., *Community Policing: Classical Readings* (Upper Saddle River, NJ: Prentice-Hall, 2000).

[53]J.Q. Wilson & G.L. Kelling, "Broken Windows: The Police and Neighborhood Safety" (March 1982) 249 *The Atlantic Monthly* 29.

[54]H. Goldstein, *Problem-Oriented Policing* (Philadelphia: Temple University Press, 1990).

[55]G.L. Kelling & M.H. Moore, "From Political to Reform to Community: The Evolving Strategy of Police" in J.R. Greene & S.D. Mastrofski, eds., *Community Policing: Rhetoric or Reality* (New York: Praeger, 1988) 3.

the police and the public.[56] With a central emphasis on state-community partnerships (whatever content may be given to them),[57] these strategies reflect the National Institute of Justice statement above: community is a resource to be harnessed by the state,[58] rather than lamenting its weakness (as in the early Chicago School) and rather than positing community as an alternative to the state model of criminal justice (as in the informal justice movement).[59]

Of course, the concept of community in criminal justice is not only subject to change over time – as Nicola Lacey and Lucia Zedner demonstrate, there are also cultural and national differences in the invocation of community in criminal justice.[60] Focusing their analyses on differences between British and German discourses on crime control, Lacey and Zedner trace the importance of the social, political, and economic contexts in each country to the specific discourse on community that emerges. Emphasizing increased social fragmentation, and the

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[56]W.G. Skogan & S.M. Hartnett, *Community Policing, Chicago Style* (New York: Oxford University Press, 1999).

[57]As Stenson argues, the concept of community is here "something of a floating signifier, with different referents in competing discourses." See "Governmental Technology", *supra* note 52 at 380. See also P. O'Malley, "Policing, Politics and Postmodernity" (1997) 6 Social & Legal Studies 363 at 370-372; *Local Governance of Crime*, *supra* note 3 at 15-62.

[58]N. Rose, "The Death of the Social? Re-Figuring the Territory of Government" (1996) 25 Economy & Society 327 [hereinafter "The Death of the Social"].

[59]Community policing, as a policy measure, has also been linked within academic criminology to a new articulation of social disorganization, and a revival of interest in the role of the "community" and of neighbourhoods to determine spatial concentrations of crime and violence. See eg. R.J. Sampson, S.W. Raudenbush & F. Earls, "Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy" (15 August 1997) 277 Science 918; *Neighborhoods and Crime*, *supra* note 2; W.G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (New York: Free Press, 1990). This work often links together elements of the older Chicago School analyses with elements of community policing: "community" tends to be invoked as a site that can produce effective social controls through informal (non-state) processes, while also emphasizing the integration of the community with state-controlled institutions, such as schools, the public police, and the legal regulation of cities more generally (see *Neighborhoods and Crime*, *supra* note 2; "What "Community" Supplies", *supra* note 4; R.J. Sampson & D.J. Bartusch, "Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences" (1998) 32 Law & Society Review 777. Robert Sampson highlights the emphasis on formal and informal alliances, or partnerships, that has become central to research on communities in criminology: "Although residents must take partial responsibility for stemming the ever present threat of decay and decline, the best state is one that involves both police and residents in planning and executing measures to control crime and restore order in public places." See "What "Community" Supplies", *supra* note 4 at 272.

[60]N. Lacey & L. Zedner, "Discourses of Community in Criminal Justice" (1995) 22 Journal of Law & Society 301 [hereinafter "Discourses of Community"]; N. Lacey & L. Zedner, "Community in German Criminal Justice: A Significant Absence?" (1998) 7 Social & Legal Studies 7 [hereinafter "German Criminal Justice"].

diffusion of conventionally statist responsibilities to non-state actors,[61] Lacey and Zedner locate the recent rise of community in broader changes in governance relations: the blurring of distinctions between public and private, increased anxiety over identity and security within a pervasive "postmodern condition," the individualism of neo-liberal politics (and the correlative shift away from state expertise), and the decentralization of authority away from the state.[62] From this perspective, they are able to explain the different emphasis on "community" in Germany than in Britain – whereas in Britain this logic is generally invoked as providing a site outside of the state for engaging in crime control, in Germany it is instead one in which responsibilities are shifted within state institutions, a push away from the central state and toward local officials.[63] In Britain, Lacey and Zedner find that "community" instead reflects a more radical fracturing of responsibility for crime and its control, and promotes private self-interest, perhaps in alliance with others, but without engaging broader social responsibilities.[64]

As such, this more recent invocation of "community" has been explained as part of an array of strategies, programmes, and political logics that have gained increased currency over the past two decades.[65] Nikolas Rose in particular has characterized these as "advanced liberal," or "neoliberalism": a set of governance strategies[66] that is characterized by a pluralization of expertise, audit mechanisms, the responsibilization of individuals to govern their own conduct prudently, localized risk management, and partnerships between the state and local

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[61]Lacey and Zedner also suggest insights from psychoanalytic theory as evidence for a fourth interpretation of the rise of community discourses in recent years. This evidence, however, appears closely connected with the other three accounts they offer, and as a result I interpret it instead as a possible mechanism through which the rise of community gains resonance within these social, political and economic contexts: see "Discourses of Community", *supra* note 60 at 316-318.

[62]*Ibid.* at 307-316.

[63]"German Criminal Justice", *supra* note 60 at 18.

[64]"Discourses of Community", *supra* note 60 at 310.

[65]See especially "The Death of the Social", *supra* note 58 at 332.

[66]Research in this area tends to draw on Foucauldian approaches to studying "government," or the "conduct of conduct." This approach is characterized by an emphasis on "how" questions, and thereby focuses on empirical studies of the techniques and strategies used to conduct the conduct of others and ourselves. See M. Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999) [hereinafter *Governmentality*]; *Democracy in Governance*, *supra* note 32.

communities.[67]

At a political level, advanced liberalism is said to refigure, or re-code, the role of the state[68] – embodied for many in Thatcherism,[69] these shifts in political rationality represent changes in governance from welfarism (and concomitant national insurance programs such as unemployment insurance and social security), to a rise in consumerism, privatisation, and individual prudence (and programs such as private pension plans, neighbourhood watch, community policing, and private security). In this process, individual citizens are reconstructed into rational consumers and innovative entrepreneurs; experts are de-privileged and are instead subject to audit techniques; and the very notion of expertise is reformulated so as to engage actors from below. Knowledge, skills, and resources are provided by the state and other agencies (such as insurance companies) so as to encourage individuals to personally calculate dangers and avert risks.[70] This conceives of citizens as active, relying on their own preferences, to design a life most appropriate to their needs, and not relying on the State to make those decisions for them.[71] While such change does not represent some master plan being projected onto reality – the extent to which welfarism may have given way to neoliberalism is itself an empirical

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[67]See eg. N. Rose, "Government, Authority and Expertise in Advanced Liberalism" (1993) 22 Economy & Society 283; N. Rose & P. Miller, "Political Power Beyond the State: Problematics of Government" (1992) British Journal of Sociology 173 [hereinafter "Political Power Beyond the State"]; N. Rose, "Expertise and the Government of Conduct" (1994) 14 Studies in Law, Politics and Society 359; P. Miller & N. Rose, "Governing Economic Life" (1990) 19 Economy & Society 1 [hereinafter "Governing Economic Life"]; "The Death of the Social", *supra* note 58; N. Rose, "Government and Control" (2000) 40 British Journal of Criminology 321 [hereinafter "Government and Control"]; *Powers of Freedom*, *supra* note 30; N. Rose, "Governing "Advanced" Liberal Democracies" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 37.

[68]"Political Power Beyond the State", *supra* note 67 at 199.

[69]A quote of Thatcher's, often relied on in the literature, suggests these shifts explicitly. Discussing the expectation that government (and society) will house the homeless, Thatcher stated that "... there is no such thing as society. There are individual men and women, and there are families ...." Later seeking to clarify these remarks, Thatcher seems to have herself conceived of society as constructed: "My meaning, clear at the time but subsequently distorted beyond recognition, was that society was not an abstraction, separate from the men and women who composed it, but a living structure of individuals, families, neighbours and voluntary associations ...." See quotations and commentary in *Governmentality*, *supra* note 66 at 151-153.

[70]*Powers of Freedom*, *supra* note 30 at 142.

[71]*Ibid.* at 166.

question, often with hybrid findings[72] – Rose and Miller argue that the project of neoliberalism is itself a fundamental shift: "[t]he political mentality of neo-liberalism breaks with welfarism at the level of moralities, explanations and vocabularies."[73]

It is in this context, for Rose and others writing in this tradition, that there is a rise of "community," which thereby becomes the object of new contestations.[74] This is an important point: advanced liberal citizens are not imagined as atomistic, yet nor are they embedded within something called "the social."[75] As Deleuze argues, "the social" – and I here rely on the definite article *the*, and conceive of "social" as a noun, to signify my emphasis on its objective construction through strategies, thought, and techniques[76] – is itself a sector that can be studied, in which institutions, problems, and personnel were brought together to act upon the population as a collective,[77] rather than being an ahistorical, or universal, category.[78] Thinking of issues as social matters – for instance, imagining poverty as a social problem – is itself a 19th century European innovation,[79] closely linked with industrialization and urbanization.[80] This led to a broad array of techniques that includes the regularization of statistics as a strategy for public

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[72]See eg. P. O'Malley, "Policing Crime Risks in the Neo-Liberal Era" in K. Stenson & R.R. Sullivan, eds., *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan, 2001) 89; P. O'Malley, "Volatile and Contradictory Punishment" (1999) 3 Theoretical Criminology 175.

[73]"Political Power Beyond the State", *supra* note 67 at 198.

[74]"The Death of the Social", *supra* note 58 at 336.

[75]*Powers of Freedom*, *supra* note 30 at 166.

[76]See M. Poovey, "The Liberal Civil Subject and the Social in Eighteenth-Century British Moral Philosophy" (2002) 14 Public Culture 125.

[77]G. Deleuze, "Foreword" in J. Donzelot, *The Policing of Families*, trans. R. Hurley (New York: Pantheon Books, 1979) ix.

[78]See discussion in K. Morrison, "The Disavowal of the Social in the American Reception of Durkheim" (2001) 1 Journal of Classical Sociology 95. As Nikolas Rose argues, "the social" was itself in tension with other planes, such as "blood and territory," "race and religion," and "town, region and nation." See "The Death of the Social", *supra* note 58 at 329.

[79]M. Dean, *The Constitution of Poverty: Toward a Genealogy of Liberal Governance* (London: Routledge, 1991).

[80]See also T.S. Popkewitz, "The Denial of Change in Educational Change: Systems of Ideas in the Construction of National Policy and Evaluation" (2000) 29 Educational Researcher 17.

regulation,[81] and which ranges from the mundane (such as the standardization of time across villages, in order to successfully rely on railway timetables), to the ambitious (such as the building of reformatories).[82]

In contrast to this 'social point of view,'[83] advanced liberal strategies locate the individual citizen within overlapping personal networks, and valorize the sphere of "community." As Nikolas Rose writes, citizens are themselves governed *through* their allegiance to local communities: not only is community a *site* to be governed, but individuals are themselves mobilized as members of existing communities, and are encouraged to be productive, active citizens, and to thereby make choices that are in the interests of themselves and those close to them.[84] Community is here posited as a voluntary space that can succeed the "social";[85] no longer defined as either providing the basis for social solidarity or as providing an alternative to the state,[86] it is instead a *means* of government, through which individuals are encouraged to pursue their personal projects and thereby govern themselves in desirable ways.[87] Individual identities are shaped in this process, and actively participate in their governance through the choices they make.[88] Though a lengthy passage, Nikolas Rose provides a particularly lucid

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[81]M. Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago: University of Chicago Press, 1998) at 307-329; T. Osborne, "Security and Vitality: Drains, Liberalism and Power in the Nineteenth Century" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 99 at 103-104.

[82]*Democracy in Governance*, *supra* note 32 at 19.

[83]"The Death of the Social", *supra* note 58 at 328-331.

[84]*Ibid.*

[85]P. O'Malley, "Criminology and the New Liberalism" (John LL. J. Edwards Memorial Lecture, Sponsored by Woodsworth College, University of Toronto, 13 November 1996), online: Centre of Criminology, University of Toronto <http://www.library.utoronto.ca/libraries_crim/centre/lecture.htm> (date accessed 29 September 2002).

[86]*Powers of Freedom*, *supra* note 30 at 172.

[87]"The Death of the Social", *supra* note 58 at 335. This ties in closely with another theme in this literature, referred to as "government at a distance." See "Governing Economic Life", *supra* note 67.

[88]*Powers of Freedom*, *supra* note 30 at 172; *Democracy in Governance*, *supra* note 32 at 6-8.

account of this specific reinvigoration of community,[89] and in so doing further draws attention to its place in responding to crime:

> Within social rationalities of government, a domain of collective security was envisaged to be maintained by the State on behalf of all citizens ... Today, this social image – and the practices to which it was linked – is displaced by a variety of different ways of imagining security, each of which mobilizes a particular sense of community. One image is of the 'gated city' preserving the security of its own residents ... The collective logics of community are here brought into alliance with the individualized ethos of neo-liberal politics: choice, personal responsibility, control over one's fate, self-promotion and self-government. In a second image, community is promoted as an antidote to the combined depredations of market forces, remote central government, insensitive local authorities in new programmes ... Here, new modes of neighbourhood participation, local empowerment and engagement of residents in decisions over their own lives will, it is thought, reactivate self-motivation, self-responsibility and self-reliance in the form of active citizenship within a self-governing community ... [T]hese opposed versions of security utilize similar images of the subject as an *active and responsible agent* in the securing of security for themselves and those to whom they are or should be affiliated ... In each case, community is not simply the territory of government, but a *means* of government: its ties, bonds, forces and affiliations are to be celebrated, encouraged, nurtured, shaped and instrumentalized in the hope of producing consequences that are desirable for all and for each.[90]

Within the context of criminal justice, David Garland's work on *The Culture of Control* draws on this conceptual frame to articulate a set of patterns that are said to now dominate our interpretations of crime and the strategies we develop for its control.[91] Garland emphasizes that many of these changes are the result of new configurations, rather than a new dominant logic, and that these new configurations (which Garland identifies as "late modernity"[92]) have some broader characteristics:[93] an emphasis on risk management rather than rehabilitation, the commercialization of crime control, a pluralization of expertise based on a new populism, and the like. Garland explicitly identifies the emphasis on "community" as part of this emerging

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[89]Rose elsewhere distinguishes the "community" of advanced liberalism from the form it takes at other times. See *Powers of Freedom*, *supra* note 30 at 167-196.

[90]"The Death of the Social", *supra* note 58 at 335 [emphasis in original, internal citations omitted].

[91]*Culture of Control*, *supra* note 5.

[92]*Ibid.* at 77.

[93]See also "Government and Control", *supra* note 67.

culture, and emphasizes local alliances of community groups with state agencies, designed to accomplish two visions of community: to enhance "community" in order to reduce the incidence of crime, and to encourage communities to engage in policing efforts, autonomously and in partnership with the state.[94] Garland goes on to conceive of these partnerships as a responsibilization strategy, through which crime control responsibilities increasingly rely on non-state actors, often without state (or even professional) expertise, and which shifts the role of the state into one that coordinates, educates, and enforces these partnerships.[95]

From this perspective, the ongoing dispersal of authority to the community is not reduced to a simple expansion of "social control" beyond the state, or what Stan Cohen had earlier analogized to a widening of the 'fishing net'[96] and lamented as leading to a dystopian control *of* communities.[97] Rather than a pristine location that is imagined as coming under state control, the approaches taken by Rose and Garland neither conceive of communities as pre-existing sites to be mobilized, nor as spaces that can be conceived of as insulated from dominant political rationalities. Instead, communities are themselves constituted through governmental strategies, mentalities, and techniques – and while some may raise different political issues than others,

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[94]*Culture of Control*, *supra* note 5 at 16-17.

[95]*Ibid.* at 124-127; D. Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society" (1996) 36 British Journal of Criminology 445 [hereinafter "The Limits of the Sovereign State"].

[96]*Visions of Social Control*, *supra* note 36 at 40-86. Within the social control tradition, Stan Cohen has sought to demonstrate that relying on "community" efforts to manage crime simply expands what he calls the "deviancy control system" (at 41). Cohen analogizes this system to a fishing net – and argues that although the community-oriented destructuring movements sought to decrease the reach of the system, they have instead widened and strengthened the net. Cohen is particularly critical of community-based alternatives such as diversion, which he associates with an increase in the number of individuals deemed deviant and the range of measures applied to them (at 50-56) and is similarly critical of the "penetration" of state authorities into what were once private areas, which he identifies as relying on the rhetoric of community to further the normative commitments of the system to engage in greater and more expansive forms of control. For Cohen, once the community is adopted as part of the state apparatus – even in those cases where reformers believe that the community is here construed as an "alternative" – the external logics and controls of the state begin to fill in conventionally private spaces (at 120-127).

[97]*Ibid.* at 127, arguing that "The real master shift about to take place is towards the control of whole groups, populations and environments – not community control, but the control of communities ... And here, the strength of the community ideology is the strength of all ideology: its persuasive ability to keep us believing that we are doing one thing while we really might be doing something else." Cohen's emphasis on the dispersal of social control and surveillance, itself drawing on Foucault's emphases on discipline and normalization, tends to unnecessarily reduce this Foucauldian perspective to an argument that seeks to unmask community for what it *really* is, underneath. See discussion in D. Lacombe, "Reforming Foucault: A Critique of the Social Control Thesis" (1996) 47 British Journal of Sociology 332.

recognition of this point avoids naming some communities as "false."[98] From a research perspective, then, the emphasis lies in determining *how* communities are conceived of, identified, encouraged, and deployed in particular programmes, such as neighbourhood watch, community policing, and the like.[99] Research to date has thereby emphasized the processes of inculcation, education, and encouragement involved in state-community partnerships, the logics of responsibilization they promote, and the reorientation of public and private responsibilities these entail. A critical finding in this literature is that advanced liberal strategies do not simply presume the existence of a "community" that can engage in partnerships with the state, but instead work to create those very communities through media campaigns, information dissemination, training courses, and educational programs.[100]

A central element of the new reliance on "community" in criminal justice, and the partnerships it promotes with state authorities, lies in an ostensibly preventive approach to managing crime.[101] Often drawing from regulatory models of control,[102] the strategy of prevention is itself closely bound up with shifting knowledges of actuarialism and privatization, as well as a reinvigoration of earlier governance strategies designed to enhance the common

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[98]"The Death of the Social", *supra* note 58 at 336.

[99]See eg. "Governmental Technology", *supra* note 52; P. O'Malley, "Policing, Politics and Postmodernity" (1997) 6 Social and Legal Studies 363; D. Garland, Book Review of *The Local Governance of Crime: Appeals to Community and Partnerships*, by A. Crawford (1998) 38 British Journal of Criminology 516 at 518-519; R. Levi, "The Mutuality of Risk and Community: The Adjudication of Community Notification Statutes" (2000) 29 Economy & Society 578 [hereinafter "Mutuality of Risk and Community"]; P. O'Malley, "Legal Networks and Domestic Security" (1991) 11 Studies in Law, Politics and Society 171 at 181-182; P. O'Malley, "Post-Keynesian Policing" (1996) 25 Economy & Society 137 [hereinafter "Post-Keynesian Policing"]; P. O'Malley, "Risk and Responsibility" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 189 [hereinafter "Risk and Responsibility"].

[100]See in particular "Post-Keynesian Policing", *supra* note 99; "Mutuality of Risk and Community", *supra* note 99.

[101]*Local Governance of Crime*, *supra* note 3; P. O'Malley, "Risk, Power and Crime Prevention" (1992) 21 Economy & Society 253. This raises a related point regarding the relation of "community" to "risk" in advanced liberalism: see U. Beck, *Risk Society: Towards a New Modernity*, trans. M. Ritter (London: Sage, 1992) at 49; "Mutuality of Risk and Community", *supra* note 99. This move to "prevention," however, has been combined with highly punitive strategies. For a more general discussion on the schizophrenia in crime control policy, see "The Limits of the Sovereign State", *supra* note 95.

[102]J. Braithwaite, "The New Regulatory State and the Transformation of Criminology" (2000) 40 British Journal of Criminology 222.

welfare, and to promote prudentialism and responsibility beyond the state.[103] Much of this has occurred at the level of policing, to the extent that some researchers are suggesting that policing has now been pluralized.[104] This conception of "policing" extends beyond the public police – rather, I take it to be a broader function that focuses on surveillance and maintaining order, including private security guards, architectural design, and resident activities, and not simply the activities of "large men in sombre uniforms who run around trying to catch criminals."[105] Instead, much of policing now takes the form of "preventative partnerships," and the "community" is often invoked as both the site of intervention and the site to be harnessed beyond the state.[106] These partnerships, of course, involve much more than simply entering into alliances that cross the public and private divides; rather, they are themselves constitutive of new knowledge formats, opening up new avenues for the exercise of power and the constitution of 'communities' and individual selves in relation to crime and its control. This close connection between "community," "partnerships," and "prevention" is highlighted by Adam Crawford, who highlights the local struggles that ensue as a result, particularly given the tension between community as the site to be valorized (with which the state can enter into partnerships) and community as the site that still needs to be developed in order to prevent crime:

> '[C]ommunity' in policy discourse is conceptualized as both something in need of regeneration and also that which constitutes the existing moral fibre of society ... The dilemma that policy discourse has struck is that, on the one hand, the answer to the question: how to prevent crime? is, through the regeneration of 'community', whilst on the other hand, the answer to the question: how to regenerate community? is, the

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[103]See eg. "Knowledge on Tap", *supra* note 27; "Risk and Responsibility", *supra* note 99. Drawing on some of this work, Rose argues that, while the logic of the welfare state provided insurance against risk for all those who were citizens, security from risk is now conceived of as a commodity for which individuals compete and consume. This commodification of risk increases personal fears while encouraging individuals to take personal measures to counteract their anxieties, inaugurating "a virtually endless spiral of amplification of risk." "The Death of the Social", *supra* note 58 at 342.

[104]D.H. Bayley & C.D. Shearing, "The Future of Policing" (1996) 30 Law & Society Review 585.

[105]C.D. Shearing & P.C. Stenning, "Reframing Policing" in C.D. Shearing & P.C. Stenning, eds., *Private Policing* (Newbury Park: Sage, 1987) 9 at 10. Interestingly, the use of the word "police" was originally given a very broad meaning, referring to "the general regulation or government, the morals or economy of a city or country." See L. Johnston, *The Rebirth of Private Policing* (New York: Routledge, 1992) at 4.

[106]*Culture of Control*, *supra* note 5 at 140-165; "The Death of the Social", *supra* note 58; *Local Governance of Crime*, *supra* note 3.

> prevention of crime. The problem in practice, therefore, is how to break *into* this virtuous circle of 'community', when at the same time its absence is perceived to be the source of the problem ... [T]he empirical weakness of 'community' collides with its normative appeal.[107]

While some legal scholars have thereby engaged this debate in order to argue in favour of one conception of community rather than another – such as "criminal justice from the bottom-up,"[108] or the developing of legal mechanisms that respond more closely to "fundamental community values"[109] – Carol Steiker highlights the difficulty that legal scholars have in tracing the legal limits of this "preventive state."[110] While I resist the exclusive emphasis that Steiker thereby gives to the state, preferring instead to attend to how problematics of crime and community are defined and governed through authorities more generally,[111] I draw on Steiker here to suggest that, in grappling with this "preventive state," we ought to first attend to the conceptions, truths, assumptions, and knowledges that are mobilized in its name.[112] With so much of this taking

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[107]*Local Governance of Crime*, *supra* note 3 at 199 [emphasis in original]. As Crawford further argues (at 61), there remains an important role for the state to play here, with even earlier emphases on "professionalization, specialisation, centralization, and bureaucratization" not being displaced as a "core element of the criminological enterprise."

[108]H. Janisch & R. Levi, "Criminal Justice from the Bottom-Up: Some Thoughts on Police Rulemaking Processes" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997).

[109]See eg. N. Lacey, *State Punishment: Political Principles and Community Values* (New York: Routledge, 1988).

[110]C.S. Steiker, "Foreword: The Limits of the Preventive State" (1998) 88 Journal of Criminal Law & Criminology 771. Steiker's article is not limited to community approaches, and includes preventive measures that seek to act on offenders/potential offenders as well (while much of my discussion turns on the ways in which community approaches reconfigure the lives of law-abiders). I have taken some liberty with Steiker's piece, since she is generally discussing "prevention" versus "punishment," but substantive passages in her article make it clear that she is also thinking about similar points.

[111]See M. Foucault, "Governmentality" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 87. On the need to 'cut off the King's head,' see M. Foucault, "Truth and Power" in C. Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, trans. C. Gordon (New York: Pantheon, 1980) 109 at 121.

[112]It is important to emphasize that I am not here seeking to provide a typology of how the concept of "community" is invoked, but instead to develop in detail its invocation in three different sites. David Nelken, however, has provided a very useful typology for examining "community" in criminal justice – Nelken has sought to identify the different stages of the criminal process in which "community" is invoked (such as policing, prosecution, and sentencing), the different goals that community involvement is said to serve (be it crime control "by the community," "in the community," or "for the community"), and the different basis for imagining community that each invokes (such as community as locality, or community as social relationship). See D. Nelken, "Community Involvement in Crime Control" (1985) Current Legal Problems 239. While Nelken at times appears skeptical of

place under the banner of "community," this dissertation focuses on its deployment in three legal sites related to crime and its prevention, crossing state and non-state forms, in constituting the local conflicts, alliances, programmes, and strategies that are then elements of any such preventive state.

III. Clusters of Community and Crime Control

In seeking to document the extent of these emerging penal politics, the turn to the local community in recent years is said to have generated three clusters of crime control. Stenson and Edwards have recently identified this typology as including: (1) reducing the opportunities to commit crime through risk assessment and management, linked with reliance on actuarial expertise for identifying individuals and populations to be managed; (2) punitive forms of sovereignty that attempt to regain control of public spaces from perceivably disorderly groups; and (3) community security technologies that focus either on defending affluent neighbourhoods or on deploying active measures to promote social organization in disorderly localities.[113]

Drawing an example from each of these clusters, this dissertation provides an analysis of the concept of "community" in three corresponding legal sites, with each the subject of a separate chapter. Megan's Law, or the community notification of sex offenders, reflects the reliance on risk assessment in managing classes of offenders; a gang loitering ordinance developed as part of community policing in Chicago is relied on as an attempt to regain control over public spaces by arresting those perceived to be disorderly; and the legal regulation of gated communities is studied as a community security technology designed to defend affluent neighbourhoods. While there is some slippage between these categories, this choice of case studies is itself designed to provide insight into the contestations over community occurring in three very different sites, and covering the field of "community" involvement in advanced liberal crime prevention efforts. As we will see, these chapters demonstrate that the concept of community takes on a different valence in each setting, and that to understand the invocation of community requires close

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these discourses of community (at 257) his emphasis is on disaggregating what community implies when it is invoked in different contexts.

[113]K. Stenson & A. Edwards, "Crime Control and Liberal Government: The 'Third Way' and the Return to the Local" in K. Stenson & R.R. Sullivan, eds., *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan, 2001) 68 at 72.

attention to other operative concepts – such as risk, harm, or even the very physical/material form that "community" itself may be taking – and that these contestations suggest both the diversity of approaches within governance strategies labelled as "advanced liberal," and an instability to any programmatic reliance on "community" in this preventive state. While I provide a brief review of each chapter at the end of this Introduction, I first provide a description of my methodological approach in the following section.

IV. Legal Sites and Sociolegal Studies

This dissertation relies on textual readings within legal sites, and situates these within a broader study of governance, knowledge, and intellectual techniques.[114] I conceive of the documents produced within legal sites – be they transcripts of testimony, judicial decisions, or administrative documents – as themselves cultural objects, produced and taken up within a specific social field.[115] The challenge here is to approach these objects from an analytical stance that keeps their content within the interpretive setting in which they were created (rather than, for instance, counting the number of times a term is used) while drawing this out as part of an analysis that does not always mirror the tensions being negotiated within these sites. In so doing, the internal documents of law can themselves be read empirically, as representations in the history of legal ideas,[116] and as evidence of how social issues are imported, defined, translated, and negotiated within one particular field. While this field, as Rosemary Coombe states, carries "signifying power,"[117] my interest remains in following and analysing the documents of law themselves, rather than suggesting that what is done in legal sites itself neatly translates to other parts of social life, a constitutive approach to law for which I maintain that evidence beyond

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[114]See generally *Powers of Freedom*, *supra* note 30 at 15-60.

[115]W. Griswold, "A Methodological Framework for the Sociology of Culture" (1987) 17 Sociological Methodology 1 at 4-6.

[116]P. Rabinow, "Representations are Social Facts: Modernity and Post-Modernity in Anthropology" in P. Rabinow, ed., *Essays on the Anthropology of Reason* (Princeton: Princeton University Press, 1998) 28 [hereinafter "Representations are Social Facts'].

[117]R.J. Coombe, "Contingent Articulations: A Critical Cultural Studies of Law" in A. Sarat & T.R. Kearns, eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998) 21 at 46.

legal texts is necessary.[118]

The empirical stance I take draws closely on the argument made by David Trubek regarding critical legal studies as an empirical project, even if scholars in this tradition often continue to work with conventional legal materials rather than engaging in research far removed from the law libraries.[119] Arguing that critical legal scholars read doctrine from an external perspective, Trubek invokes the distinction between theology and religion to ground his claim that critical legal scholarship reads doctrine as itself social, even if it has "abandoned the patrol car for the library"[120] – for Trubek, the distinction lies in the stance one takes toward doctrine, rather than in the reading of doctrine itself. Yet, my approach is in other ways distinct from work in critical legal studies, which generally posits either that legal reasoning is unintelligible (the claim of indeterminacy) or instead posits a claim to 'truth' that law is not recognizing (such as race, gender, or class).[121] I am not here positing normative claims about how law ought to function, or about what the content of the law ought to be in any particular area. Yet I am also not seeking to debunk law's authority or epistemology, or offer a 'truth' of community to replace the present legal imaginaries. This empirical stance instead seeks to locate a position between the conventional "law on the books" and the "law in action" distinction of law and society scholarship – and in this dissertation, I seek to demonstrate what can be gained when not insisting on this distinction.

In his essay on "Politics and the Study of Discourse," Michel Foucault describes "an analysis of the discourses in the dimension of their exteriority."[122] Although an infelicitous phrase, I draw on Foucault here to suggest that elements of law are always in the process of negotiation, and when investigated, the "law on the books" is itself the product of contestations, strategies,

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[118]See generally A. Sarat & T.R. Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life" in A. Sarat & T.R. Kearns, eds., *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993) 21.

[119]D.M. Trubek, "Where the Action is: Critical Legal Studies and Empiricism" (1984) 36 Stanford Law Review 575.

[120]*Ibid.* at 589.

[121]See generally M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987).

[122]M. Foucault, "Politics and the Study of Discourse" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 53 at 60.

assumptions and categorizations – and why these are valorized by law and society scholars as "law in action" at some points, but dismissed as simply the "law on the books" at others, is never explained. Instead, this dissertation studies law as a set of practices, forms, techniques, institutions, and norms that are themselves bound up in the processes of governing modern societies.[123] Studying law in this way, I emphasize the claims made in legal sites, the arguments deployed by those engaging with the legal complex, the manner in which law comes to identify and problematize situations in specific ways, the plural forms of knowledge drawn upon in so doing, and the technical arguments made in translating situations into legal forums and across legal sites.[124] Law is here a 'reality,' albeit one in a different mode than those who study the same concerns in other venues.[125] And yet, as a reality, law takes on a particular form. Law is an "idealizing text," distinct from "a shopping list on the refrigerator door" – and as a result, the texts of law contain political hybridities that are often overlooked by those seeking to determine what the law in fact is, or in fact ought to be.[126]

It is perhaps for this reason that within analyses of governance – by which I simply mean the use of rational techniques designed to shape conduct – legal institutions have come to play a central role.[127] Davina Cooper stresses that law can in fact be understood as playing a role in the governance *of* governance, with courts playing an important part in authorizing or de-authorizing governmental strategies.[128] For instance, a political programme to engage communities in their own policing may rely upon certain police practices that impose curfews on juveniles, restrictions on panhandlers, or blocks to traffic: judicial decisions will then influence the viability of such measures (as will, of course, "law in action" factors, such as police discretion

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[123]"Governed by Law?", *supra* note 21 at 570-571.

[124]*Governmentality*, *supra* note 66 at 27-39.

[125]M. Foucault, "Questions of Method" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 73 at 81.

[126]J.B. White, "Constructing a Constitution: "Original Intention" in the Slave Cases" (1987) 47 Maryland Law Review 239 at 267-269.

[127]*Democracy in Governance*, *supra* note 32 at 10-14.

[128]D. Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (New York: Rivers Oram, 1998) at 17.

or the power of private associations). And yet, as Jonathan Simon argues, law is also implicated in the very formation of justificatory and legitimating discourses ("political rationalities"), identifying and problematizing events and areas to be governed ("programs"), and the technical mechanisms through which these are then put into place ("technologies of government").[129] For Simon, legal doctrines can "provide a privileged forum for the articulation and critique of the political rationalities through which government is publicly justified,"[130] further arguing elsewhere that legal forums play a central symbolic role in either spreading/reinforcing or dissolving/delegitimizing choices of how to govern.[131]

This emphasis on the legal ability to generate authoritative representations, and to thereby engage in processes of authorizing knowledges, values, programs, and rationalities, is generally identified as drawing on Foucauldian analyses of power and its circulation.[132] Yet the emphasis this places on the logics and ideational vocabulary of governance has been criticized by others, who instead argue in favour of studying how governance operates 'in practice,' beyond the texts, in 'real life.' For some, this reflects a positivist orientation often taken in sociolegal studies more generally (particularly in North America), in which the texts of law are often dismissed as "trivial or mystificatory," and that "real knowledge about law as a social phenomenon [is] gained only by observing patterns of judicial, administrative or policing activity, lawyers' work and organization, or citizens' disputing behaviour."[133] Since this stance presumes that empirical work can itself come closer to the "truth" of the situation, I resist a critique of law on these grounds, preferring instead to compare, juxtapose, and highlight the different truths each creates,[134] and to thereby open up the contingency of each rather than expose them to the bright

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[129]"In the Place of the Parent", *supra* note 31 at 17.

[130]*Ibid.* at 18.

[131]"Ideological Effects of Actuarial Practices", *supra* note 24 at 775.

[132]See eg. J. Simon, "For the Government of Its Servants: Law and Disciplinary Power in the Work Place, 1870-1906" (1993) 13 Studies in Law, Politics, and Society 105; "Governed by Law?", *supra* note 21.

[133]R. Cotterrell, "Why Must Legal Ideas be Interpreted Sociologically?" (1998) 25 Journal of Law & Society 171 at 173 [hereinafter "Why Must Legal Ideas be Interpreted Sociologically?"]. For a fuller discussion from the critical legal studies perspective, see *Critique of Adjudication*, *supra* note 25.

[134]See generally A. Riles, "Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity" (1994) 3 University of Illinois Law Review 597.

light of critique.[135] In this way, legal ideas are themselves part of the social world – or, in Paul Rabinow's terms, "representations are social facts" – and the *internal* legal texts are themselves subject to external analysis.[136]

David Garland, however, has provided a more nuanced critique of research that focuses on texts and programmes, rather than engaging in what he argues are the real, empirical, practices that one finds on the ground. For instance, speaking about the reform of the English Prison Service, Garland argues that a focus on rationalities of government would suggest that the Prison Service had undergone a fundamental transformation in the early 1990s, in which it was rendered increasingly autonomous from the state – but in fact, Garland argues, the patterns of interaction were such that the realities within the Prison Service were sharply different, such that "the legal structures of governance of the organization turned out to be a poor guide to the real organizational dynamics."[137] For Garland, then, analyses of texts and programmes can only provide evidence for an ideal type – a weakness that cannot provide any evidence for how the social field operates as a whole, the effects that are occurring on the ground, and the political contestations over how discourses emerge.[138] Yet, Garland does not dismiss such analyses, arguing instead that much turns on just what one is seeking to investigate, so that the study of rationalities of government or how government is articulated, needs no additional insight if one is seeking to study the systems of thought themselves.[139] This provides an external position for reading legal materials, I suggest, that has often been absent in what is generally thought of as

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[135]"Why Must Legal Ideas be Interpreted Sociologically?", *supra* note 133.

[136]See "Representations are Social Facts', *supra* note 114; "Why Must Legal Ideas be Interpreted Sociologically?", *supra* note 133. Even within the professional field of law, a study of texts can itself provide insight into the mechanisms of authority that operate to privilege some knowledges, conceptions, and values over others. As Pierre Bourdieu argues in analogizing to the study of religion, "it is just as mistaken to impute practices to the effect of liturgy or dogma ... as to neglect that effect by imputing such practices entirely to personal inclinations, neglecting thereby the specific efficacy of the body of clerics." In drawing on Bourdieu in this way, I emphasize legal constructions of the concept of "community" across three legal sites – constructions which, though epistemologically hybrid, thereby gain the authority of the state and can confer symbolic capital onto a specific vision of community, despite its contestation elsewhere. See Bourdieu, *supra* note 1.

[137]D. Garland, "'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology" (1997) 1 Theoretical Criminology 173 at 200.

[138]*Ibid.* at 200-205.

[139]*Ibid.* at 199-200.

empirical research in law and society – to understand how law conceives of the concept of community, I agree with Garland, provides little (if any) insight into how this same concept is negotiated in everyday life. Similarly, to understand how "community" functions within legal decision-making cannot tell us the effects, intended or unintended, of such decisions – such as whether community notification of sex offenders, for instance, really builds community. Within a study of law, however, taking an external approach to legal materials provides room for an analytic strategy that conceives of law itself as the object of study, while refraining from being captured by the internal logic of the legal decisions themselves. Except in one of the three case studies, in which I examine the testimony of neighbourhood residents in Chicago, I am not seeking to make claims about how the programmes themselves operate on the ground, but instead on how they operate within law and legal discourse, and the truths that are thereby generated, contested, and authorized within legal sites themselves.

In developing this approach, then, I do not argue in favour of a particular legal concept of community, as Roger Cotterrell does in calling for increased normative plurality within legal frameworks;[140] nor do I provide a consistent analysis of how the concept of "community" is invoked in everyday experience with the law (though I do engage in this work while discussing Chicago's Gang Congregation Ordinance), a remarkable task that has been undertaken by others writing in the "law in action" tradition.[141] Furthermore, I am not seeking to define the "community" to, or of which, law speaks,[142] the ways in which something akin to the "community" is reshaped in relation to the state,[143] or the "community" that can be saved through programmatic legal reform.[144] Instead, I am interested in focusing on the truths of law that are, as an empirical matter, made in the name of community, and the truths of community that are similarly made in the process. As Bourdieu states in the quotation that opens this

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[140]"A Legal Concept of Community", *supra* note 20.

[141]*Three American Towns*, *supra* note 20.

[142]"Community in Legal Theory", *supra* note 20.

[143]B. de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism" in R. Abel, ed., *The Politics of Informal Justice*, vol. 2 (New York: Academic Press, 1982) 249.

[144]R.M. Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996) at 148-163.

Introduction, legal representations themselves carry official (state) weight, and my emphasis is on these very representations, and the avenues they open up for legal claims about community, crime, and efforts to promote order – and how these are similarly bound up in the fragmented production of "law" itself.[145]

V. Overview of the Chapters

In emphasizing legal sites, I draw on the three clusters of crime control that I specified earlier in this Introduction. The first case study, in chapter two of this dissertation, focuses on the community notification of sex offenders in New Jersey – commonly known as "Megan's Law" – and links the constitution of community in this legal site with conceptions of risk and risk management. The unique interplay between "community" and "risk" in this context works to operationalize the preventive state in a unique way. Through particular uses of legal doctrine, the preventive state is called into being, while shielded from political criticism (having discharged its duty by alerting the 'community' to the 'risk') and legal accountability (with any results being blamed on private individuals who are not acting on the information provided). These moves, as I analyse in this case study, are premised on a set of assumptions regarding the nature and functioning of community life, concepts of risk and prudentialism, and an invocation of 'common sense' that provides a guiding orientation for both community and risk. And these moves, in turn, refigure public and private responsibilities for crime and its control – reflecting a changing role for both the state and for individual communities, and a changing conception of who ought to be responsible for managing and preventing crime.

The second case study, in chapter three of this dissertation, focuses on a gang loitering ordinance adopted as a community policing measure by the City of Chicago in 1992. This chapter links up the constitution of community with the concept of "harm," and provides a sociolegal history of that development, from the testimony of residents up to the US Supreme Court. In so doing, I demonstrate how "community" takes on different roles throughout the sociolegal history of the Chicago ordinance: as the initial locus of the harm to be defined, as both the victim of law's failures and the source of law's grandeur, as the conceptual territory to be

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[145]See "Governed by Law?", *supra* note 21; A. Hunt & G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Chicago: Pluto, 1994) at 39-58.

policed and the space of neoliberal subjects who can effect their own policing in cooperation with the state, and as the source of expertise on harm and policing. When brought together with the rationalities of community harm that are invoked by state authorities – be they the directives of police officers or the decision of the US Supreme Court declaring the ordinance unconstitutional – I suggest that governing crime through community provides for an unstable technology of government, but one which raises implications for how authorities conceive of ensuring the public welfare within shifting paradigms of governance.

The third case study, in chapter four of this dissertation, focuses on the proliferation of gated communities. Focusing on law's vision, or gaze, this chapter finds that in contrast to the privatopia literature that imparts a coherent logic to gated communities, and which often finds legal authorities complicit in developing neoliberal forms of community that gated communities have come to instantiate, this vision is in fact strongly resisted by the courts. By relying on literature that highlights the social construction of space and the built environment, I isolate the decisions that deal with the borders of gated communities from other cases involving private residential forms – and finds that, in contrast to what is suggested by the literature, courts dealing with the boundaries of gated communities are suspicious of the localism that these developments assert. While I do not suggest that this yields a law of gated communities, my attention is on the representations of gated communities that courts locate within law's gaze, and the discursive ways in which the borders of these communities are invoked, contested, and negotiated within the case law.

The final chapter concludes by returning to the concept of community as it is invoked in these case studies, and the arguments regarding advanced liberalism and the preventive state that are canvassed in this introduction. Drawing on research in science studies, I rely on documented processes of translation in that field to trace the ways in which "community" is rendered governmental in each of this dissertation's case studies, and the differential effects that are thereby generated in each of these legal sites. In so doing, I argue that asking *how* legal governance is effected, in specific, empirically documented instances, can provide evidence for understanding the relationship of law to broader social events (in this case, the reliance on the concept of "community" in responding to crime), while further providing evidence for the ways in which both law and its authoritative claims are produced. This evidence presents greater

hybridity within legal sites than recent commentary suggests, while further providing the basis for developing more nuanced accounts of how "community"-centred efforts to manage crime operate in these three legal sites – thereby providing evidence about the development of legal doctrine when faced with advanced liberal strategies, as well as evidence for the potential stability of any "preventive state."

Chapter Two

The Mutuality of Risk and Community: Community Notification, Punishment, and the Public/Private Divide

> Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it ... But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good ... The fundamental contradiction – that relations with others are both necessary to and incompatible with our freedom – is not only intense. It is also pervasive (Kennedy, 1979).[1]

> [I]n the transition from class to risk society, the *quality of community* begins to change ... Basically, one is no longer concerned with attaining something 'good', but rather with *preventing* the worst ... The dream of the class society is that everyone wants and ought to have a *share* of the pie. The utopia of the risk society is that everyone should be *spared* from poisoning . The *commonality of anxiety* takes the place of the commonality of need ... [marking] in this sense a social epoch in which *solidarity from anxiety* arises and becomes a political force .... (Beck, 1992).[2]

I. Introduction

In this chapter, I focus on the rise of community notification statutes in the US, commonly known as Megan's Law. Among other measures, these statutes authorize, and at times mandate, the public dissemination of the identity of convicted sex offenders found to present a moderate to high risk of recidivism, though the degree of information and the scope of dissemination differ by state. Those subject to notification are not only those who commit their crime subsequent to the implementation of these statutes, but may include past offenders who have already been released, and whose neighbours may now be informed of both their presence and their past offenses.[3]

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[1]D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo Law Review 205 at 212-213 [hereinafter "The Structure of Blackstone's Commentaries"].

[2]U. Beck, *Risk Society: Towards a New Modernity*, trans. M. Ritter (London: Sage, 1992) at 49 (emphasis in original) [hereinafter *Risk Society*].

[3]E.R. Walsh, F. Cohen & B.M. Flaherty, *Sex Offender Registration and Community Notification: A "Megan's Law" Sourcebook* (Kingston, NJ: Civic Research Institute, 1998) [hereinafter *Megan's Law Sourcebook*]; P. Finn, *Sex Offender Community Notification* (Washington, D.C.: National Institute of Justice, Research in Action, 1997) [hereinafter *Sex Offender Community Notification*].

While past efforts to deal with sex offenders, especially those that defined sexual offending as a psychopathy,[4] often involved attempts to reintegrate the sex offender into society after being treated by experts, community notification works instead on identifying and classifying offenders' risk profiles – not in order to treat offenders or to condemn them, but as a regulatory strategy designed to manage offenders and make crime a tolerable fact of everyday life.[5] In so doing, confronting individual dangerousness has been replaced by the prediction and management of risk factors. Whereas Castel argues that this shift to risk entails a move away from the individual and toward collections of factors and correlations,[6] Rose goes further by demonstrating that this "risk thinking" opens a space for different forms of community involvement, and different relationships between the individual pathological person, the

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[4]There was, of course, disagreement over whether sexual offending should be understood as a mental illness. There was also a great deal of resistance to the sexual psychopathy laws, especially among criminologists and legal scholars. Classic analyses of these were developed by Edwin Sutherland: see E. Sutherland, "The Diffusion of Sexual Psychopath Laws" (1950) 56 American Journal of Sociology 142 [hereinafter "Diffusion of Sexual Psychopath Laws"]; E. Sutherland, "The Sexual Psychopath Laws" (1950) 40 Journal of Criminal Law & Criminology 543 [hereinafter "Sexual Psychopath Laws"]. See also N. Morris, *Madness and the Criminal Law* (Chicago: University of Chicago Press, 1984) at 135 (describing the passage of these laws "like a rash of injustice across the United States").

[5]Interestingly, the 1990s also saw a great deal of interest in chemical castration. In many ways, chemical castration reaffirms our faith in rehabilitation, but a faith that is grounded in "hard science" rather than in therapy. Chemical castration suggests that, if individuals can be reformed, it is by acting on their actual bodies, rather than on their "souls." This is not only the case with sex offenders – for instance, jobs for parolees have been replaced with monitoring devices that control their physical movement, rather than influence their social mobility. Interestingly, though, the American Psychiatric Association has taken a stance against chemical castration, on both scientific and normative grounds, stating that these practices "are objectionable because they are not based on adequate diagnostic and treatment considerations," and that they "improperly link medical treatment with punishment and social control." See "APA Opposes Civil Commitment of Sex Offenders After Prison" *Psychiatric News* (21 August 1998), online: Psychiatric News <http://www.psych.org/pnews/98-08-21/civil.html> (last accessed: 19 October 2002). On making crime a tolerable aspect of everyday life, see D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) [hereinafter *Culture of Control*] and M.M. Feeley & J. Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and its Implications" (1992) 30 Criminology 449 [hereinafter "New Penology"].

[6]R. Castel, "From "Dangerousness" to Risk"in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault* (Chicago: University of Chicago Press, 1991) 281 at 288: "To intervene no longer means, or at least not to begin with, taking as one's target a given individual, in order to correct, punish or care for him or her ... There is, in fact, no longer a relation of immediacy with a subject *because there is no longer a subject*. What the new preventive policies primarily address is no longer individuals but factors, statistical correlations of heterogeneous elements ... To be suspected, it is no longer necessary to manifest symptoms of dangerousness or abnormality, it is enough to display whatever characteristics the specialists responsible for the definition of preventive policy have constituted as risk factors." (at 288).

community, and mental health professionals.[7] The subsequent reconfiguration of relationships and responsibilities that result may then have implications beyond the narrower realms of psychiatry and mental health:

> Madness comes to be emblematic of the threat posed to 'the community' by a permanently marginal, excluded, outcast and largely unreformable sector who require enduring management. All zones of potential interpretation with these dangerous sectors might come into contact with, and prey upon, the innocent public are felt to be zones of risk – the shopping mall, the car park, the railway station, the street ... In this new configuration, not merely those with mental health problems, not only psychiatric professionals, but everyday life itself is 'governed through madness.'[8]

In this chapter, I concentrate on the ways in which this 'risk thinking' has been taken up by courts in the adjudication of Megan's Law. Although Megan's Law is the subject of ongoing academic analysis, this has rarely contemplated the specific strategies, technologies, and conceptual vocabularies that are mobilized and drawn upon in notifying communities of an offender's presence.[9] Rather, work in this area focuses on legalistic questions regarding offenders' rights, premised on an initial determination of whether public notification constitutes punishment for the purposes of constitutional analysis, rather than a non-punitive, or regulatory, measure to manage the risk of reoffense. This is, of course, an important distinction in legal doctrine: while the US Constitution places a number of limits on state punishment, far fewer limits exist when the state is not acting punitively, but is rather seeking to regulate, or manage, a social problem.[10] It remains surprising, though, that there has been little attempt to grapple with the broader sociolegal implications of Megan's Law. This is especially so since the regulatory

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[7]N. Rose, "Governing Risky Individuals: The Role of Psychiatry in New Regimes of Control" (1998) 5 Psychiatry, Psychology and Law 177 [hereinafter "Governing Risky Individuals"].

[8]*Ibid.* at 192. This is not a theoretical point. Mike Davis, for one, provides a vivid example of the impact this logic of community and risk can have on everyday life, describing the City of San Dimas' "child-molestation exclusion zone," and pointing to the city's efforts to "I.D. and fingerprint our kids for safety," with a warning to keep "hands off our kids." See M. Davis, *Ecology of Fear: Los Angeles and the Imagination of Disaster* (New York: Vintage, 1999) at 386-388.

[9]But see R. Levi, "The Mutuality of Risk and Community: The Adjudication of Community Notification Statutes" (2000) 29 Economy & Society 578. See also B.J. Telpner, "Constructing Safe Communities: Megan's Law and the Purposes of Punishment" (1997) 85 Georgetown Law Journal 2039.

[10]C.S. Steiker, "Foreword: The Limits of the Preventive State" (1998) 88 Journal of Criminology Law & Criminology 771 [hereinafter "Preventive State"].

emphasis on risk management that it deploys shifts the legal debate away from a question of individual rights, focusing instead on how the community ought to govern and be governed, and thereby challenging classically liberal models of criminal law. This is demonstrated in the following passages, drawn from the constitutional litigation of Megan's Law in New Jersey:

> [T]here can be no doubt that the Legislature acted with the purpose to address a present, serious public safety problem, not to punish past offenders. It is clear that protection of the public is a legitimate, non-punitive purpose. 'There is no doubt that preventing danger to the community is a legitimate regulatory goal.' The Legislature's decision to provide the public with pertinent risk information serves the legitimate regulatory goal of protecting the public. And, as [past cases] require, community notification under Megan's Law is rationally related to the legitimate, non-punitive purpose – i.e., the unpleasant consequences must come about as a relevant incident to a regulation of a present problem.[11]

> The Registration and Notification Laws ... do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not to be punished further. They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself ...[T]he characteristics of some of [these offenders], and the statistical information concerning them, make it clear that despite [any integration into their communities], reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.[12]

This shift toward regulatory measures and risk management is a classic example of what Steiker calls 'the preventive state' in discussing shifts in criminal law. Rather than purporting to deal with an offender's past wrongdoing through a penal state sanction, the power of the state (and, as we will see, the power of civil society as well) is said to be deployed preventively, to anticipate future conduct rather than exact sanctions for past events.[13] This move away from the language of punishment, drawing heavily for its *episteme* on languages of risk, management, knowledge, and common sense – representing a mix of expert and non-expert rationalities – has

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[11]Brief of the Attorney General of New Jersey in *W.P.* v. *Verniero*, No. 96-5416 (filed 26 August 1996) at 25 [emphasis in original, citations omitted] [hereinafter *Brief of the Attorney General of New Jersey (filed 26 August 1996)*].

[12]*Doe* v. *Poritz*, 662 A. 2d 367 at 372-373 (N.J. Sup. Ct. 1995) [hereinafter *Doe* v. *Poritz (New Jersey Supreme Court)*]. Denise Reaume has pointed out to me the irony of this quote. It is, in fact, the very risk of reoffense posed because of integration that is being responded to with Megan's Law, and to suggest that offenders pose a risk despite such integration seems inconsistent in this context.

[13]"Preventive State", *supra* note 10.

developed into a strategy for advanced liberal governance in the area of criminal law.[14] In recent years, courts have found pre-trial detention, prophylactic searches and seizures (frisks), civil commitment of sexually violent predators, drug-testing, and a host of other measures to be regulatory, and thereby not subject to constitutional limits on punitive sanctions.[15] Of course, Steiker is not the first to notice this shift in criminal justice, a process through which much of the 'new penology' is operationalized, a process which some refer to in describing post-disciplinary forms of governance, and which for some others represents a covert widening of a social control net.[16] The proliferation of this *techne* of government[17] in legal doctrine, though, is perhaps best outlined by Steiker – who not only locates these measures as part of a burgeoning preventive paradigm, but also identifies a general unease in grappling with whether preventive measures can constitute punishment, which she implies is further related to a deep-seated difficulty in negotiating the limits of state conduct.[18]

As such, the doctrinal move toward interpreting such measures as regulatory, rather than punitive, represents an important shift in rationalities and logics of criminal law regulation. Yet,

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[14]On *epistemes* of government, see M. Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999) at 31-32, where he refers to "the forms of knowledge that arise from and inform the activity of governing" (at 31), and asks "what forms of thought, knowledge, expertise, strategies, means of calculation, or rationality are employed in practices of governing?" (at 31) [hereinafter *Governmentality*].

[15]On pre-trial detention, see *United States* v. *Salerno*, 481 U.S. 739 (1987); *Schall* v. *Martin*, 467 U.S. 253 (1984). On frisks, see *Michigan* v. *Long*, 463 U.S. 1032 (1988); *Maryland* v. *Blue*, 494 U.S. 325 (1990). On civil commitment, see *Kansas* v. *Hendricks*, 521 U.S. 346 (1997) [hereinafter *Hendricks*]. On urinalysis drug testing, see *Chandler* v. *Miller*, 520 U.S. 305 (1997). For a review of these issues in light of the preventive state, see "Preventive State", *supra* note 10.

[16]"New Penology", *supra* note 5; R. Greenspan, "Criminal Due Process in the Administrative State" (1994) 14 Studies in Law, Politics and Society 169; J.C. Coffee Jr., "Paradigms Lost: the Blurring of the Criminal and Civil Law Models – And What Can be Done About it" (1992) 101 Yale Law Journal 1875; J. Hall, "Interrelations of Criminal Law and Torts" (1943) 43 Columbia Law Review 753; S.H. Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 University of Chicago Law Review 423; P.H. Robinson, "The Criminal-Civil Distinction and the Utility of Desert" (1996) Boston University Law Review 201; P.H. Robinson, "Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders" (1993) 83 Journal of Criminal Law & Criminology 693; S. Cohen, *Visions of Social Control: Crime, Punishment and Classification* (New York: Blackwell, 1985).

[17]On *techne* of government, see Dean's questions regarding the implementation of any particular strategy. As he asks, "by what means, mechanisms, procedures, instruments, tactics, techniques, technologies and vocabularies is authority constituted and rule accomplished?": *Governmentality*, *supra* note 14 at 31.

[18]C.S. Steiker, "Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 Georgetown Law Journal 775.

while Steiker's concern is straightforwardly with the constitutional and policy limits there may be on the non-punitive 'preventive' state, there is work to be done in understanding the implication of law in this area outside of the constitutional questions that she raises. In articulating the scope and limits of the preventive state, I instead seek to engage in an exercise that identifies how the preventive state operates in law. This study of the architecture[19] of conceptual techniques most centrally responds to Steiker's concerns, since it allows us to recognize the "connections among the various policies of the preventive state"[20] by linking (and articulating) the conceptual tools they deploy. How, in short, is the preventive state constituted by courts? And how have advanced liberal conceptions of governance been articulated and invoked in this adjudication?

It is important to note that I am not interested in asking why Megan's Law has come into being, nor in posing normative questions regarding its legitimacy. I am interested, rather, in asking how courts have constructed arguments regarding community notification, and how key concepts have been deployed, implicitly or explicitly, in achieving this governance.[21] In the context of Megan's Law, I argue that the more general "risk thinking" identified by Rose and Castel is brought together with specific conceptions of "community" in developing community notification. Although a classic theme in criminal law, defining risk is itself fraught with difficulty, particularly when trying to distinguish risk from general uncertainty.[22] But where, precisely, does this space of "community" lie in this adjudication – is it the zone of private individual interactions, shielded from the state, or is it a space through which the state governs, through which the state designs political programmes to harness the strength of individual,

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[19]See also L. Lessig, "The New Chicago School" (1998) 27 Journal of Legal Studies 661.

[20]"Preventive State", *supra* note 10 at 779.

[21]The priority of asking "how questions" is the hallmark of a Foucauldian approach to studying governance. For more, see *Governmentality*, *supra* note 14 at 20-29 and N. Rose, *Powers of Freedom: Reframing Political Thought* (New York: Cambridge University Press, 1999) [hereinafter *Powers of Freedom*].

[22]In his classic text, Frank Knight posits an important difference between "risk" and simple "uncertainty," suggesting that risk involves "knowing the odds" even if you don't know what will happen while uncertainty exists when the odds themselves remain unknown. See F.H. Knight, *Risk, Uncertainty and Profit* (London: London School of Economics and Political Science, 1948).

localized communities?[23] Is the community a site through which individuals mobilize themselves in novel, location-specific, ways? Ontologically, courts that have passed judgement on Megan's Law have avoided problematizing the concept of community, offering it instead as a 'solution' to doctrinal questions about punishment. Of course, as Kelman states, this manner of invoking contested concepts – such as "risk" and "community" – is not particular to this area of law:

> Legal discourse, then, need not bring out underlying policy or philosophical dilemmas; it may well suppress their presence through unconscious manipulation of material that allows us to believe that we are 'solving' a case by applying settled or noncontroversial decision norms to 'facts' that are found without reference either to norms or to a subconscious urge to avoid thorny issues.[24]

The simultaneous reliance on conceptions of "community" and "risk," I argue, reveals a tension running through the case law that has gone largely unnoticed. I suggest that this practice of the preventive state is operationalized through various invocations of the public-private divide. Deployed simultaneously, then, conceptions of community and risk have structured what is deemed "public" and what is deemed "private," along with the implicit normative judgements relating to public and private power. And in debating the constitutionality of the legislation, state and federal courts have in effect been grappling with the nature and limits of non-state power, and the difficulties in reconciling non-regulation of the private sphere derived from a model that focusses on state coercion (ie. a laissez-faire approach to 'private' relations) with a model that also purports to emphasize the protection of individual rights over collective ends (eg. to what extent can individual rights be put in jeopardy by non-state actors).[25] As such, while the cases

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[23]Nikolas Rose has referred to the latter as "governing through community." See *Powers of Freedom*, *supra* note 21 at 167-196.

[24]M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987) at 289 [emphasis in original]. See also M. Kelman, "Interpretive Construction in the Substantive Criminal Law" (1981) 33 Stanford Law Review 591.

[25]All of public law is, in varying degrees, reflective of this tension. "Community," as a result, has become a focal point of many attempts to reconcile individual liberties with 'collective' moralities. See e.g. R.M. Dworkin, "Liberal Community" (1989) 77 Calif. Law Review 479; P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992); M.J. Mossman, "Individualism and Community: Family as a Mediating Concept" in A.C. Hutchinson & L.J.M. Green, eds., *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) 205. Perhaps more indirectly, see F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harvard Law Review 1497 [hereinafter "Family and the Market"].

are formally set up as a debate over the proper legal test to employ in determining whether community notification constitutes punishment, I argue that these analyses are premised on a wider and more pervasive debate about the public/private divide, the nature of power, and law's limits in recognizing that the power to coerce/punish may exist outside the realm of the state.[26]

My task in this chapter is to draw this line out of the cases, demonstrating the ways in which concepts of "community" and of "risk" function within legal analyses of community notification. Certain ways of deploying community and risk make it possible to say things about the relative autonomy of the "public" and "private" spheres, about the relationship of an individual to the larger "community," and about the legality of preventive practices; this draws our attention to how ideas of "community" and of "risk," when deployed contemporaneously, have helped generate shifts in our expectations and assumptions of the state's role in providing security (and in our own roles in that regard); and provides evidence for how ideas such as "community" and "risk" are relied upon as authority for legal decisions. This focuses on what Nikolas Rose calls an "intellectual technology" that establishes an ethical basis for actions and decisions, despite the multivocality that terms such as community and risk necessarily imply.[27] As such, this chapter is designed to better understand the bases for the Megan's Law decisions while also developing a keener understanding of how broader social changes (ie. ongoing shifts in the governance of security) are translated into legal discourse,[28] authorized through the deployment of concepts in particular ways, with particular normative truths attached to them.

I focus, then, on distilling the conceptual mechanisms relied on by one aspect of this preventive state, namely the practice of community notification in Megan's Law, and the logics of public and private these mechanisms engage. In ascribing roles for public and private, this preventive state focuses on risk management, but does so in a way that governs communities as participating in the management of these risks, and not relying on the state for any particular

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[26]In this way, I argue that the adjudication of community notification statutes relies heavily on both a teleological and a technological separation of public from private, and a reconfiguration of those roles.

[27]For this idea of authority, see *Powers of Freedom*, *supra* note 21 at 27: "To govern, one could say, is to be condemned to seek an authority for one's authority."

[28]Schlag has also taken up this idea of translation in referring to the ways in which law reduced "incommensurabilities" by requiring the use of legal idioms to keep claims within predefined limits: P. Schlag, *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) at 30-31.

form of statistical or medical expertise.[29] As I will demonstrate, this public/private binary draws instead on interpretations of community and risk – which, in turn, invoke a logic of 'common sense' that provides both a rhetorical and operationalizing force. This reliance on common sense is a theme that Mariana Valverde and I have elsewhere explored in the context of liquor licensing, discussing the ways in which common sense knowledges implement a responsibilization of licensees and their employees.[30] In the present chapter, I continue to explore this link between common sense and responsibilization, focusing on the ways in which the legal adjudication of Megan's Law constitutes communities with much of the burden for the risk management of sex offenders and the prevention of sex offenses. On one level, this prevalence of "common sense" solutions provides evidence for Simon Cole's argument that we are witnessing a "decreasing relevance of psychiatric expertise" in responding to sex crimes, since everyone already "knows" that sex offenders are "sick."[31] I expand on Cole's point, though, to further argue that this form of responsibilization thereby relieves the state of both moral and legal accountability – not only with respect to preventing reoffense,[32] but also with respect to any claims resulting from harms that an offender may later experience. Finally, this governance is sought without making the state irrelevant: without forsaking its conventional monopoly on punishment, and without making the community so independent, or risk so

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[29]A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (New York: Oxford University Press, 1999) [hereinafter *Local Governance of Crime*]; P. O'Malley, "Risk and Responsibility" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 189 [hereinafter "Risk and Responsibility"].

[30]R. Levi & M. Valverde, "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness" (2001) 26 Law & Social Inquiry 819.

[31]S.A. Cole, "From the Sexual Psychopath Statute to "Megan's Law": Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949-1999" (2000) 55 Journal of the History of Medicine and Allied Sciences 292 at 312 [hereinafter "From the Sexual Psychopath Statute to Megan's Law"]. Of course, expertise alone does not preclude normative decisions regarding what constitutes being "sick": see R. Goodman, "The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary 'Medical' Intervention" (1995) 105 Yale Law Journal 255 (noting, for instance, Russian "medico-labor prophylactic colonies," which require severe psychiatric treatment for suspected chronic alcoholics and drug addicts).

[32]J. Simon, "Managing the Monstrous: Sex Offenders and the New Penology" (1998) 4 Psychology, Public Policy and Law 452 [hereinafter "Managing the Monstrous"].

common-sensical, as to not require some state involvement.[33] In other words, this is an analysis of how 'community' and 'risk' have become governmental, and how ideas of community and risk have been relied upon as authority for legal decisions in the preventive state.

II. Public and Private

The public/private distinction is not simply a legal fiction. It is a distinction rooted, rather, in classical liberal thought, in which the state's coercive power is suspect, and in which the role of the state is to protect the relations that are freely entered into by private parties.[34] The distinction, then, is designed to protect the autonomy of certain relations, said to be in the "private" sphere since they are characterized by individual "choice," as against intrusion by the state; at the same time, it implies that the private sphere is separable from the public (that the State is not implicated in all relations), that the intrusion of the public sphere into private areas is to be avoided, that the autonomy of the private sphere is to be protected, and that the existing structure and relations in the private sphere are natural, and apolitical.

The division between the public and the private has since become a central feature of modern legal thought. Blackstone's commentaries, with their rigid division of public from private, is a paradigmatic example of this focus on classification. The ordering of knowledge is, of course, always contestable; contrary to what the structure of Blackstone's commentaries implies, our experiences of what are "public" and "private" are not phenomenologically occurring, but are instead the product of specific regulatory processes, and of prevailing *epistemes*. For instance, Morton Horwitz highlights how, with 16th century taxation being conceived of as a private gift from the taxpayer that is consensually arranged through Parliament (and not as a sum exacted by the State), taxation was not historically conceived of as a matter of public law.[35] From a legal perspective, the 19th century saw the enshrining of rigid legal distinctions between the public and the private, with courts focused on shielding private contractual relations from state intrusion

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[33]D. Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society" (1996) 36 British Journal of Criminology 445 [hereinafter "Limits of the Sovereign State"].

[34]See W.W. Fisher III, M.J. Horwitz & T.A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993) at 98-99.

[35]M. Horwitz, "The History of the Public/Private Distinction" (1982) 130 University of Pennsylvania Law Review 1423 at 1423-1424 [hereinafter "History of the Public/Private Distinction"].

– with *Lochner* v. *New York*'s 'protection' of the right of bakery workers to contract for lengthy work weeks (over 60 hours) being the most infamous of such efforts. The interaction between public and private is not, however, easily summed up. The private is, in a sense, privileged in this dynamic, since its autonomy is said to be beyond the state. This private sphere is associated with conscience, with family, and with emotion. In contrast, the public sphere lacks these qualities, and often generates hostility as a result – yet, associated with the sphere of economic relations, and thereby feared/revered at some level, the public attracts respect, it being the sphere of progress and of modernity, and is thereby privileged in other ways.[36]

Attacking the public/private divide has been a favoured tool for legal critics throughout most of the twentieth century. Legal realists, critical legal scholars, feminist scholars, critical race theorists, Foucauldian scholars, and even conventional constitutional and administrative law scholars have joined this assault.[37] While the malignant effects of privileging the public over the private, and of respecting the "autonomy" of the private sphere, are often associated with the work of feminist scholars,[38] the same fundamental point motivates all these critiques. The legal system, by deploying a distinction between what is "public" and what is "private," is engaged in political choices, yet the language deployed "mystifies these processes."[39] As Karl Klare puts

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[36]For collections that cover a broad amount of ground, see M. Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) [hereinafter *Public and Private: Feminist Legal Debates*], and see J. Weintraub & K. Kumar, eds., *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago: University of Chicago Press, 1997) [hereinafter *Public and Private in Thought and Practice*].

[37]Some of the most insightful work in this area includes: R. Gavison, "Feminism and the Public/Private Distinction" (1992) 46 Stanford Law Review 1 [hereinafter "Feminism and the Public/Private Distinction]; "Family and the Market", *supra* note 25; L.L. Jaffe, "Law Making by Private Groups" (1937) 51 Harvard Law Review 201; G. Frug, "The City as a Legal Concept" (1980) 93 Harvard Law Review 1057; "The Structure of Blackstone's Commentaries", *supra* note 1; D. Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 University of Pennsylvania Law Review 1349; K. Klare, "The Public/Private Distinction in Labor Law" (1982) 130 University of Pennsylvania Law Review 1358 [hereinafter "Public/Private Distinction in Labor Law"]; "History of the Public/Private Distinction", *supra* note 35; N. Rose, "Beyond the Public/Private Division: Law, Power, and the Family" (1987) 14 Journal of Law & Society 61 [hereinafter "Beyond the Public/Private Division"]; N. Lacey, "Theory Into Practice? Pornography and the Public/Private Dichotomy" (1993) 20 Journal of Law & Society 355.

[38]For instance, that the "personal is political," that female subjectivity is unrecognized publicly or privately (see N. Naffine, "Sexing the Subject (of Law)" in *Public and Private: Feminist Legal Debates*, *supra* note 36, 18 or Catharine MacKinnon's argument that feminism has had to explode the private to demonstrate that women do not actually enjoy a meaningful private sphere (C.A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press) at 191).

[39]"Beyond the Public/Private Division", *supra* note 37 at 65.

it:

> [I]t is seriously mistaken to imagine that legal discourse or liberal political theory contains a core conception of the public/private distinction capable of being filled with determinate content or applied in a determinate manner to concrete cases. *There is no 'public/private distinction.'* What does exist is a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement. The law contains a set of imageries and metaphors, more or less coherent, more or less prone to conscious manipulation, designed to organize judicial thinking according to recurrent, value-laden patterns. The public/private distinction poses as an analytical tool ... but it functions more as a form of political rhetoric to justify particular results.[40]

These criticisms have been extremely persuasive. Few scholars would now contest that courts make distinctions based on whether they construe an activity as public or as private, and that some doctrines, such as the "state action" doctrine, are designed to redefine those cases that are more easily perceived to be at the margin. Yet, some argue that it is simply the content of what is "public/private," rather than the dichotomy itself, that is troubling. These include arguments, for instance, in favour of reproductive choice on the grounds of privacy, while arguing that conventionally private spheres need to be thought of as "public," thereby demanding state intervention.[41] Although this may weaken the progressive critique of the public/private distinction somewhat, this is only the case if one conflates legal critique with legal strategy – a move that is commonly made to defeat progressive critiques that have a reformist component.

One unfortunate result of the success of the critique is that the exposition of the public/private divide has become somewhat dulled in academic research. Yet, we now need more empirical verification of the use of the public/private divide in legal analyses; that past research has suggested that the distinction is indeterminate is simply an invitation to further research, and not the end of all inquiry.[42] And, rather than focus on demonstrating the incoherency of the public/private distinction, I focus instead on what invoking the public/private distinction makes

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[40]"Public/Private Distinction in Labor Law", *supra* note 37 at 1361 [emphasis in original].

[41]"Feminism and the Public/Private Distinction, *supra* note 37.

[42]On this point, see D. Kennedy *A Critique of Adjudication: (fin de siècle)* (Cambridge, MA: Harvard University Press, 1997) at 276, where he criticizes the idea that a critique is ever-lasting: "In the latter days of cls, postmodernist crits sometime thought they knew, without ever reading a judicial opinion, that 'law' just 'had to be' indeterminate, because deconstruction had 'proved' that all texts are indeterminate."

possible, or motivates[43] – what visions of community and of risk are engaged in (re-) creating that distinction, and what forms of power are thereby opened up.[44] In the context of Megan's Law, the adjudication of community notification statutes relies on multiple images of the community, contests that are inextricably linked to the delineation of what is private from what is public. As Susan Boyd states:

> Attention is also directed in recent literature to the contradictory role of 'community' in the construction of the public/private divide. Sometimes community is considered private *vis-à-vis* the state [such as when a neoliberal government] expects that community groups will assume responsibility for functions that previously were handled by the state ... 'Community' can, on the other hand, take on a public inflection as, for example, when progressive groups call for more community-based input and responsibility for public decisions over resources [though this too may] shift responsibility for social services to the private sphere.[45]

In dealing with Megan's Law cases from this perspective, one particular critique of the public/private divide, Fran Olsen's study of "The Family and the Market," is especially relevant.[46] In her classic essay, Olsen is concerned with the ways in which a "structure of consciousness" has developed that separates the market from the family. Olsen demonstrates that, although both the family and the market are conceived of as "private" areas in which the laissez-faire state should not intervene, the market is perceived as structuring our public lives (despite market exchange being considered fundamentally *private*)[47], and the family as

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[43]J. Weintraub, "The Theory and Politics of the Public/Private Distinction" in *Public and Private in Thought and Practice*, *supra* note 36, 1 at 3 (arguing that these distinctions "are rarely innocent analytical exercises, since they often carry powerful normative implications") [hereinafter "Theory and Politics of the Public/Private Distinction"].

[44]See also "Beyond the Public/Private Division", *supra* note 37. While I agree that critique of the public/private division "is hamstrung by the analytic strategy it uses" (at 66), I don't conclude that "in many cases, analysis of law is the wrong place to start if one wishes to understand regulatory strategies." I seek to understand what work the public/private distinction does, and the tools that are relied upon in giving that distinction bite, and from that perspective law remains a place from which to understand the regulatory strategies of one aspect of government.

[45]S.B. Boyd, "Challenging the Public/Private Divide: An Overview" in S.B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 3 at 15 [hereinafter "Challenging the Public/Private Divide"].

[46]"Family and the Market", *supra* note 25.

[47]See "Theory and Politics of the Public/Private Distinction", *supra* note 43 at 4: "If market exchange is considered a 'private' act – on the grounds of being, in principle, self-interested, nongovernmental, and unconcerned with collective outcomes – then it does not cease to be private when it is carried out 'in public'."

structuring our private lives. Since efforts to reform both the market and the family have simply sought to import ideas from one context to the other, Olsen concludes that a feminist theory of the state cannot develop until the market/family dichotomy is transcended.

As we will see, Olsen's analysis of the ideological roles of the market and the family works extremely well in the context of Megan's Law: where communities are conflated with families as paradigmatically "private"; where neighbourhood residents are conflated with consumers that need to be afforded some protection to ensure their 'equal bargaining power' against individual pariahs; where, outside of the risk posed by individual pariahs, the community is perceived as a safe zone in which the state ought not interfere; and where the state is expected to protect the autonomy of the individual community/family, and as a result is expected not to act directly, but simply provide the education and information required for individuals to make informed choices based on their individual abilities and personal preferences. Yet, rather than draw on Olsen's work to make normative claims regarding the status of the family in the context of public and private, I instead adopt the more Foucauldian approach taken by Jacques Donzelot in *The Policing of Families*.[48] In so doing, my interest in concepts such as "family" or "community" is in how they are taken up to achieve governmental ends in the context of security. With Megan's Law, community, family, market, and risk all come into the mix – which I will discuss in more detail when examining the major decisions on the constitutionality of Megan's Law.

III. Megan's Law

Sex offenders have occupied a central place in criminal justice policy throughout much of the 20th century,[49] a focus that cultural historians link with concerns over masculine identity, the range of acceptable sexual behaviour,[50] the structure of the family and changing economic

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[48]J. Donzelot, *The Policing of Families*, trans. R. Hurley (New York: Pantheon Books, 1979) [hereinafter *Policing of Families*].

[49]See P. Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven: Yale University Press, 1998) [hereinafter *Moral Panic*].

[50]According to several historians, homophobia has played an instrumental role in the sex crimes panics: see *ibid.* at 1-65; E. Freedman, "'Uncontrolled Desires': The Response to the Sexual Psychopath, 1920-1960" (1987) 74 Journal of American History 83 [hereinafter "Uncontrolled Desires"]; J. D'Emilio, "The Homosexual Menace" in K.L. Peiss, C. Simmons & R.A. Padgug, eds., *Passion and Power: Sexuality in History* (Philadelphia: Temple University Press, 1989) 226.

relations, and so on.[51] The 1930s through the 1950s saw the passage of sexual psychopathy laws, designed to treat sex offenders in specialized, professional, hospital settings and then release them into the community;[52] the 1970s saw a focus on sexual offenses within families and in intimate relationships, including child abuse,[53] and a move away from an exclusive focus on stranger rape;[54] and the 1990s witnessed what Allen calls the "decline of the rehabilitative ideal," with a focus on indeterminate criminal sentences, civil commitment, and community notification.[55]

Several tragic stories have fuelled public support of community notification.[56] As Edwin Sutherland classically demonstrated with respect to sexual psychopath laws in the 1940s, these high-profile cases have served as the impetus for the enactment of broad community notification legislation.[57] In the 1990s, this response to high-profile sex cases has taken an added twist, with the names of high-profile victims often being adopted as the titles of the community notification statutes: be it Megan's Law, Zachary's Law, the Amy Jackson Act, the Jacob Wetterling Act, and so on.[58] Some commentators have suggested that this change is more than cosmetic, and that

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[51]"Uncontrolled Desires", *ibid.*; G. Chauncey, "The Postwar Sex Crime Panic" in W. Graebner, ed., *True Stories From the American Past* (New York: McGraw-Hill, 1993) 160.

[52]See R. Lieb, V. Quinsey & L. Berliner, "Sexual Predators and Social Policy" (1998) 23 Crime and Justice: A Review of Research 43 at 65 [hereinafter "Sexual Predators and Social Policy"]. For a more detailed discussion, see *Moral Panic*, *supra* note 49 at 49-93.

[53]For more on "child abuse" in this period, see *Moral Panic*, *ibid.* at 118-144.

[54]See e.g. C. Spohn & J. Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact* (New York: Plenum, 1992).

[55]F.A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981) [hereinafter *Decline of the Rehabilitative Ideal*].

[56]See abstract of paper presented by L. Klein, J. Luxenburg & S. Cleary, "'The Fire Next Door': Megan's Law and the Impact of Media Images on the Formation of Legal Policy" (Society for the Study of Social Problems, 1996).

[57]"Diffusion of Sexual Psychopath Laws", *supra* note 4; "Sexual Psychopath Laws", *supra* note 4. This trend, in fact, began in 1937, with Michigan enacting the first sexual psychopath law at that time: see J. Hagan, *Modern Criminology: Crime,. Criminal Behavior, and its Control* (New York: McGraw-Hill, 1985) at 83.

[58]Jonathan Simon raises the interesting point that, where legislation was once named after the lawmakers (eg. the Sherman Act), they are now named after victims: "Managing the Monstrous", *supra* note 32. The symbolic element of Megan's Law should not be ignored. For more on President Clinton's symbolic crime control policies, see N.E. Marion, "Rethinking Federal Criminal Law: Symbolic Policies in Clinton's Crime Control Agenda" (1997) 1 Buffalo Criminal Law Review 67, and see the review of sex offender databases and community notification in A.R. Kabat, "Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a

these laws exemplify the move away from adopting legislation in the name of the "social," and instead invoke the authority of the individual victim, and of the local community, rather than the (often discredited) state itself.[59] Victims have been thereby invested with the authority traditionally reserved to democratically elected officials, with our very failure to protect these victims itself commanding political authority – part of a more general "governing through crime" described most ably by Jonathan Simon,[60] while also reflective of the increased salience of non-state involvement in managing crime.[61]

Community notification was first instituted by Washington State in 1990, and authorized (but did not mandate) the public release of information regarding sex offenders found to present a high risk of recidivism; prior to passing that Act, law enforcement officials were liable for the potential breach of confidentiality that notification may entail.[62] This legislation was passed in the wake of two high-profile tragedies. In 1988, Gene Kane was close to completing his 13 year sentence for attacking two women, and was placed in a work-release facility in downtown Seattle[63] – after two months, Kane abducted and murdered Diane Ballasiotes, whose mother afterwards became a leading advocate for victims' rights. This was soon followed by a second tragic case. Earl Shriner had a 24 year history of assaults on children, and had murdered a

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Symbol's Sake" (1998) 35 American Criminal Law Review 333 [hereinafter "Scarlet Letter Sex Offender Databases"]. Community notification, aside from being called "symbolic," has also been discounted as "feel good legislation": see eg. R.E. Freeman-Longo, "Feel Good Legislation: Prevention or Calamity" (1996) 20 Child Abuse and Neglect 95 [hereinafter "Feel Good Legislation"].

[59]M. Valverde, R. Levi, C. Shearing, M. Condon & P. O'Malley, *Democracy in Governance: A Socio-Legal Framework* (Ottawa: Law Commission of Canada, 1999) [hereinafter *Democracy in Governance*]. Denise Reaume has further suggested to me that rather than invoking the authority of the victim, such a move can also be understood as deflecting any criticism away from the legislation, by closely identifying the legislation with the victim herself. This insight can further open up interesting inquiries regarding the move away from the state as the legally identified "victim" of crime.

[60]J. Simon, "Governing Through Crime" in L.M. Friedman & G. Fisher, eds., *The Crime Conundrum: Essays on Criminal Justice* (Boulder, CO: Westview, 1997) 171.

[61]With respect to policing, see L. Johnston, *The Rebirth of Private Policing* (New York: Routledge, 1992).

[62]"Sexual Predators and Social Policy", *supra* note 52 at 71-72.

[63]Although he had been incarcerated since 1975, he received no treatment during that time, and the prison psychologist stated that he was not a good candidate for release.

classmate when he was a teenager himself. Following his release after ten years in prison,[64] and while out on bail pending (another) trial on a rape charge, he sexually mutilated a seven-year-old boy in Tacoma.[65] In the wake of this tragedy, a group of citizens – the "Tennis Shoe Brigade" – sent over 15,000 tennis shoes to Washington's governor, as symbols for victimized children.[66] A Task Force was put in place, which held hearings in six communities across Washington State. The upshot of the Task Force recommendations resulted in what a Washington prosecutor refers to as "the Nation's toughest sex offender laws," including a doubling of the length of prison sentences, treatment programs, the first civil commitment regime for sex offenders (since upheld by the US Supreme Court in *Kansas* v. *Hendricks*),[67] sex offender registration, and community notification.[68]

The story of Megan Kanka came not long after. In July 1994, in a middle-class suburb of New Jersey, seven-year-old Megan was raped and strangled to death by a neighbour,[69] Jesse Timmendequas,[70] who had been believed to be a 'quiet and gentle man.'[71] What neighbourhood

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[64]Although he was considered too dangerous to be placed on work release, having told prison officials of his plans to reoffend when he would get out of prison, he was released at the end of his 10-year prison term.

[65]The boy was lured into a wooded area, where Shriner orally and anally raped him, stabbed him, and then cut off his penis. The boy – in shock, covered with blood and mud, and wearing only his sandals – was later found by a school teacher. These facts are from B. Steinbock, "Megan's Law: A Policy Perspective" (Summer-Fall 1995) 14 Criminal Justice Ethics 4; M.L. Earl-Hubbard, "The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s" (1996) 90 Northwestern University Law Review 788 at 794 [hereinafter "Child Sex Offender Registration Laws"].

[66]K. Hudson, "How Outrage Sparked Law to Commit Sex Predators" *The Toronto Star* (13 December 1992) A1.

[67]*Hendricks*, *supra* note 15.

[68]See J. Simon, "Senate Passes a Bill on Sex Offenders" *The Seattle Times* A1 (24 January 1990) A1. Much of this summary is based on N. Maleng, "The Local Responsibility for Control and Prosecution of Sex Offenders: Behind Washington State's History of Landmark Sex Offender Laws" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 81 at 81-84.

[69]A.D. Brooks, "Megan's Law: Constitutionality and Policy" (1996) 15 Criminal Justice Ethics 1 at 1.

[70]Timmendequas brought Megan into his home by promising to show her a new puppy, strangled her with a belt, sexually assaulted her, wrapped her head in a plastic bag, put her in a toy box and cut her shorts into pieces. See G.S. Rafshoon, "Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process" (1995) 44 Emory Law Journal 1633 *n*1. See also additional facts in *New Jersey* v. *Timmendequas*, 737 A. 2d 55 (N.J. Sup. Ct. 1999) [hereinafter *Timmendequas, Supreme Court 1999*].

[71]S. Fields, "We Should Lock Them Up for Life: Megan's Law Doesn't Really Protect Society from Sexual Predators" *The Atlanta Journal* (6 March 1995) A8, as cited in C.M. Kong, "The Neighbors are Watching: Targeting Sexual Predators with Community Notification Laws" (1995) 40 Villanova Law Review 1257 at 1257.

residents didn't seem to know[72] was that Timmendequas was a twice-convicted sex offender, who had recently been released from Avenel, New Jersey's treatment centre for compulsive, repetitive sex offenders, and was living in the neighbourhood along with two other sex offenders.[73] Furthermore, although Timmendequas had refused treatment throughout his stay at Avenel, and although he himself doubted that he could adjust to life outside prison, he was still released early based on his 'good time' credits.[74] Having confessed to the crime, Timmendequas has since been convicted and sentenced to death.[75]

Megan's story became a focus of public, media, and legislative attention, particularly with it coming on the heels of six-year old Amanda Wengert's death, who was also abducted and murdered by a neighbour with a history of prior sexual offenses,[76] and the murder of twelve-year-old Polly Klaas in California.[77] The focus was on 'knowledge' and the public's 'right to know.'[78] Megan's mother, Maureen Kanka, summarized this concern when she stated that 'Had

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[72]R. Siegel, "Megan's Alleged Killer Appears Before Judge: Mercer Prosecutor Can Stay on Case" *The Record* (10 June 1995) A3. While this is the most common summary of the events, there are reports to the contrary as well, with suggestions that neighbours may have known that the three men living in the home were sex offenders, and "[i]t has even been reported that Megan's parents warned her to stay away": see the brief discussion in E. Lotke, "Politics and Irrelevance: Community Notification Statutes" (1997) 10 Federal Sentencing Reporter 64 at 65-66 [hereinafter "Politics and Irrelevance"]. This question has had the unfortunate consequence of diverting attention away from community notification as a policy, and onto the individual actions of individual, victimized, parents. In denying that they had any information that the men were sex offenders, Maureen Kanka demonstrated the difficulties in negotiating parenthood in this context: "I did not know that three sex offenders were living in our neighborhood," Kanka said ... "My husband and I did nothing to cause Megan's death. We are not bad parents," she said tearfully, her husband, Richard, by her side." See D. De La Cruz, "Megan's Parents Assail Report: Kankas Did Not Know of Molester" *The Record* (11 July 1996) A3.

[73]The Adult Diagnostic and Treatment Center (ADTC) opened in Avenel in 1976. Although sex offenders were now viewed as prisoners (and not patients), the ADTC did, for some time, continue a focus on treatment: see "From the Sexual Psychopath Statute to Megan's Law", *supra* note 31 at 302ff.

[74]C. Stile, "In Memory of Megan" *The Trenton Times* (4 October 1994) A1, as cited in "Pursuing Public Protection", *infra* note 82 at 32 *n*12.

[75]J.R. Acker & C. Cerulli, "When Answers Precede Questions: Megan's Laws' Uncertain Policy Consequences" (1998) 34 Criminal Law Bulletin 235 at 235 *n*3 [hereinafter "When Answers Precede Questions"]. For more on Timmendequas, see *Timmendequas, Supreme Court 1999*, *supra* note 70; *New Jersey* v. *Timmendequas*, 773 A. 2d 18 (N.J. Sup. Ct. 2001).

[76]I. Mendez, "Megan's Law: 10 Sex Offender Bills Clear Senate" *The Star-Ledger* (4 October 4 1994) 1, as cited in "Pursuing Public Protection", *infra* note 82 at 33. At 33 *n*18, it is noted that, following Amanda Wengert's death, the New Jersey Legislature enacted several bills to respond to the tragedy.

[77]On the Polly Klaas story ("the murder of America's child"), see *Moral Panic*, *supra* note 49 at 196-197.

[78]Of course, even prior to Megan's Law, public warnings did occur. In 1992, for instance, a District Attorney in New

I known that there were three paedophiles living across the street from my home, I never would have allowed Megan to walk out of the door of my house alone.'[79] "Why," neighbours asked, "had they not been told?"[80] In a single week, 100,000 New Jersey residents signed petitions supporting a community notification law.[81] One such petition demanded:

1. That all residents of a community be vested with the right to know of a convicted child sexual offender's conviction should this sex offender desire to live in and among the community.
2. That a twice convicted child sex offender be automatically subject to a life sentence, in prison, without parole.
3. That a person convicted of murdering and sexually molesting a child be committed to death under the State of New Jersey's death penalty.[82]

At the end of October, 1994, the New Jersey Legislature – having bypassed hearings on prospective bills with the Speaker of the Assembly declaring an emergency[83] – enacted 'Megan's Law,' and the establishment of a registration and mandatory community notification system for convicted sex offenders.[84] This shift from Washington State's discretionary notification to a mandatory system of notification was signed by the Governor of New Jersey

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Jersey warned the public that Donald Chapman, recently released from Avenel, was likely to reoffend. Perhaps most interestingly, though, residents do not appear to have been initially satisfied with being told – rather, they demanded that the State do something to protect them. See "From the Sexual Psychopath Statute to Megan's Law", *supra* note 31 at 305-306.

[79]See D. Privitera, "Life's Work for Megan's Mom: Helping Children Be Aware" *The Record* (19 May 1995) A1.

[80]J. Hoffman, "New Law is Urged on Freed Sex Offenders" *The New York Times* (4 August 1994) B1.

[81]"Politics and Irrelevance", *supra* note 72 at 64.

[82]R.J. Martin, "Pursuing Public Protection through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law" (1996) 6 Boston University Public Interest Law Journal 29 at 33 *n*19 [hereinafter "Pursuing Public Protection"].

[83]I. Mendez, "Sex Crime Package Voted by Assembly" *The Star-Ledger* (30 August 1994) 1. The Speaker of the Assembly stated that bypassing committee debates was based on the wishes of the electorate ("Critics complain that the speedy pace in the Assembly blocks debate and deliberation. But Haytaian [the Speaker of the Assembly] said the step is justified. "The people of this state have spoken. They have said, 'Look, let's get on with it,'" he said."). See M. Ruess, "Megan's Law Moving Fast in Assembly: Crackdown on Sex Offenders" *The Record* (16 August 1994) A1.

[84]*New Jersey Sexual Offender Registration Act*, Pub. L. 1994, Chs. 128, 133 (codified at N.J.S.A. 2C: 7-1 to 7-11).

on October 31, 1994, with Maureen Kanka at her side.[85] Along with the flurry of media attention it received, "Megan's Law" is now included in Webster's College Dictionary, defined as "any of various laws aimed at people convicted of sex-related crimes, requiring community notification of the release of offenders, establishment of a registry of offenders, etc."[86]

Since that time, the US Congress has enacted legislation mandating the public release of information regarding certain sex offenders.[87] The 1994 Jacob Wetterling Act[88] requires states to establish registries for certain classes of sex offenders, or risk losing 10% of federal criminal justice funding if they do not comply.[89] This registration requirement has since been amended through Congress' own "Megan's Law," which requires that "a designated state or local law enforcement agency shall release relevant information that is necessary to protect the public concerning a specific person required to register."[90] At the signing ceremony for the federal Megan's Law, President Clinton hailed that:

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[85]J.F. Sullivan, "Whitman Approves Stringent Restrictions on Sex Criminals" *The New York Times* (1 November 1994) B1.

[86]"Sexual Predators and Social Policy", *supra* note 52 at 72.

[87]Proponents note a range of benefits of community notification statutes. Acker and Cerulli have summarized these stated benefits as: this is information that anyone would want to obtain; this assists law enforcement in apprehending offenders; public awareness helps prevent offenses; notification is a public shame that can produce and reinforce law-abiding conduct; and notification is less drastic than other measures, such as life imprisonment. See "When Answers Precede Questions", *supra* note 75 at 240-246. Peter Finn has summarized the benefits of notification as protecting the public, improving law enforcement's ability to investigate sex offenses, educating the public about sex offenses, increasing criminal justice system collaboration, and improving the criminal justice system's involvement in the community: see *Sex Offender Community Notification*, *supra* note 3.

[88]The Jacob Wetterling Act is named after an 11 year-old Minnesota boy who was abducted by a mask-wearing stranger while returning home from the video store. See *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act*, 42 U.S.C. § 14071 (1994).

[89]The funding at risk comes from the Edward Byrne Memorial State and Local Law Enforcement Program, administered by the Bureau of Justice Assistance, US Department of Justice. This Program provides formula grants to States to improve the functioning of the criminal justice system, with specific emphasis on violent crime and serious offenders: see M. Beckman, "Panel Introduction" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 15. For a discussion of the problems associated with Federal funding of State programs in the area of criminal justice, see "When Answers Precede Questions", *supra* note 75 at 238-239; T.M. Mengler, "The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime" (1995) 43 University of Kansas Law Review 503; but see T. Stacy & K. Dayton, "The Underfederalization of Crime" (1997) 6 Cornell Journal of Law & Public Policy 247.

[90]*Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, §170101(d), 109 Stat. 1796.

> From now on, every state in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love. Today, America warns: If you dare to prey on our children, the law will follow you wherever you go, state to state, town to town. Today, America circles the wagons around our children. Megan's Law will protect tens of millions of families from the dread of what they do not know. It will give more peace of mind to our parents.[91]

Finally, the US Federal Government has since enacted a third law, the Pam Lyncher Sexual Offender Tracking and Identification Act, named after a victims' rights advocate killed in the explosion of TWA Flight 800.[92] The Lyncher Act requires the FBI to establish a national database to track the movements of convicted sex offenders, and establishes more onerous requirements for sex offender registration in the individual states.[93] As of this writing, all states now require convicted sex offenders to register with law enforcement.[94] In addition, while 42 of the 56 states and territories requested extensions to comply with the federal Wetterling Act and Megan's Law,[95] all but five states now provide for some form of public dissemination, though the scope, content, and form of such dissemination vary widely between states.[96]

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[91]W.J. Clinton, "Remarks at Signing Ceremony for Megan's Law" (17 May 1996), online: LEXIS (CODES, PRESDC).

[92]See "Introduction" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) vii.

[93]See E.A. Rathbun, "History and Current Status of a National Sex Offender Registry" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 37; R.C. Thomas, "The Impact of the Lyncher Act", in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 40.

[94]Michigan was the last state to do so, in 1996: E.A. Pearson, "Status and Latest Developments in Sex Offender Registration and Notification Laws" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 45 at 45 [hereinafter "Status and Latest Developments"]. These registries are maintained by a state agencies, and in most states local law enforcement is responsible for collecting this information. In most states, the registry contains the offender's name, address, photograph, date of birth, (vehicle license numbers) and social security number, and offenders must generally register for a minimum of ten years. There are, in addition, private databases, maintained by organizations including the Roman Catholic Church and the Boy Scouts of America. For a discussion of the issues involved in private databases and non-convicted sex offenders, see "Scarlet Letter Sex Offender Databases", *supra* note 58 at 351-353.

[95]J. M. Chaiken, "Foreword" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) v.

[96]The five states that currently do not have notification provisions are Hawaii, Kentucky, Missouri, Nebraska and New Mexico: see "Status and Latest Developments", *supra* note 94 in which these provisions are compared across

The range of offenders required to register, and potentially subject to community notification, is quite broad, with a review of state laws revealing a hodgepodge of triggering offenses,[97] often not limited to offenses against children.[98] Registration often requires individuals to provide law enforcement with a wide range of information,[99] including DNA samples,[100] license plate numbers, type of vehicle, distinguishing physical features or marks (such as scars and tattoos),

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states. For another helpful review, see "Sexual Predators and Social Policy", *supra* note 52 at 74-75.

[97]For instance, in addition to a statutory list, Alabama targets "any act of sexual perversion or sexual abuse" (see J.A. Houston, "Sex Offender Registration Acts: An Added Dimension to the War on Crime" (1994) 28 Georgia Law Review 729 at 730 *n*12). Arizona requires registration for adultery, Louisiana for bigamy, and Ohio for voyeurism (see A.R. Bedarf, "Examining Sex Offender Notification Laws" (1995) 83 California Law Review 885 at 888 [hereinafter "Examining Sex Offender Notification Laws"). Some jurisdictions maintain registries of juvenile sex offenders (see J.A. Hunter Jr. & L.J. Lexier, "Ethical and Legal Issues in the Assessment and Treatment of Juvenile Sex Offenders" (1998) 3 Child Maltreatment 339). And in Washington, where registration is triggered for offenses committed "for the purpose of sexual gratification," a paperboy who stole a vibrator, photographs, and a box of condoms from a female customer was as a result subject to registration (*Washington* v. *Halstein*, 857 P. 2d 270 (Sup. Ct. 1993)).

[98]Even though the federal guidelines only address sex offenses committed against children and sexually violent offenses (see *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act*, 42 U.S.C. § 14071 (1994)), very few states take such a restrictive approach, with even the Federal Guidelines stating that they represent a "floor for state registration systems, not a ceiling" (*Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act*, 62 Fed. Reg. 139, 39009 at 39013 (1997)).Rather, the range of offenses that require registration include possessing sexual photos of a minor, or posting obscene bumper stickers, public exposure, loitering outside a public restroom for the purpose of engage in lewd acts, as well as rape and sexual molestation. See "Child Sex Offender Registration Laws", *supra* note 65 at 800-801; *Megan's Law Sourcebook*, *supra* note 3; S. Matson & R. Lieb, *Sex Offender Registration: A Review of State Laws* (Olympia, WA: Washington State Institute for Public Policy, 1996) [hereinafter *Review of State Laws*]; "Examining Sex Offender Notification Laws", *ibid.* at 888-890.

[99]Since I will be dealing with New Jersey's Megan's Law in this chapter, it may be useful to reproduce the range of registration requirements in that state: Registrants must provide the following to the police: name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, fingerprints, address of legal residence, address of any current or temporary residence, date and place of employment, date and place of each conviction, adjudication or acquittal by reason of insanity, indictment number, a brief description of the crime or crimes for which registration is required, and any other information that the Attorney General deems necessary to assess risk of future commission of a crime, including criminal and correctional records, nonprivileged personnel, treatment, and abuse registry records, and evidentiary genetic markers when available (see *Doe* v. *Poritz*, 661 A. 2d 1335 at 1338 (N.J. Super. Ct. 1995) [hereinafter *Doe* v. *Poritz, (New Jersey Superior Court)*]). These requirements extend over the offender's lifetime, unless the offender can demonstrate to a court that, having been offense-free for 15 years following his release, he is not likely to pose a threat to the safety of others. Some offenders must also provide address verification with law enforcement every 90 days, while others must verify their addresses annually. Convicted offenders from other states who move to New Jersey must notify authorities within 70 days of their arrival. See *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws* (New Jersey, June 1998).

[100]*Review of State Laws*, *supra* note 98.

and shoe size.[101] Furthermore, the retroactive nature of some schemes can subject offenders to registration and possible notification even when subsequent changes in the law mean that the acts for which they were convicted, if committed today, would no longer be criminal, such as sexual activity with same-sex partners.[102] Indeed, the number of registered sex offenders in the US is overwhelming: a 1996 study suggested that there are over 185,000 registered sex offenders throughout the country.[103] Some states are particularly aggressive; in describing the Illinois registration system, an Assistant Bureau Chief of the Illinois State Police boasted that:

> We have some great stories. We registered an 86-year-old man in a nursing home, a quadriplegic and an individual in the Federal Witness Protection Program. We even registered a man currently in a coma, so I think our program has been pretty aggressive.[104]

The combination of registration and community notification is touted as the 'one-two punch' in dealing with concerns that sex offenders recidivate at a particularly high rate,[105] and thereby

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[101]*Megan's Law Sourcebook*, *supra* note 3 at Chapter 4, Chart B.

[102]In a personal communication, a California official has expressed to me that this may explain the large number of registered offenders in California, since California has maintained a registry for decades. Although individuals can apply to be removed from the list as a result, this may attract unwanted attention. See W. Claiborne, "At the Los Angeles County Fair, 'Outing' Sex Offenders" *The Washington Post* (20 September 1997) A1; "Scarlet Letter Sex Offender Databases", *supra* note 58 at 336 *n*13.

[103]For details by state, see Washington State Institute for Public Policy, *Sex Offender Registration: National Requirements and State Registries* (Olympia, WA: Washington State Institute for Public Policy, 1996).

[104]K. Lonbom, "The Illinois Registration and Notification System for Sex Offenders" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 72 at 72. In contrast, the haste to implement registration programs led to some underinclusive registries as well: Connecticut initially neglected to include the offense of "risk of injury to a minor," though most convictions for sex crimes against children are for that offense. See M. Lawlor, "Creating Effective Sex Offender Legislation Requires Collaboration Between Lawmakers and Justice Agencies" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 87. In New Jersey, inmates under the control of the Department of Corrections must also register, or be subject to discipline for refusal to register, a requirement that has been upheld by the courts: see *A.F. and A.G.* v. *Fauver*, 671 A. 2d. 155 (N.J. Super. Ct. 354) [hereinafter *A.F. and A.G.*].

[105]Recidivism is the central stated purpose of Megan's Law. See eg. *Brief of the Attorney General of New Jersey (filed 26 August 1996)*, *supra* note 11 at 20-25; Brief for the United States as Amicus Curiae Supporting Defendant/Petitioner in *Doe* v. *Poritz*, No. 39,989 (filed April 1995) (1996) 6 Public Interest Law Journal 75 at 78-80 [hereinafter *Brief for the United States (filed April 1995)*] ("[a]s a group, sex offenders are significantly more likely than other repeat offenders to reoffend with sex crime or other violent crimes, and that tendency persists over time" (at 79)). For studies on sex offender recidivism, see eg. "Sexual Predators and Social Policy", *supra* note 52 at 65; "Politics and Irrelevance", *supra* note 72. For a review of the ways in which questions of recidivism have been considered within the context of registration and notification laws, see "Examining Sex Offender Notification

pose a public safety problem.[106] These measures have led proponents of notification to argue that residents are "empowered" rather than "helpless in the face of unknown criminals,"[107] and can thereby protect themselves and their families more effectively.[108] This was perhaps most vividly expressed by Assemblymen in the New York State Legislature, stating that "[f]inally a bill addresses the right of society," as opposed to the rights of "the human equivalent of toxic waste."[109]

Broadly speaking, there are four approaches to community notification that have been implemented to date.[110] In some, a state agency determines the level of risk an offender poses and then implements a community notification plan that reflects the offender's level of risk. In others, certain types of offenders are statutorily determined to be subject to notification, with the method of notification also determined by statute, carried out by a state agency. Not all approaches, however, involve notification carried out by the state alone: in some, offenders themselves are required to do the actual notification, while in other states community groups and individuals must request information about whether a sex offender is living in their community, sometimes for a small fee.

New Jersey relies on the first form of community notification, with registered sex offenders classified according to three tiers of risk.[111] Based on the results of a 'registrant risk assessment scale,' described in more detail below, prosecutors then classify a registrant in a tier, reflecting

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Laws", *supra* note 97 at 893-898; C.L. Kunz, "Toward Dispassionate, Effective Control of Sexual Offenders" (1997) 47 American University Law Review 453 at 471-473 [hereinafter "Toward Dispassionate"]; W.A. Logan, "A Study in 'Actuarial Justice': Sex Offender Classification Practice and Procedure" (2000) 3 Buffalo Criminal Law Review 593 [hereinafter "A Study in Actuarial Justice"].

[106]*Megan's Law Sourcebook*, *supra* note 3 at Chapter 1, Page 2.

[107]"Examining Sex Offender Notification Laws", *supra* note 97 at 906.

[108]*Megan's Law Sourcebook*, *supra* note 3 at Chapter 1, Page 3.

[109]See Assembly Minutes, as quoted in *Doe* v. *Pataki*, 940 F. Supp. 603 at 622 (S.D. N.Y. 1996). The use of the term "waste" is particularly interesting, given Feeley and Simon's analysis of the new penology as based on "waste management": see "New Penology", *supra* note 5 at 470.

[110]This summary is based on amalgamating the models in two previous pieces: *Sex Offender Community Notification*, *supra* note 3 at 5; and "Examining Sex Offender Notification Laws", *supra* note 97 at 904-906.

[111]For a national analysis of the processes of classification contained in these statutes, see "A Study in Actuarial Justice", *supra* note 105.

the degree of risk that the offender may recidivate. No offenders are 'Tier Zero' – rather, all registered sex offenders are presumed to pose some risk of reoffense.[112] Tier One registrants are not subject to community notification in New Jersey; rather, prosecutors notify those law enforcement agencies likely to encounter the offender.[113] When, however, a registrant is assessed as being of moderate risk (Tier Two), prosecutors also notify those community organizations that are eligible to receive notification, and that are 'likely to encounter' the offender – those organizations that 'are in a location or in close geographic proximity to a location which the offender visits or can be presumed to visit on a regular basis,' when these have a fair chance to encounter the offender. This determination is in the discretion of the prosecutor's office, and 'may be as small or large as the facts and circumstances warrant,'[114] although this discretion is subject to judicial review.[115] Tier Three offenders – those who are found to present a high risk of reoffense – are subject to full-blown community notification. The prosecutor not only notifies law enforcement and eligible community organizations, but also notifies members of the public likely to encounter the offender, subject to judicial review.[116] This generally includes neighbourhood residents and residents in areas he is likely to frequent.[117] After fifteen years of being released, a registrant may apply to terminate the obligation to register, by proving that he is not likely to pose a threat to others.[118] As of March 2001, 7605 individuals had registered with the New Jersey State police, with approximately 70 registrants added monthly.[119] And of those

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[112]This is true even if a registrant scores "0" points on the Registrant Risk Assessment Scale: see *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws* at Exhibit E (New Jersey, March 2000) [hereinafter *Guidelines March 2000*].

[113]This is called a "Law Enforcement Alert." See *ibid.* at 18.

[114]*Ibid.* at 13-14.

[115]*Ibid.* at 5, 14.

[116]*Ibid.* at 14.

[117]*A.A. et al.* v. *New Jersey*, 176 F. Supp. 2d. 274 at 280 (Dist. Ct. N.J. 2001) [hereinafter *A.A.*].

[118]Administrative Office of the Courts, Criminal Practice Division, *Report on Implementation of Megan's Law* at 6-7 (New Jersey, 1 June 2001) [hereinafter *Report on Implementation*]

[119]*Ibid.* at 7-8.

registrants that have been assigned tiers, nearly 60% have been placed in tiers two and three.[120]

In New Jersey, the responsibility to notify may also be delegated. Within schools, for instance, principals determine the scope of notification for Tier Two and Tier Three offenders, and may notify, among others: aides, bus drivers, coaches, maintenance staff, professional support staff, school level administrative staff, security personnel, teachers' assistants, and teachers. Where there is a Tier Three notification, prosecutors and local law enforcement will also notify students and their parents. Schools may also hold age appropriate discussions in the classroom, school meetings with parents, teaching staff, administrative staff, and so on.[121]

In contrast to New Jersey, which relies on prosecutorial discretion to determine the scope and form of community notification,[122] some states take a different approach. In Louisiana, for example, all registered sex offenders are subject to community notification,[123] and the offender can be required to advertise his presence with bumper stickers, signs, or labels on his clothing.[124] Oregon has required predatory sex offenders to notify neighbours of their presence, including the placement of a sign on their door stating 'Dangerous Sex Offender. No Children Allowed'[125] and 'Sex Offender Residence.'[126] Others, such as Michigan and Florida, disseminate community notices via the Internet, a practice that has been the subject of constitutional litigation in New Jersey.[127] And in California, where about 1 in every 150 adult males is a registered sex

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[120]*Ibid.* at 12-14. As of March 1, 2001, seventy-nine percent of registrants have been assigned tiers, with 58% being placed in Tiers 2 or 3.

[121]*Guidelines March 2000*, *supra* note 112.

[122]See summary of the scope and form of dissemination in New Jersey detailed in *A.A.*, *supra* note 117 at 280-281.

[123]This is a system that is in place in other states as well, such as in Illinois and in Kansas: see M. Welter, "Development of the Illinois Sex Offender Registration and Community Notification Program" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 75 at 76.

[124]This discussion of the Louisiana statute relies on *Sex Offender Community Notification*, *supra* note 3.

[125]See *Oregon* v. *Bateman*, 771 P. 2d 314 at 316 (Or. Ct. App. 1989).

[126]"Toward Dispassionate", *supra* note 105 at 460 *n*38.

[127]See *A.A.*, *supra* note 117 at 280-281. In *A.A.*, the District Court provides a list of 30 states that maintain sex offender Internet registry web sites (at 282 *n*7). Florida's web site can be found at *Florida Registered Sexual Offenders & Predators Search*, online: Florida Department of Law Enforcement <http://www.fdle.state.fl.us/Sexual_Predators/> (last accessed: 20 October 2002) (which can also be reached at

offender[128] (California has been registering sex offenders for decades, though notification is much more recent),[129] notification relies on the 'Megan's Law CD-ROM' and the 'Child Molester Identification Line.'[130] Police officers on patrol can also notify individuals when they are in proximity to a registered serious sex offender, such as parents in a park with their children; local police may also warn community residents that a registered serious sex offender lives nearby, typically through door-to-door fliers; and for high risk offenders, police can advertise his identity and whereabouts in any manner they see fit.[131]

IV. Megan's Law in New Jersey: The Doctrinal Debate over Punishment

Community notification has generated a flurry of case law in several US states, and activity across the US federal courts.[132] This adjudication has often focused on assessing the

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1-888-FL-PREDATOR). Michigan's web site can be found at Michigan Public Sexual Offender Query, online: Michigan State Police <http://www.mipsor.state.mi.us/> (last accessed: 20 October 2002) (which is updated daily at 6am).

[128]More than 77,000 Californians are required to register (with approximately 3,000 new registrants per year, this comes to about 1 in every 150 adult males in California). 64,000 of these individuals (over 83%) are designated as "serious" or "high risk." See "California's History", *infra* note 130 at 65.

[129]The first sex offender registry was established by California in 1947 (though Jenkins suggests that the registry system was implemented in 1949 after the Fred Stroble case, who was referred to as the "weeping werewolf." See *Moral Panic*, *supra* note 49 at 201), soon followed by five other states in the 1950s and 1960s. See "Status and Latest Developments", *supra* note 94 at 45.

[130]For $10, "the public can check whether suspected individuals are a threat to their safety or their children's safety." See D. Smith, "California's History of Sex Offender Registration Requirements and Responses to new Federal Mandates" in *National Conference on Sex Offender Registries: Proceedings of a BJS/Search Conference* (Washington, DC: US Department of Justice, 1998) 64 at 65 [hereinafter "California's History"]. One journalist has suggested that the number be 1-900-PERVERT: see D.J. Saunders, "The Public's Right to Know" *The San Francisco Chronicle* (6 April 1994) A17. At one point, New York was enjoined by a Federal district court from creating a similar 900 scheme. See K.S. Lombardi, "Sex-Felon Rights and Notification Face Legal Snag" *The New York Times* (17 March 1996) 13WC.

[131]"California's History", *ibid.*

[132]Although there has been virtually no case law in Canada on community notification, such programs do exist. These initiatives can be divided into three categories: 1) Protocols established between provincial and territorial governments, major police forces, correctional agencies, and others to provide police with advice on if, when, and how the public, or selected sub-groups, should be notified; 2) Notification-specific legislation which guides police forces or notification committees on if when, and how the public, or selected sub-groups, should be notified; and 3) Provisions of provincial and or federal privacy legislation which authorize designated persons to alert the public or targeted individuals or groups about the release/presence of a person who represents a threat to public safety. See "Canadian Community Notification Programs" (National Conference: Community Notification and Other Techniques for Managing High Risk and Dangerous Offenders, 15-17 June 1997) [unpublished]; Manitoba Justice, "Summary of Canadian Notification Programs" (National Conference: Community Notification and Other

constitutionality of Megan's Law – and courts have been centrally concerned with distilling the particular doctrinal test to be relied on in determining whether it constitutes 'punishment' for constitutional analysis. Most notably, it has been argued that, due to the retroactive nature of Megan's Law, community notification violates the Ex Post Facto Clause, in that it "inflicts a greater punishment, than the law annexed to the crime, when committed"; that community notification violates the prohibition against Bills of Attainder by applying "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial"; that community notification runs afoul of the Double Jeopardy clause by constituting "a second prosecution for the same offense after conviction," and by providing "multiple punishments for the same offense"; and that community notification constitutes cruel and unusual punishment, thereby violating the Eighth Amendment of the US Constitution.[133]

In this chapter, I will focus on those cases dealing with the constitutionality of Megan's Law in New Jersey. There are several reasons for this choice. While community notification has been challenged in several states, courts in New Jersey have heard the bulk of such cases, and heard them in some of the earliest years of litigation in this area, beginning in February 1995.[134] Second, New Jersey (and other states, such as New York), witnessed an initial split between the state and federal courts dealing with the constitutionality of community notification, with federal courts declaring the statutes unconstitutional, and state courts generally upholding them – yet the state and federal courts have since come to an agreement that the statutes are not punitive, and are in fact constitutional.[135] This divide is particularly interesting given the distinct judicial

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Techniques for Managing High Risk and Dangerous Offenders, 15-17 June 1997) [unpublished].

[133]Because they have often determined the threshold question of whether Megan's Law constitutes punishment, the earliest cases (those dealing with the retroactive nature of Megan's Law) have effectively determined the viability of other constitutional challenges as well, despite some dispute over whether there is a single test for punishment applicable to all constitutional questions.

[134]It is true that Washington heard cases earlier than these two states, as did Alaska. However, Washington's statute was permissive rather than directive; authorities were granted discretion as to whether to notify communities or not. Alaska's statute, in contrast, only required registration. See *Rowe* v. *Burton*, 884 F. Supp. 1372 (Dist. Ct. Alaska 1994).

[135]This is the case even though the Federal courts have most recently enjoined the State of New Jersey from Internet dissemination of offenders' home address. This was done on constitutional privacy grounds rather than a determination that the dissemination is punitive. See *A.A., supra* note 117.

traditions from which state and federal courts stem, a distinction that reflects the tensions of US Federalism more generally.[136] As such, the study of punishment versus regulation, and the role that community plays in that tension, provides a vantage point from which to think about these broader issues. Third, these cases, given their timing and the divisions between the federal and state courts, attracted a significant number of amicus curiae that later cases have not enjoyed. Early cases included, for instance, arguments from chapters of the American Civil Liberties Union, the United States Department of Justice (despite the challenges being to state laws), attorneys representing the New Jersey Senate, and lawyers representing individual citizens, ranging from Maureen and Richard Kanka (in cases challenging the constitutionality of Megan's Law) to Carlos Diaz, an offender who became the victim of harassment by the New York-based Guardian Angels after a preliminary injunction prevented officials from issuing a community notification. Finally, New Jersey cases have since been recognized as the leading cases in the area, yet have rarely been analysed outside of exclusively doctrinal scholarship.

Whether community notification constitutes punishment has been the driving question of the adjudication since the initial New Jersey case, in *Doe* v. *Poritz*, decided in 1995.[137] In 1985, Doe pled guilty to molesting two teenage boys, at which time an Adult Diagnostic and Treatment Centre determined that his conduct was "characterized by a pattern of repetitive and compulsive behavior."[138] Yet, in 1992, six years after being sentenced to a ten-year term, Doe was found to be "capable of making an acceptable social adjustment" and released on parole.[139] Since that time, Doe had been renting an apartment and working in the community, claiming to have complied with all provisions of his release including psychological treatment. Finding himself subject to potential community notification under Megan's Law because of the earlier Treatment Centre diagnosis (which he had not challenged at the time), Doe sought to enjoin enforcement of the statute in the Superior Court of New Jersey.

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[136] R.A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge, MA: Harvard University Press, 1985) at 169-197.

[137] *Doe v. Poritz, (New Jersey Superior Court), supra* note 99.

[138] *Ibid.* at 1338.

[139] The determination was made by the Special Classification and Review Board: *Ibid.*

The decision of Justice Wells for the New Jersey Superior Court in *Doe* exemplifies the tensions inherent in determining whether community notification constitutes punishment under the US Constitution, or whether this is simply an "unpleasant" burden.[140] Determining that a statute can constitute punishment even if it is not criminal,[141] Justice Wells relies on a test for punishment that was articulated by the US Supreme Court in 1989, in *United States* v. *Halper*:[142]

> ... a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.[143]

The *Halper* test has, however, been the subject of much debate. Confusion over the scope of *Halper* stems from the Court's use of the word "solely" in the above quotation. Taken literally, civil sanctions which serve retributive or deterrent purposes, despite also serving other non-punitive (remedial) purposes, are to be construed as punishment – only those civil sanctions that have no element of retributive or deterrent purpose are exempt from punishment analysis. Yet, in *Halper* itself, the US Supreme Court applies the test differently, deciding that punishment refers to those sanctions which "may not fairly be characterized as remedial but *only* as a deterrent or retribution."[144] These two approaches in *Halper* are flatly irreconcilable: according to the former, any civil sanction that serves a retributive or deterrent purpose must be interpreted as punitive (a broad formulation), while the latter formulation defines as punitive those sanctions that are found to *only* serve retributive or deterrent purposes (a narrow formulation).

In purporting to resolve this confusion, Justice Wells in *Doe* further relies on a decision of

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[140]*Ibid.* at 1340.

[141]In so doing, Justice Wells finds that punishment "cuts across the division between civil and the criminal law": *Ibid.*

[142]*United States* v. *Halper*, 490 U.S. 435 (1989) [hereinafter *Halper*]. As stated in *Halper*, "[t]he notion of punishment ... cuts across the division between civil and the criminal law ... It is commonly understood that civil proceedings may advance punitive and remedial goals, and conversely, that both punitive and remedial goals may be served by criminal penalties.": see the elements quoted in *Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1340.

[143]*Halper*, *ibid.* at 448, cited in *Doe v. Poritz, (New Jersey Superior Court), ibid.* at 1340-1341.

[144]*Ibid.* [emphasis added]. Although the Court uses the word "only" in the earlier statement of the test as well, it is qualified: the Court had stated that what is punitive are those sanctions that can *only* be said to *also* serve retributive or deterrent purposes. When the term "also" is dropped, the term "only" changes the test entirely.

the 7th Circuit in *Bae* v. *Shalala*. In *Bae*, the defendant argued that an employment sanction he suffered served a punitive purpose[145] – even if it also served a remedial purpose – and as such must be characterized as punishment under the broad formulation enunciated in *Halper*.[146] The 7th Circuit instead adopted a "much more pragmatic"[147] reading of the *Halper* test, holding that a civil sanction will only constitute punishment if it "may not fairly be characterized as remedial, but *only* as a deterrent or retribution."[148] In so doing, the *Bae* Court determines that a civil sanction will only constitute punishment if punitive goals constitute its "overriding purpose."[149] In determining this overriding purpose, the court examines the legislature's stated purpose, some objective inquiry into that purpose, whether the legislative history taken as a whole demonstrates "unmistakable evidence of punitive intent," and whether the measure is properly tailored to meet the non-punitive objective.[150]

The "overriding purpose' test designed in *Bae* sits halfway between the narrow and broad formulations expressed in *Halper*. A sanction will not be found to be punitive simply because it contains some deterrent or retributive purpose, nor will it be exempt from punishment analysis simply because it contains some non-punitive purpose. Applying this standard, the Superior Court of New Jersey finds that the registration and notification provisions of Megan's Law are not punishment in the constitutional sense, and as such do not violate the ex post facto clause,[151] the Double Jeopardy clause,[152] or the ban on bills of attainder,[153] and do not constitute cruel and

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[145]After being convicted of a felony relating to the industry in which he worked, the defendant was then prohibited from further working in the generic drug industry.

[146]*Bae* v. *Shalala*, 44 F. 3d 489 (7th Cir. 1995); *Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1340, 1341 [hereinafter *Bae*].

[147]*Doe v. Poritz, (New Jersey Superior Court), ibid.* at 1341.

[148]*Bae*, *supra* note 146 at 493.

[149]*Ibid.*

[150]By referring to the legislative history *taken as a whole*, the *Bae* Court is able to find the sanction non-punitive even though "the legislative history is replete with references to its deterrent objective": ibid. at 494.

[151]*Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1340-1343.

[152]*Ibid.* at 1344.

[153]*Ibid.* at 1343.

unusual punishment.[154] According to Justice Wells, community notification is regulatory, and not punitive, since the goal is to prevent sex offenses and to resolve future incidents, and not to punish offenders. Justice Wells justifies this conclusion by relying on the following arguments:

1. The legislative preamble makes it clear that the intent is to remedy the dangers posed by recidivism among sex offenders, and to protect children by preventing and 'resolving' sex offenses;[155]
2. The burdens imposed on sex offenders are not punitive in nature. Megan's Law does not seek to alter their behaviour or restrict their movement, does not forbid them from holding jobs or becoming productive members of society, does not impose heavy fines/penalties ("the cost of compliance amounts to minutes of their time per year and perhaps the cost of postage or bus fair [sic]") , and does not increase the term of imprisonment or parole;[156]
3. Dividing offenders into risk categories, and tailoring the response to that determination, makes it clear that the statute is meant to regulate perceived danger, and not simply to punish;[157]
4. The social context evidences that Megan's Law was enacted to respond to a demand for information ("fair warning") and not in response to a demand for punitive measures;[158]
5. Registration laws (though not notification) have existed in New Jersey in the past, with the 1952 Criminal Registration Act having required the registration of drug felons;[159]
6. The placement of Megan's Law in the criminal law section of the New Jersey statutes is irrelevant, and may simply be designed to facilitate indexing;[160]
7. If the past penalties for sex offending – fines, imprisonment, and stigma caused by conviction – are an insufficient deterrent to sex offenders, it is doubtful that Megan's Law would constitute a significant deterrent (with deterrence being a hallmark of punishment);[161]
8. Any retribution delivered by Megan's Law is minimal at best.[162]

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[154]*Ibid.* at 1343-1344.

[155]*Ibid.* at 1341.

[156]*Ibid.*

[157]*Ibid.*

[158]*Ibid.* at 1342 (N.J. Super. Ct. 1995).

[159]*Ibid.*

[160]*Ibid.* at 1342-1343 (N.J. Super. Ct. 1995).

[161]*Ibid.* at 1343 (N.J. Super. Ct. 1995).

[162]*Ibid.*

Yet, just days later, the United States District Court reaches an opposite conclusion in *Artway* v. *Attorney General of New Jersey.*[163] Relying on an entirely different set of cases, the District Court finds instead that Megan's Law is punitive. In so doing, the decision in *Artway* relies on the following test for punishment:

> [If] the statute does not have a clear punitive purpose, the court must determine whether the effect of the statute or its scheme is punitive in nature – such that its application goes beyond its regulatory function.[164]

The District court, as a result, places greater emphasis on *effects* rather than the legislative intent emphasized by the state court's application of the *Harper* test in *Doe.* In so doing, the District Court relies on a non-exclusive list of factors articulated by the Supreme Court in *Kennedy* v. *Mendoza-Martinez* for an "independent analysis" of the "true nature" of the practical purpose and effects of Megan's Law,[165] namely:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[166]

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[163]*Artway* v. *Attorney General of New Jersey*, 876 F. Supp. 666 (Dist. Ct. N.J. 1995) [hereinafter *Artway (1995)*].

[164]*Ibid.* at 672 (Dist. Ct. N.J. 1995).

[165]*Artway (1995), supra* note 163 at 673.

[166]*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 at 168-169 (1963) [hereinafter *Kennedy*]. The District Court's reliance on the *Kennedy* factors is not without controversy. Both counsel for the defendant and the plaintiff argued that the proper analysis is dictated by a string of cases including the Supreme Court's decision in *Halper.* As can be expected, plaintiff's counsel argued that the *Halper* line of cases must be read as classifying a statute, that is even partially punitive, as punishment. This is quite different than the interpretation provided by the Superior Court in *Doe*, though plaintiff also relies on the language in *Austin* v. *United States*, 509 U.S. 602 (1993) and *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767 (1994) (see *Artway (1995), ibid.* at 673 *n*8). Plaintiff's stand-by counsel argued that the Court should apply the test dictated in *Kurth Ranch*, *Austin*, and *Halper*, which counsel argued (based on *Austin*) casts the appropriate analysis as "if the means employed ... are not exclusively remedial or if they are even partially punitive, the entire statute or policy musty be deemed punitive." Defendant also argued that

With two conflicting opinions – one in the state court finding Megan's Law not to be punitive, and one in the federal court finding the opposite – the question was then brought to the Supreme Court of New Jersey. Upholding Justice Wells' decision in *Doe*, the New Jersey Supreme Court criticized the Federal Court's reliance on the *Kennedy* factors to assess whether Megan's Law is punitive:

> There are unfortunate aspects to the use, particularly to the literal use, of [*Kennedy*]. The mechanical assessment of each of the seven factors, the weighing of each, and the unguided indeterminate balancing of the various weights has the potential, and, we believe, in some cases, the practical effect of distracting a court from a significant analysis of the issues, distracting it from an analysis of the regulatory intent of the statute or sanction, the societal goals served by the regulation, the extent to which its punitive consequences are but an inevitable result of the statute or sanction, and ultimately from an evaluation of the fair characterization of the statute to decide whether the purposes served by the constitutional provisions require its invalidation.[167]

The New Jersey Supreme Court is apparently concerned that the *Kennedy* factors will enable courts to find statutes punitive simply by an examination of their effects – despite a statute having a regulatory intent and purpose.[168] As such, upholding the trial decision in *Doe*, the New Jersey Supreme Court relies on *Halper* to focus on legislative intent, and proceeds to find Megan's Law not punishment, and therefore constitutional.[169] That there may be a punitive effect is, for the State Court, merely incidental, since "[i]t is not intended as punishment but rather is

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the Kennedy test had been overtaken by these cases, though presumably would read these cases differently. The Court, though, determined that for ex post facto analyses, *Kennedy* continues to be appropriate, since each of the three other cases are particular to a situation. See *Artway (1995), ibid.* at 673 *n*8.

[167]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 403.

[168]*Ibid.* Yet, in concluding that very paragraph, the Court uses its criticism of *Kennedy* to invoke the specter of precisely the opposite result – that punitive measures may be shielded from unconstitutionality because they have *regulatory* effects: The *Kennedy* test "would permit a statute, provision, or sanction to withstand constitutional attack despite punitive intent and impact if other factors 'outweigh' the punitive pointers, a result contrary not only to the contentions of plaintiff, but to this Court's understanding of the relevant law": *Ibid.*

[169]*Ibid.* at 396, discussing *United States* v. *Hudson*, 14 F. 3d 536 (10th Cir. 1994). The Court states that: "What counts, therefore, is the purpose and design of the statutory provision, its remedial goal and purposes, and not the resulting consequential impact, the 'sting of punishment,' that may inevitably, but incidentally, flow from it." The Court also states that "[t]he relation between any burdens imposed and the nonpunitive purpose and legislative intent must be accorded *greater weight*": *Ibid.* at 406.

a consequence that is simply unavoidable, for it goes to the very heart of the remedy: that which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public."[170]

The same debate played itself out in several cases. Federal courts stood by the decision in *Artway* that Megan's Law constitutes punishment, granting injunctions and certifying class actions against community notification,[171] there being "no way to unscramble an egg."[172] State courts, on the other hand, relied on the decision in *Doe* that Megan's Law does not constitute punishment, and so went about the administrative business of determining the admissibility of expert evidence, the proper scope of notification, requirements for notice, and so on.[173]

The doctrinal tide began to shift in the appeal of *Artway* to the United States Court of Appeals.[174] The federal Court of Appeals in *Artway* agrees with the state courts that the *Kennedy* factors are an inappropriate test for punishment. Instead, the Court relies on the *Harper* test that had been relied on by the New Jersey state courts, and tacks on two elements in determining whether a sanction constitutes punishment: an historical inquiry into the use of this type of measure in the past, and an inquiry into the effects of the measure.[175] While arguing that "[o]nly the Supreme Court knows where all the pieces belong,"[176] the Court of Appeals decides on a

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[170]*Ibid.* at 404. Criticizing the majority's "exclusive reliance on legislative intent," Judge Stein dissents in this appeal of *Doe*, finds instead that Megan's Law does indeed constitute punishment, and does so by relying on the same judicial test for punishment relied on by the majority to reach the opposite conclusion. Ibid. at 423ff..

[171]See *Artway (1996, 3rd Cir.)*, *infra* note 174; *E.B.* v. *Poritz*, 914 F. Supp. 85 (Dist. Ct. N.J. 1996) [hereinafter *E.B. (1996)*]; *W.P.* v. *Poritz*, 931 F. Supp. 1187 (Dist. Ct. N.J. 1996) [hereinafter *W.P. (1996, motion for certification and injunctive relief)*].

[172]*E.B. (1996)*, *ibid.* at 91.

[173]See *A.B.*, *infra* note 228; *C.A (New Jersey Superior Court)*, *infra* note 336; *E.A.*, *infra* note 229; *G.B. (New Jersey Superior Court)*, *infra* note 312; *E.D.*, *infra* note 212; *A.F. and A.G.*, *supra* note 104; *B.G.*, *infra* note 227.

[174]*Artway* v. *Attorney General of New Jersey*, 81 F. 3d 1235 (3rd Cir. 1996) [hereinafter *Artway (1996, 3rd Cir.)*].

[175]While stating that even a "substantial sting" will not render a regulatory measure punitive, the Court argues that "at some level the 'sting' will be so sharp that it can only be considered punishment regardless of the legislature's subjective thoughts": *Ibid.* at 1261.

[176]*Ibid.* at 1263. In addition, Justice Shadur's concurring opinion reflected on the difficulties in reaching a test for punishment, asserting that "[a]ny efforts of the lower courts in the federal system to interpret the sometimes Delphic pronouncements from the Supreme Court can on occasion resemble (to mix metaphors) the divination of entrails," and that "the oracular message from the ultimate authority ranks high in the scale of obscurity." *Ibid.* at 1272.

three-prong analysis, including subjective legislative purpose, objective legislative purpose, and effect, and finds that *registration* does not present sufficiently dire consequences to be considered punitive.[177] Yet, this finding does not extend to community notification – determining that this constitutional question was not yet ripe, the Court of Appeals does not address community notification, but does refer to its harsh effects, makes reference to the offender's compelling argument in this regard, and flatly denies a petition to rehear whether the trial court erred in finding notification punitive.[178]

Six weeks later, the federal courts take the next step. Whereas the Court of Appeals in *Artway* found registration to not be punitive, the District Court in *W.P.* v. *Poritz* further finds that community *notification* is not punitive.[179]

In rendering its decision, the Court focuses on a more recent decision of the US Supreme Court in *Ursery*,[180] handed down just after the appeal of *Artway*. "Poised to apply the *Artway* formula," the Court argues that instead *Ursery* "alters the analysis to be employed in the case at bar."[181] *Ursery*, according to the Court, "expressly rejects the philosophical foundation of *Artway*," by stating that there is no "universal analytical framework for defining 'punishment' in all cases," and that courts ought not attempt to synthesize past cases to devise definitions for punishment. As such, the Court in *W.P.* decides to examine considerations common to past cases dealing with punishment, but not synthesize these into any one "test":

> These common considerations are the expressed intent of the legislature as reflected in the legislation itself and the legislative history; the 'purpose' of that legislation, viewed objectively, particularly if that demonstrates a potential for a more punitive objective;

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[177] *Ibid.* at 1264-1267.

[178] *Artway* v. *Attorney General of New Jersey*, 83 F. 3d 594 at 598 (3rd Cir. 1996) [hereinafter *Artway (1996, 3rd Cir., Petition for Rehearing)*]. The sole dissenter was Circuit Judge Alito, who based his dissent on the test that had been used in *Artway* to determine punishment, stating that he had "grave doubts" that a measure's sting, or negative repercussions, could result in a finding that the measure itself was punitive. He then turns this question on its head, arguing that, in fact, we lack evidence regarding any such repercussions, since by enjoining the State from implementing notification, there was no "adequate empirical basis" for making any arguments regarding the secondary effects, "a most unedifying prospect" (at 598).

[179] *W.P.* v. *Poritz*, 931 F. Supp. 1199 (Dist. Ct. N.J. 1996) [hereinafter *W.P. (1996)*].

[180] *United States* v. *Ursery*, 518 U.S. 267 (1996) [hereinafter *Ursery*].

[181] *W.P. (1996)*, *supra* note 179 at 1207.

> a balancing of remedial and punitive goals; an analysis of how such laws have been considered historically, if there is any clear historical analogue; and a review of the 'effect' of such legislation, if that effect is extreme or severe.[182]

In deploying this looser test for punishment, however, the District Court suggests that the resulting framework is not much different from what it had originally relied on by deploying the Kennedy factors in *Artway*. The Court explicitly notes that, "in an analysis similar to that in *Kennedy*," the District Court "must weigh these considerations in a less structured fashion to reach its decision."[183] What is most fascinating, then, is despite likening *Ursery* to a *Kennedy* analysis, the District Court reaches an opposite result, now finding that notification is not punitive. The Court reaches this conclusion by noting that the stated purpose is not punitive, that Megan's Law "is not an instrument of 'vengeance for its own sake'" since it has the goal of preventing a societal problem, that offenders will not necessarily be faced with public opprobrium, that Megan's Law is not focused on the offender, but on the public, and that due process is now available.[184] Finally, according to the Court in *W.P.*, only the *legal* actions of community members should play a part in assessing whether Megan's Law is punishment, and that these are unlikely to render punitive the "sting" of notification.[185] And even though it explicitly states that it is reaching this result based on the new decision in *Ursery*, the Court then asserts that notification ought not be found punitive even under the *Artway* standard articulated by the Court of Appeal:

> [T]his Court concludes that although *Ursery* affected the approach employed in analyzing Megan's Law, the result in this case would be the same even under the more rigid formula of *Artway* that requires one to leap over the hurdles which that Opinion erects on the track to the finish line. This Court presents this clarification because it may be of some importance to a reviewing court.[186]

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[182]*Ibid.* at 1209.

[183]*Ibid.*

[184]A technical point is also made regarding classification proceedings: see *ibid.* at 1217

[185]*Ibid.* at 1218-1219.

[186]*Ibid.* at 1223.

The decision in *W.P.* was stayed within days. As a result, while state courts in New Jersey continued to work through the mechanics of community notification, including issues of prosecutorial discretion and individual challenges to risk assessments, the matter remained unresolved in the federal courts for another year, until the decision in *Alan A.* v. *Verniero*.[187] The claim in *Alan A.* was brought by several plaintiffs, as a request to enjoin state officials from proceeding with community notification and from determining tier classification.[188] Returning to the applicability of the *Kennedy* factors to determine punishment, the District Court notes that these factors had been criticized by both the New Jersey Supreme Court and by the United States Court of Appeal, yet notes that the US Supreme Court, in determining whether civil commitment of sexually violent predators constituted punishment, recently relied on some of these very factors.[189] The Court thereby concludes that "it appears that the [*Kennedy*] factors, or at least some of the factors, are instructive to the determination of whether a measure is penal in nature."[190]

The District Court in *Alan A.* relies on the *Kennedy* factors, but reaches an opposite conclusion than it had in *Artway*. The District Court now asserts that any negative consequences that result from notification ought to be dealt with through the local police power, "not through the abrogation of appropriate remedial legislation designed to protect society."[191] Any humiliation or shame that results from notification originates, according to the Court, "in the underlying crimes committed, not in the notification procedure"; Megan's Law is intended to be remedial and to prevent reoffense, and any argument that links public ostracism to notification, rather than to the offender's crime, "is simply result-oriented sophistry," with the Court stressing that "the offender should not, and cannot, expect community approval."[192]

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[187]*Alan A.* v. *Verniero*, 970 F. Supp. 1153 (Dist. Ct. N.J. 1997) [hereinafter *Alan A. (1997)*].

[188]According to the District Court, the filings were initially so voluminous that they were in excess of two reams of paper, were grossly over length and printed in small type font: Ibid. at 1160 *n*2.

[189]See *Hendricks*, *supra* note 15; and see *Ibid.* at 1173.

[190]*Alan A. (1997)*, *ibid.*

[191]*Ibid.* at 1174.

[192]*Ibid.* at 1175.

Furthermore, the Court finds that, though an offender may be deterred by community notification, this is simply "an added benefit," since the Act does not implicate retribution or deterrence, but is rather a "self-defense mechanism" to protect individuals in the community.[193] Finally, indications in the legislative debates that Megan's Law was indeed intended to be punitive are dismissed, with the Court finding that "[t]he stray remark of one legislator is not sufficient to undermine an appropriate purpose."[194] This is buttressed by the Court's invocation of US Supreme Court's decision in *Kansas* v. *Hendricks* that involuntary civil commitment is itself not punitive – finding that "[w]here the restriction of liberty through civil confinement is found not to constitute punishment ... it is not comprehensible how notification, a significantly less burden, can be said to do so."[195]

Any inconsistency between the District Courts determinations (in both *W.P.* and *Alan A.*) and the suggestions of the Court of Appeal in *Artway* are finally resolved by the Court of Appeal in *E.B.* v. *Verniero*,[196] which is the appeal of *W.P.* that had been stayed one year prior. In *E.B.*, the Court of Appeal finds that *Artway*'s synthesis of the test for punishment survives the decisions of the US Supreme Court in both *Ursery* and *Hendricks*,[197] but that the decision in *Hendricks* on civil commitment demonstrates that legislative intent ought to be deferred to more heavily.[198] As the Court concludes, "if we determine that the actual legislative purpose was remedial, we must sustain Megan's Law against the current challenges unless its objective purpose or its effect are sufficiently punitive to overcome a presumption favoring the legislative judgment."[199] This standard leads to the Court of Appeal's determination that Megan's Law is not punitive.

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[193]*Ibid.* at 1176.

[194]*Ibid.* at 1178.

[195]*Ibid.* at 1191.

[196]*E.B.* v. *Verniero*, 119 F. 3d 1077 (3rd Cir. 1997) [hereinafter *E.B. (1997)*].

[197]The Court finds that *Ursery* ought to be limited to civil forfeiture cases, and that *Hendricks* relies on factors that overlap with the *Artway* standard.

[198]The Court of Appeal finds that *Hendricks* provides "a new and important 'fixed point' that is of great utility in determining on which side of the punitive/nonpunitive line to place community notification": *E.B. (1997)*, *supra* note 196 at 1096.

[199]*Ibid.*

The Court finds that the legislation's stated purpose is remedial and not punitive;[200] that a reasonable legislator could have believed that the means chosen were justified by these remedial goals;[201] and that although the effects of notification may be harsh, they are not imposed by the State per se,[202] and in any event are less harsh than the effects of civil commitment found not to be punitive in *Hendricks*.[203]

Through their own twists and turns, then, the State and Federal courts came to agree that New Jersey's Megan's Law does not constitute punishment, and thus is not subject to the constitutional strictures that come into play when the state acts punitively. Most recent constitutional challenges, since these cases, have focused instead on the privacy issues implicated by the use of a registrant's home address (leading to a change in the guidelines)[204] and the creation of an internet-based registry (presently enjoined).[205] What is frustrating about this "morass of constitutional litigation,"[206] though, is not that courts are relying on doctrinal tests for what constitutes punishment, nor that courts are relying on different tests to reach similar results. Rather, it is the seeming insistence of courts that the tests – in and of themselves

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[200]Relying on the statute's statement of purpose and the statement accompanying the Bill to the Senate – though not examining legislative debates – the Court of Appeal concludes that the statute's legislative purpose is remedial and not punitive, to which it "must give substantial deference": *Ibid.* at 1097.

[201]Rather than seeking to examine the statute from a neutral standpoint, the Court of Appeal makes it clear that the analysis of objective purpose will import a presumption that the intent is not punitive; "[i]f a reasonable legislator motivated solely by the declared remedial goals *could have* believed the means chosen were justified by those [remedial] goals, then an objective observer would have *no basis* for perceiving a punitive purpose in the adoption of those means": *Ibid.* at 1098 [emphasis added].

[202]As such, given the reasonable relation of Megan's Law to nonpunitive goals, the tailoring of notification depending on risk assessment, and the public nature of criminal convictions, Megan's Law's objective purpose is not found to be punitive, despite the fact that these individuals "can expect to experience embarrassment and isolation": *Ibid.* at 1101.

[203] There is, according to the Court, a risk of private violence that we all face, and the increased risk faced by registrants "pales by comparison to the civil commitment of sex offenders sanctioned in *Hendricks*": *Ibid.* at 1105. In his dissent, Circuit Judge Becker reaches radically different conclusions. While also applying *Artway*, Becker looks to see whether the text or legislative history demonstrate that notification is not punitive. Even prior to discussing the potentially punitive effects of the legislation, Becker determines that the history, text, and design of the notification provisions, when examined objectively, all point to community notification's punitive nature. See *ibid.* at 1111ff.

[204]See *Paul P.* v. *Farmer*, 227 F.3d 98 (3rd Cir. 2000).

[205]*A.A., supra* note 117.

[206]*Ibid.* At 279.

– do the work necessary to resolve whether community notification entails punishment. Strewn throughout the case law, then, are passages that criticize previous courts for relying on the "wrong" test (and, for this reason alone, reaching the "wrong" result), or passages that excuse previous courts' wrong result as resulting from being decided before the Supreme Court's latest pronouncement in this area. What is frustrating, then, is the insistence of courts that the tests provide a pure deductive logic from which to determine whether the state is acting punitively, and that there is any firm line that separates what is *punitive* from what is *regulatory*.[207] As Stanley Fish might suggest, what is frustrating is law's need to have a "formal existence"[208] in these cases.

While there appears to be no doubt that some of these tests – such as those that privilege the stated legislative intent – are more conservative/deferential than others, a reading of the cases demonstrates that these tests don't carry their own effectivity. Judges in this area have reached different results by highlighting different aspects of "history"; the elements to be taken into

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[207]This is most evident by the inherent vagueness of the test that is said to 'synthesize the jurisprudence,' as presented in *Artway*, which critical legal scholarship might define as indeterminate:

> A measure must pass a three-prong analysis – (1) actual purpose, (2) objective purpose, and (3) effect – to constitute non-punishment ... If the legislature intended Megan's Law to be 'punishment,' i.e., retribution was one of its actual purposes, then it must fail constitutional scrutiny ... If the legislature's actual purpose does not appear to be to punish, we look next to its 'objective' purpose. This prong, in turn, has three subparts. First, can the law be explained solely by a remedial purpose? If not, it is 'punishment.' Second, even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered 'punishment.' Third, if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its 'usual' manner, consistent with its historically mixed purposes. Unless the partially deterrent measure meets both of these criteria, it is 'punishment.' If the measure meets both of these criteria and the deterrent purpose does not overwhelm the statutory purpose, [it is not punishment]. Finally, if the purpose tests are satisfied, we must then turn to the effects of the measure. If the negative repercussions – regardless of how they are justified – are great enough, the measure must be considered punishment.

See *Artway (1996, 3rd Cir.)*, *supra* note 174 at 1263. Even putting to one side the vagueness of whether something is deterrent or retributive, no real attempt is made to define when negative repercussions are "great enough," when a deterrent purpose is 'overwhelming,' when something can be said to be "traditionally" regarded as punishment, and so on.

[208]S. Fish, "The Law Wishes to Have a Formal Existence" in S. Fish, ed., *There's No Such Thing as Free Speech: And It's a Good Thing, Too* (Oxford: Oxford University Press, 1994) 141.

account in analysing the "legislative scheme" have not been uniform; the legislature's stated purpose has been interpreted differently, depending on the evidence relied upon by courts; and the effects on registrants that ought to be properly attributed to the State have been the subject of controversy. As such, while the tests are not irrelevant – courts that rely more heavily on legislative intent, for instance, do find Megan's Law to be non-punitive, in contrast to courts that rely more heavily on effects – they remain indeterminate, as is evidenced by the fact that not all courts relying on "effects" have declared Megan's Law to be punitive, with some relying on different effects than others to reach their conclusions. There is a more substantive question at play, which has to do with the *content* that is attributed to each element of these tests, and the background assumptions at play regarding community, risk, and the role of the State. In pursuing this question, this chapter draws on Roger Cotterrell's work on *Law's Community*, in which he too pursues the question of how law contemplates "community," and in which he concludes that different presentations "encourage a different outlook on legal institutions and processes,"[209] and may "define parameters within which possibilities for the promotion and realization of practical ideals for legal regulation can be set."[210]

As a result, while the majority of commentary on Megan's Law has focused on what the proper test ought to be for assessing its constitutionality, the remainder of this chapter will instead reconsider the New Jersey cases by focusing on the conceptions of community, risk, public, and private that are at play, and seek to explore the normative content that is engaged in working through these issues.

V. Constituting the Preventive State

Although appearing to focus on narrower doctrinal questions regarding the proper test for punishment, the adjudication in this area has led to central questions being asked regarding the nature of punishment, the nature of public and private power, and the responsibilities that ought to be ascribed to public and private in this context.[211] Ought the likely effects on registrants be

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[209]R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (New York: Oxford University Press, 1995) at 241 [hereinafter *Law's Community*].

[210]*Ibid.* at 244.

[211]See generally Note, "Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released

included in determining whether a measure is punitive? Are the reactions of private citizens – which may lead to ostracism or violence – relevant to determining whether the state has acted punitively in notifying the community of an offender's presence?[212]

While relying on different tests to reach their conclusions, those courts that have upheld the constitutionality of New Jersey's Megan's Law – regardless of the doctrinal test relied upon – have generally determined that community notification is a regulatory, and not punitive, measure, and is thereby not subject to legal limits on state punishment. This interpretive move generally relies on three intertwined arguments that, when combined, uses notions of risk, community, and common sense to call the preventive state into being, while also working to shield this preventive state from legal accountability. Let us turn to these three arguments, which I will present generally before more thoroughly illustrating their effects in the decisions dealing with Megan's Law in New Jersey.

First, courts that have upheld the constitutionality of Megan's Law have held that the problem of sex offending requires a 'public' response: modern private citizens cannot be expected to unknowingly bear the risk of living among sex offenders; modern private citizens do not have

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Sex Offenders" (1996) 109 Harvard Law Review 1711.

[212]There have been constitutional challenges that have not focused on punishment. These have included claims that notification is a violation of personal liberty, thereby infringing on the right to privacy and reputation and on the right to travel, and a violation of substantive due process; that community notification is a violation of the Equal Protection Clause; that notification violates the Fourth Amendment right against unreasonable searches and seizures; and that notification statutes are unconstitutionally vague. Most interestingly, these have generally been decided similarly. Courts, having determined that community notification is a regulatory measure to enhance community safety, have generally extrapolated from that logic to assert that the governmental interest is sufficiently important, and the individual interest not so in need of protection (since the measure is not punitive), such that these other constitutional claims fail as well. Finally, several other challenges have been brought that focus on how community notification is to be applied. Community notification has been challenged on procedural due process grounds, raised to challenge one's risk assessment and the "tier" of notification that results. Other offenders have argued that they did not receive notice of possible community notification prior to entering a guilty plea; that the constitutional protections of a criminal trial should apply to tier review hearings; and that community notification guidelines ought to be subject to the requirements of the Administrative Procedures Act. Some offenders have argued that the requirements of registration and notification should not apply to them: that their offense is outside the "heartland" of cases intended to be regulated by the legislature, or that the statute does not mandate registration/notification for the offense committed. There is also a litany of less commonly litigated issues. Juveniles have argued that community notification is at odds with young offender statutes; some cases have centered on a would-be registrant's failure to register; on the question of jurisdiction when the offender has moved away from the state (*In the Matter of Registrant E.D.*, 288 N.J. Super. 166 (1996) [hereinafter *E.D.*]), whether registration can be ordered as a term of probation; whether a refusal to register can be the basis of prison discipline; whether it violates the "single-subject rule"; the conflict of jurisdictions between state and federal courts; whether registrants can be dismissed from civil service jobs or public schools; and whether registrants can rely on pseudonyms. For a review of some non-punishment based arguments, see *Megan's Law Sourcebook, supra* note 3 at Chapter 3.

access to the forms of information, and economies of scale, that the state enjoys; and as a result the state is required to act in order to protect them. Second, while private citizens cannot successfully cope with sex offending without some intervention by the state, the work that must be accomplished to protect oneself from sex offenders must be done by private citizens, relying on non-expert knowledges of how to avoid and cope with risk. While expertise on risk is mobilized to suggest that community notification can be carried out rationally and objectively, this same expertise is undercut throughout the adjudication, with courts instead positing that expertise is unnecessary (and at times less effective) for assessing risk of reoffense. In so doing, courts upholding Megan's Law's constitutionality affirm the political premise that, in the context of freed offenders who are thought to have the potential to recidivate, the state's role ought to be limited to providing the information, organization, and education that communities require to protect themselves to the best of their abilities, rather than seek to address "root causes" through a more centralized strategy.[213] Third, any harm that community notification may cause to an individual registrant is generally said not to be attributable, in any proximate sense, to the state. Rather, since any harms stem from the actions of private individuals (who have acted on the information released to them), these actions are 'private' harms, and as a result the state is not held to be responsible for them. This third argument relies heavily on an imagination of the community in which citizens are not acted upon as individuals per se, but are governed instead as members of (pre-conceived) families, with very specific structures, capacities, and resources attributed to them as a result.[214] The state engages with these citizens by identifying offenders in their midst, and in so doing enters into contractual relations with them. This strategy reflects an advanced liberal conception of community, through which individuals are imagined to pursue their own self-interest – and are responsibilized to do so through notification itself.[215] Furthermore, in the face of any abusive action, courts rely on the argument that the state will

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[213]See generally *Powers of Freedom*, *supra* note 21 at 167-196; "Risk and Responsibility", *supra* note 29.

[214]*Policing of Families*, *supra* note 48.

[215]See J.Q. Whitman, "What is Wrong with Inflicting Shame Sanctions?" (1998) 107 Yale Law Journal 1055 [hereinafter "Shame Sanctions"]. In contrast to my account, Whitman seeks to understand Megan's Law as being flawed because it does not recognize the reality of the statist vision of the public. My argument suggests that the strength of Megan's Law, and its negotiation of public and private, draws heavily on its contemplation of this third vision of the community.

engage the criminal law to prosecute vigilantism, but that the state cannot be expected to accept responsibility for the 'misuse' of the information it has released, nor for the consequences of having played a part in activating and educating community members to engage in surveillance, self-protection, and policing.

These three arguments constitute the preventive state in a very particular way. Community notification by the state is conceived of as a necessary response to a pressing social problem, requiring the informational resources of the state, thereby justifying (and mandating) the intervention of the public state. This state intervention, however, is conceived of as harnessing the power of individuals and their families in civil society, being neither a Keynesian intervention by the state to monopolize the monitoring or control of sex offenders, nor an expert driven focus that purports to solve the problem of sex offenders by making risk calculable and governable. This move encourages state involvement, while insulating it – morally, politically, and possibly legally – from any failure to actually prevent reoffense. Finally, the consequences of notification that the offender may bear are set aside as merely private responses that do not implicate the state, thereby insulating it from claims by sex offenders regarding community notification as a punitive measure. These public/private logics, when deployed contemporaneously, both mandate intervention by the preventive state while insulating it from political criticism and legal challenge.

This highlights the issue that I discuss in the remainder of this chapter. How can the risk of private violence, in one situation, be conceived of as a problem that requires a partnership between the 'state' and 'communities,' while the possible outcomes of that partnership are said to be beyond the state? In short, how is the preventive state called into being, while shielded from political criticism (having discharged its duty by alerting the 'community' to the 'risk') and legal accountability (with any results being blamed on private individuals who are not acting on the information provided)? These moves are premised on a set of assumptions regarding the nature and functioning of community life, concepts of risk and prudentialism, and an invocation of 'common sense' that provides a guiding orientation for both community and risk. In pursuing this analysis, I will focus on decisions dealing with New Jersey's Megan's Law, which served as many of the early decisions in this area, and as such set up many of the doctrinal fault lines

to which subsequent decisions have continued to refer,[216] particularly since the US Supreme Court has not yet addressed their constitutionality.[217]

VI. Community, Risk, and the Negotiation of Public and Private

Argument 1: The Problem of Sex Offending Requires a Particular Public Response

Although the question of whether Megan's Law is punitive or regulatory is examined by courts as a discrete doctrinal question, it stems from an initial premise regarding the nature of community and its relationship to the state. While sexual offenses have long been seen as within the purview of the state (even so, some sexual offenses have been conceived of as wholly private[218]), the nature of the response remains contingent on how the problem is defined. As such, community notification of sex offenders cannot be understood only as the response to sexual offending, the problem of sex offender recidivism, or the publicity surrounding tragic events in the local community, which are the arguments presented in the literature. Community notification, rather, also responds to concerns with the internal relations of communities themselves, and the relationships through which offenders can become 'invisible' risks.[219]

Through the prism of Megan's Law, the State becomes a necessary ally of civil society, a State that identifies with "community," called upon by civil society rather than being antagonistic to it or parasitic upon it for its support. This view permeates the state and federal court decisions in which the constitutionality of Megan's Law is upheld – but is absent from those decisions in which community notification is defined as punitive, and the statute thereby

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[216]See also L.H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, PA: Pennsylvania State University Press, 1995) at 93. After discussing the "stories" in classic U.S. constitutional law cases, for instance, LaRue notes that he "cannot prove that the stories" he develops "are *the* fundamental stories of constitutional law," but suggests their value in allowing us to think about racial inequality nonetheless.

[217]In February 1998, the US Supreme Court refused to hear arguments relating to the retroactivity of Megan's Law. See R. Hanley, "New Jersey to Appeal Ruling Halting Sex-Offender Warnings" *The New York Times* (20 April 2000) B5. Most recently, the Court has agreed to hear appeals from Alaska and Connecticut regarding community notification, to be heard this year. See L. Greenhouse, "States' Listings of Sex Offenders Raise a Tangle of Legal Issues" *The New York Times* (4 November 2002) A12.

[218]See, for instance, the discussion of the "marital rape exemption" in K.C. Connerton, "The Resurgence of the Marital Rape Exemption: The Victimization of Teens by their Statutory Rapists" (1997) 61 Albany Law Review 237.

[219]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 376.

found to be unconstitutional. Getting at this question requires an examination of the images of community that courts invoke, even though it is difficult to specify precisely how these images might have influenced a particular result. Following Cotterrell, however, I suggest that these images are constitutive of doctrinal frameworks, and reveal background assumptions and normative concerns that motivate decision-making and question-setting.[220] While drawing on a range of decisions in this section, I focus primarily on three pivotal cases: the decisions of the New Jersey Superior and Supreme Courts in *Doe* v. *Poritz*;[221] the decisions of the United States District Court and Court of Appeals in *Artway* v. *Attorney General of New Jersey*;[222] and the decision of the United States Court of Appeals in *E.B.* v. *Verniero*.[223]

The New Jersey Courts in *Doe* v. *Poritz*, the first case to uphold the constitutionality of Megan's Law, rely heavily on the language and images of the public sphere, a move which seeks to legitimate a State role in community notification. Speaking for the majority of the New Jersey Supreme Court in *Doe* v. *Poritz*, Judge Wilentz conceives of community notification as a response to the "spectacle of offenses committed by neighbors," a response to "highly publicized and horrific offenses," and a response designed to protect "the children of society."[224] This image of the *spectacle* – though the crime itself was committed in the offender's home – is aligned with the positioning of "*society's' children*" as the potential victims that the state must protect. This is not, despite the language of 'community' notification, an exclusively local problem – it is, rather, "a national trend reflecting a national problem"[225] that concerns society as a unified collectivity, invoking a Durkheimian collective conscience that calls for a broader

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[220]*Law's Community*, *supra* note 209 at 241, 325.

[221]Both these cases found Megan's Law to be constitutional, and were the first cases in New Jersey to do so. See *Doe v. Poritz, (New Jersey Superior Court)*, *supra* note 99, aff'd as modified *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12.

[222]*Artway (1995)*, *supra* note 163; *Artway (1996, 3rd Cir.)*, *supra* note 174; *Artway (1996, 3rd Cir., Petition for Rehearing)*, *supra* note 178 at 598). The District Court in *Artway* found Megan's Law unconstitutional, and the Court of Appeals expressed concern over notification while upholding the constitutionality of simple registration.

[223]This decision upholds the constitutionality of community notification under Megan's Law: *E.B. (1997)*, *supra* note 196.

[224]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 375-376.

[225]*Ibid.* at 376.

strategy than a single, local, community can provide. *Society*, according to the Court, has the right to know, so as to be able to protect itself. This very focus on *self-help* is central to upholding Megan's Law, with the Supreme Court thereby shifting the discussion away from an analysis of the limits of state action:

> The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose ... The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children ... [These laws] represent only the conclusion that society has the right to know of [the presence of sex offenders] not in order to punish them, but in order to protect itself.[226]

This theme of a unified society reoccurs throughout the decisions upholding community notification: Megan's Law is articulated as protecting "society"[227] and reflecting "the interests of the public."[228] While society is thereby presented as composed of unified interests, community is in contrast perceived as shifting: offenders are recognized as crossing the geographic boundaries of community, with the scope of community itself thought to be contested given the social mobility offered by modern life.[229] In this way, courts have expanded the scope of notification as not only contingent on a registrant's residence, but also on the geographic area surrounding his work place, even if the registrant commutes to that work place from outside the state, thereby extending "community" beyond political boundaries, and providing no fixed manner for ascertaining its limits in individual cases.[230]

How, then, do these courts engage with the idea of community that lies at the heart of community notification, while preserving a role for the state to deal with this "national

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[226]*Ibid.* at 372-373.

[227]*New Jersey in Interest of B.G.*, 674 A. 2d 178 at 184 (N.J. Super. Ct. 1996) [hereinafter *B.G.*].

[228]*In the Matter of Registrant A.B.*, 667 A. 2d 200 at 204 (N.J. Super. Ct. 1995) [hereinafter *A.B.*].

[229]*In the Matter of Registrant E.A.*, 667 A.2d 1077 at 1081-1082 (N.J. Super. Ct. 1995) [hereinafter *E.A.*]. Similarly, Megan's Law applies to offenders who committed their offense "under the law of any jurisdiction," so that the community being contemplated isn't one that has necessarily suffered a harm caused by the registrant, but purely a future-oriented notion of a community that might be harmed in the future: see *Diaz* v. *Olsen*, 110 F. Supp. 2d 295 (Dist. Ct. N.J. 2000).

[230]*In the Matter of Registrant E.D.*, 672 A. 2d 183 (N.J. Super. Ct. 1996) [hereinafter *E.D.*].

problem"? How do courts reconcile the very idea of community that motivates Megan's Law, with a role for the state that adopts a more Durkheimian tone of national, social, solidarity? This reconciliation is achieved, I argue, through a reliance on community that simply presumes a geographic spatiality, and that does not, and cannot have knowledge of all its members. It is the lack of knowledge, and not the existence of the offenders themselves, that render individual community members *defenseless* – suggesting that trusting the State to take care of this problem would itself be ineffective to guard against this risk.[231] This lack of knowledge, furthermore, represents a vulnerability that the state must assist the community to overcome, since it is at this more local level that individual communities must rely on a solidarity that is threatened by unknown sex offenders:

> The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighbourhood, are entitled not to be disturbed simply because of that prior offense and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.[232]

The individual community is depicted in contrast to the threat posed by the sex offender. Once integrated into the community, the Court presumes that community members are not wary of their fellow members, and it is this trust inherent in community life that opens a space for sex offenders to present an undiscoverable danger. Community notification, then, is alert to this disjuncture between trusting communities and security, and works to isolate the individual offender so that the community can continue to maintain its cohesion and solidarity – particularly when the offenders, as Megan's mother has pointed out, "don't look like monsters."[233] At one level, this trust requires the state to intervene in community life, and isolate those individuals who present a certain risk so that they will be excluded from the dense

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[231]*Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1342.

[232]*Doe* v. *Poritz (New Jersey Supreme Court), supra* note 12 at 373.

[233]B. Williams, "A Visit from Megan's Mother: Offers Tough Words of Advice to Parents" *The Record* (13 November 1996) A1 at A2.

networks of trust that would otherwise protect them from being discovered – this will thereby 'give people a chance to protect themselves and their children.'[234] At another level, these decisions also appear to lament the very lack of community – it is not that the trust intrinsic in community life leads to an overly trusting community, but that because of the lack of information regarding one another, community life has yet to take hold. This second reading laments the lack of a gemeinschaft form of community, and is concerned with community members who have not fully embraced the community by voluntarily disclosing their criminal pasts. As such, these offenders have only 'apparently' been integrated into their communities, into an "apparently normal lifestyle," having "adjusted their lives so as to appear no more threatening than anyone else in the neighborhood," and having "slipped anonymously into the life [they choose]," with Megan's Law "tearing asunder" an offender's "cloak of anonymity."[235] As such, while the New Jersey Supreme Court believes that state disclosure of this information may implicate privacy interests in individual cases, these need to be "weighed against the potential molestation, rape, or murder by others of women and children."[236] On this second reading, then, the problem is not that the nature of community life leads to an overabundance of trust, but rather that without community notification, there is no community to speak of, since without knowledge of each other a self-regulating community that can rely on informal social controls has not yet been constituted.[237] As others have pointed out, community notification itself may be part and parcel of broader community-building efforts, and attempts to encourage leadership and community service.[238] Social order, as Hebenton and Thomas argue, is not only protected in this way, but is rather "actively constructed and managed."[239]

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[234]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 372.

[235]*Ibid.* at 373; *Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1349.

[236]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 373.

[237]Given the centrality of "community" in this context, it is perhaps most ironic that the very question of community was brought up within a motion by Timmendequas, both in terms of the county from which jurors ought to be empaneled, and in terms of whether jurors should be disqualified for having knowledge of Megan's Law. See *Timmendequas, Supreme Court 1999*, *supra* note 70.

[238]L. Presser & E. Gunnison, "Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?"(1999) 45 Crime & Delinquency 299 [hereinafter "Strange Bedfellows"].

[239]B. Hebenton & T. Thomas, "Sexual Offenders in the Community: Reflections on Problems of Law, Community

Whether the community is constituted through notification, or whether the community is such a trusting environment as to be too easily permeated, however, doesn't matter too much in determining the role of the state in supplying the necessary information regarding the presence of sex offenders. On either approach, this view of the community relies on a very particular conception of an inside/outside distinction that is different to the majority of work on crime prevention. The 'community' is, in most work on street crime, invoked to demonstrate that danger is coming from without, held hostage by an external force that has taken over its otherwise safe neighbourhoods, a theme which finds parallels in recent efforts to regulate panhandling and public loitering.[240] On the other hand, when dealing with organizational deviance, factors from without are rarely invoked; studies of police deviance, for instance, demonstrate the prevalence of a 'bad apple' explanation for criminality.[241] In this latter context, then, the long-term community is preserved, and even strengthened, by the rooting out of bad apples from its midst, and by blaming the deviance on moral, rather than systemic, failures.

This inside/outside binary, however, is not fully clear in the context of community notification. From a policy perspective, community notification presupposes that the sex offender is among us, someone with whom we have to learn to live (and avoid) on a daily basis – he is not an offender who comes from outside the community, but rather lurks among unsuspecting community members. Much of the logic of community notification presupposes this idea of community as geographically defined, a spatiality which further implies that to be an effective preventive measure offenders will remain within certain territorial boundaries, will become 'known' and recognized, and will not go 'underground' to commit crimes within an unsuspecting community (a concern that critics of Megan's Law have failed to make with any success).[242] As stated in *Doe* v. *Poritz*, the sex offender is "loose in [our] midst."[243] That he is

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and Risk Management in the U.S.A., England and Wales" (1996) 24 International Journal of the Sociology of Law 427 at 431 [hereinafter "Sexual Offenders in the Community"].

[240]J.Q. Wilson & G.L. Kelling, "Broken Windows: The Police and Neighborhood Safety" (March 1982) 249 The Atlantic Monthly 29.

[241]C.D. Shearing, ed., *Organizational Police Deviance: Its Structure and Control* (Toronto: Butterworths, 1981).

[242]"When Answers Precede Questions", *supra* note 75.

[243]*Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1342.

'loose,' of course, reflects the offender's inability to manage his own 'riskiness,' and implies that the burden of that risk calculation must be shifted onto members of the surrounding community, a point that I expand upon later in this discussion. Here, I want to contrast this idea of being 'in our midst' with a second logic of notification, that the offender is, almost by definition, a stranger. Not only does community notification presuppose that we do not already know his life history, but also it implies that we will now know to avoid him, and be on our guard in his presence. He is, then, either someone who can be avoided because he was never part of the community, or someone who can be alienated from the community without much difficulty – he is not, in short, part of us, in any thick sense. Curiously defined as being both inside and outside, the sex offender calls for a particular form of risk management.

Basing themselves on this logic of inside/outside in defining the community's relationship to the offender, the New Jersey courts in *Doe* v. *Poritz* then rely on 'risk' to justify the need for the state to intervene and unmask sex offenders, by making information regarding them available to community members. Risk is relied on to conflate all community members as potential victims. The "evil to be regulated," according to *Doe* v. *Poritz*, is not the existence of sex offenders, but rather the community's lack of knowledge regarding their risk for reoffense.[244] It is this lack of information regarding risk that puts members of the community at risk for victimization. Managing risk, not responding to the problem of sex offenders per se, is what the New Jersey Supreme Court refers to in speaking of the "essence" of its decision.[245] As a result, although possibly disturbing the "apparently normal lifestyle" of previously-convicted sex offenders, this concern is "weighed against the potential molestation, rape, or murder by others of women and children because they simply did not know of the presence of such a person," and who might thereby "suffer because of their ignorance."[246] If, as Pat O'Malley and others have suggested, advanced liberal forms of governing crime rely heavily on techniques of responsibilization to activate individuals and communities,[247] the Court in *Doe* v. *Poritz* is

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[244]*Ibid.*

[245]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 372.

[246]*Ibid.* at 373 [emphasis added].

[247]See eg. "Risk and Responsibility", *supra* note 29; P. O'Malley, "Post-Keynesian Policing" (1996) 25 Economy &

apparently concerned over the information failure that may result when the risk to be combatted is, as stated by the Superior Court in *Doe* v. *Poritz*, "an invisible enemy." Without "fair warning," how will potential victims know what, or whom, to be vigilant against?[248]

This conceptualization of risk relies on its invisibility and its indiscriminateness to invoke a role for the state within a broader logic of prudentialism. The simple existence of the public record, kept by the state and examinable by all citizens, is not conceived of as an appropriate remedy to this problem, since the Court worries that citizens "may have no reason to make such requests."[249] It is, rather, the packaging together of that information, and its organized release to the public, that is central to the state's role, especially given the "costs in time, effort, and expense, that members of the public would incur in assembling the information themselves."[250] Although O'Malley has elsewhere suggested that neoliberal 'community' strategies "allow for collective action without invoking the discredited imagery of the state"[251] community notification does not entail a rigid separation of state and community, but rather a realignment of their functions. As O'Malley describes, this technology of governance "removes the key conception of regulating individuals by collectivist risk management, and throws back upon the individual the responsibility for managing risk"[252] in allegiance with his or her 'community,' yet does so in a way that integrates the state as a necessary guardian of individuals' ability to do so effectively.

Whereas the New Jersey Courts conceive of a public that, though seeking to protect itself, requires some assistance from the State to manage risk given the nature of "community,"the Federal Courts in *Artway* v. *Attorney General* adopt a markedly different stance. Although as

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Society 137 [hereinafter "Post-Keynesian Policing"]; K. Stenson, "Community Policing as a Governmental Technology" (1993) 22 Economy & Society 373; *Culture of Control*, *supra* note 5 at 124-127; "Limits of the Sovereign State", *supra* note 33.

[248]*Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1342.

[249]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 376.

[250]*Ibid.* at 411.

[251]P. O'Malley, "Criminology and the New Liberalism" (John LL. J. Edwards Memorial Lecture, Sponsored by Woodsworth College, University of Toronto, 13 November 1996), online: Centre of Criminology, University of Toronto <http://www.library.utoronto.ca/libraries_crim/centre/lecture.htm> (date accessed 29 September 2002).

[252]"Risk and Responsibility", *supra* note 29 at 197.

a doctrinal matter, the Federal courts adopt an effects-based test for punishment, rather than the state courts' emphasis on legislative intent, the *Artway* courts also contemplate a very different community, and a different relationship between the state and civil society. The apparent differences between the courts, however, does not merely stem from the *Artway* courts' focus on effects, since even the New Jersey courts chose to imagine a very particular community while focusing most of their doctrinal analysis on legislative intent – and of course, nothing inherent in the nature of the tests prevented the *Artway* courts from reaching a similar result.

Perhaps ironically the District Court decision in *Artway*, although finding Megan's Law unconstitutional, actually adopts a far more cohesive vision of community than do the state courts. Individual offenders are not perceived to have only 'apparently' been integrated into the community, but there is instead a suggestion that sex offenders are, in fact, part of the community itself. The Court refers to the potential for "castigation by a community *of one of its members*,"[253] and expresses concern that past convictions will be made available "to each and every member of a registrant's community, whether they are interested or not."[254] This latter concern not only conceives of a registrant as belonging to a community (and not simply masquerading within it),[255] but also suggests that not all residents in a community may care to know of a registrant's past offenses. For the District Court, in fact, separating out the offender from the community is the crux of what renders Megan's Law unconstitutional. In this vein, the Court compares community notification with the "social castigation of a member of its community" in *The Scarlet Letter* and *To Kill a Mockingbird*; with Nazi practices intended to identify Jews; with the classification of groups in the Indian caste system, and so on.[256]

Given the *Artway* Court's doctrinal focus on the effects of notification, it is perhaps not surprising that the Court would emphasize concerns over ostracizing an offender from the community. Although this doesn't explain the particularly virulent analogies the Court adopts,

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[253]*Artway (1995), supra* note 163 at 686.

[254]*Ibid.* at 689.

[255]In *Artway*, the US Court of Appeals, although not dealing with the question of notification, finds the argument that the essence of historical punishment is 'being shunned by one's community' to have "considerable force": See *Artway (1996, 3rd Cir.), supra* note 174 at 1265.

[256]*Artway (1995), supra* note 163 at 686-687.

nor the Court's presumption that registrants seem to belong to the community in a thicker sense than the New Jersey State Courts suggest, there is yet another aspect to the *Artway* vision of community that is striking. Whereas the State Courts in *Doe* v. *Poritz* imagine the registrant as an individual offender, living anonymously among an unsuspecting community, the District Court in *Artway* instead refers to these offenders as an identifiable *group*[257] and as a *minority* within society. Whereas this is evident in the analogies to Nazi Germany and to the Indian caste system, it is an argument made explicitly by the Court in finding that community notification would constitute a lifelong branding of these offenders, and suggesting that notification is a continuation of a pattern in which, "in generation after generation, the majority in society has found ample justification for continuing such practices."[258] This narrative posits a cohesive community that is seeking to stigmatize offenders for breaking its moral code, rather than one that is protecting against the possibility of reoffense.[259] Perhaps not surprisingly, risk does not play a role in assessing community notification in *Artway*.[260]

This is a very different narrative, however, than that of the US Court of Appeals in *E.B.* v. *Verniero*, deciding that community notification is not punitive. As with the New Jersey State courts, the Court of Appeals relies instead on risk and its assessment, and posits a community that lies in sharp contrast to that imagined in *Artway*. Although relying, for the most part, on the *Artway* formula for assessing whether the legislation is punitive, the Court in *E.B.* rejects the analogy between notification and earlier forms of branding and shaming, since State dissemination of information was not necessary in historical periods when all "would have knowledge of these matters" – and though the dissemination of information may later lead to ridicule and shaming, it itself is distinct from those punishments.[261] Notification, in *E.B.* v. *Verniero*, is due to the lack of community itself.

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[257]*Ibid.* at 684.

[258]*Ibid.* at 689.

[259]*Ibid.* at 686-687.

[260]Where risk is invoked in this decision, this concept is also invoked as presuming a stable community that will act to deter offenders: see discussion in Argument 3, below.

[261]*E.B (1997), supra* note 196 at 1099.

These different visions of community, then, each generate a call for different relations with the State, and for different assignments of the public/private divide. The dominant paradigm set by the State Courts in *Doe* v. *Poritz*, and echoed by the US Court of Appeals in *E.B.* v. *Verniero*, posits risk as paramount, identifies the community as one which can be invaded by individuals from without, and suggests that the community itself has yet to be fully constituted – and the role of the State is to remedy this weakness by providing the information that might have been had in a "thicker" community setting. An alternative paradigm, articulated by the federal courts prior to the decision in *E.B.*, conceives of the community as already having a moral code, as including those members that violate its moral code (these are not defined as outsiders), and as susceptible to violent forms of internal discrimination – and in this case, the role of the State is to protect against majority tyranny. In the former, community is imagined as a safe place, though one which has yet to be attained; and in the latter, community is perceived as highly active, yet potentially oppressive.

The irony, of course, is that community notification appears most justifiable where the community is weak. Depending on one's reading, this is either where the community is too trusting to be protective of its borders or where a system of notification is required in order to speak of a "community" that can be self-regulating. Where civil society is conceived as already having formed self-regulating communities – the decision in *Artway* goes on to suggest that these communities may impose sanctions on sex offenders even without state intervention – the proper role of the State is, in contrast, to avoid identifying with the community, all the while accepting that communities will enforce their moral codes as they see fit. As Cotterrell suggests, these assumptions regarding community life carry important normative implications, and set up as *truths* what are simply partial, limited, and often unexamined claims.[262]

In the case of Megan's Law, these truths structure whether community notification is understood as regulatory or punitive, a decision on which the constitutionality of Megan's Law rests. And in this way, these ideas of community also serve as authority for particular public responses by the State, delimiting the acceptable bounds of public and private conduct. Much of this returns toward the end of this chapter, where I discuss the forms of accountability that

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[262]*Law's Community*, *supra* note 209 at 240-241.

Megan's Law sets up between the state and local communities, and the relationship between community and risk in that process. Before doing so, however, the concept of "risk" as articulated in the case law itself needs to be unpacked.

Argument 2: The Assessment and Management of Risk

From a doctrinal perspective, how courts conceive of risk assessment is critical to their views on punishment and the constitutionality of Megan's Law. Courts upholding Megan's Law specifically refer to the risk assessment process in determining that Megan's Law is simply regulatory, and not punitive, since it classifies registrants based on their risk of reoffense. In fact, it is the rational and objective nature of the risk assessment process that motivates courts to find that, regardless of any possible negative effects on registrants, the legislative intent – both subjectively and objectively ascertained – is purely remedial, to protect rather than to punish.

The centrality of risk assessment, however, also works to delineate the scope of public and private power, by highlighting whether expertise is required in this process, and in structuring what is public (and thereby the responsibility of the State) and what is private (and thereby not the State's responsibility). With sex offending in contemporary times usually perceived as requiring state-run expertise,[263] risk assessment itself is caught up in a larger debate over the scope of what ought to be public and what ought to be private. As such, the very practice of risk assessment – said to be at the heart of the ability to assign offenders to tiers and warn the community of their presence in a rational fashion – is implicated in negotiating the public/private divide.

As I demonstrate in this section, the move in Megan's Law to involving community members in the monitoring of sex offenders both embraces and rejects what is commonly conceived of as expertise in assessing risk. This simultaneous deployment of expert and lay knowledges regarding risk is what provides community notification with so much of its strength: community notification is said to be a rational, objective measure because of its scientific underpinnings (thereby providing support for its constitutionality), while allowing for a shift from the State to

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[263]The history of how to respond to sex-offending has implicated State expertise throughout the 20th century. See eg. "From the Sexual Psychopath Statute to Megan's Law", *supra* note 31; "Sexual Predators and Social Policy", *supra* note 52.

local communities in managing sex offenders by deprivileging the need for that very expertise.[264]

Although empirical evidence suggests that judges exhibit systematic errors in gauging risk, and that they hold different beliefs regarding sexual offending than do professionals in this field,[265] I am not suggesting that expert risk assessments are somehow better than judicial or lay assessments. I am solely interested in demonstrating that the hybridity of risk as a technology in the implementation of Megan's Law is itself a mechanism through which governance is achieved. This hybridity, I argue, is critical to understanding Megan's Law and its negotiation of public and private power, a negotiation in which the question of expertise is bound up with the role of the State under advanced liberalism.[266] As Nikolas Rose explains, over the late 19th and early 20th centuries, expertise itself became bound up with the State, regardless of whether it was actually located in the State at any given moment:

> The authority of expertise becomes inextricably linked to the formal apparatus of rule ... This was not so much a process in which a central State extended its tentacles throughout society, but the invention of various 'rules for rule' that sought to transform the State *into* a centre that *could* programme – shape, guide, channel, direct, control – events and persons distant from it ... The truth claims of expertise were highly significant here: through the powers of truth, distant events and persons could be governed 'at arms length': political rule would not itself set out the norms of individual conduct, but would install and empower a variety of 'professionals', investing them with authority to act as experts in the devices of social rule.[267]

In advanced liberal democracies, however, expertise is increasingly fractured, and the knowledges that come to form expertise are increasingly decentred. Drawing on Rose's work,

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[264]I disagree, then, with Hebenton and Thomas' claim that public discussion is "at odds" with the criminal justice system's focus on calculability, both because the two paradigms serve to modify each other in important ways (and in that sense, epistemological challenges do not make them "at odds") and because neither paradigm is exclusively constituted by one knowledge format, but are themselves plural and internally contested. The claim is made in "Sexual Offenders in the Community", *supra* note 239 at 441.

[265]W. K. Viscusi, "How do Judges Think About Risk?" (1999) 1 American Law & Economics Review 26; K.M. Bumby & M.C. Maddox, "Judges' Knowledge about Sexual Offenders, Difficulties Presiding over Sexual Offense Cases, and Opinions on Sentencing, Treatment, and Legislation" (1999) 11 Sexual Abuse: Journal of Research and Treatment 305.

[266]N. Rose, "Expertise and the Government of Conduct" (1994) 14 Studies in Law, Politics and Society 359 at 372.

[267]N. Rose, "Governing 'Advanced' Liberal Democracies" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 37 at 39-40 [emphasis in original] [hereinafter "Governing Advanced Liberal Democracies"].

I here investigate the various forms of expertise that are implicated in community notification, and suggest that the simultaneous deployment and displacement of expertise provides support for state-run notification, while opening spaces for new relations between expertise and politics, and shifts in relations of authority.[268] From a theoretical perspective, this section also builds on Rose's analyses by investigating the epistemological struggles themselves as empirical instances of contestation. Although my argument is at odds with Boa Santos' suggestion that science is "the privileged form of knowledge of state action,"[269] I draw much of the theoretical significance of this analysis from Santos' work – and thereby conceive of these epistemological struggles as further constitutive of moral codes and social relationships, or political programmes and governance strategies more broadly.[270]

a) The Design of Risk Assessment in Megan's Law

Expert assessments of risk are said to play an important part in the general scheme of community notification and Megan's Law in New Jersey. First, actuarial risk assessments are relied on by legislatures in concluding that sex offenders, as a group, present higher risks of recidivism that require some form of management post-release.[271] Second, the risk assessment scale relied on in assessing an offender's risk tier is said to be based on science,[272] with the panel that developed the scale including mental health experts, and with the scale itself relying on risk

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[268]*Ibid.* at 54-61.

[269]B. De Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 439 [hereinafter *Toward a New Common Sense*].

[270]See generally *ibid.* at 403-455.

[271]See "A Study in Actuarial Justice", *supra* note 105, which concludes that these legislative findings "typically vastly overstate the capacity of social science to predict the likelihood, frequency, and nature of sex offender recidivism" (at 593-594). For a brief review of the accuracy of predicting reoffense among this population, and developments that may improve the accuracy of future instruments, see "Sexual Predators and Social Policy", *supra* note 52 at 94-97.

[272]For example, see the comments made by Philip Witt, a psychologist who helped draft the scale: "Despite what some people say, there is actual empirical literature that shows you can use certain variables like the ones we selected to make predictions about the likelihood of future offenses." See B. Sanderson, "Battles Loom over Sex Crimes Score Card: Point System Part of Megan's Law" *The Record* (16 September 1995) A1.

criteria said to have empirical support.[273] The expertise, be it actuarial or clinical, supporting Megan's Law is continually invoked to justify community notification as being regulatory, and not punitive. As the United States Attorney argues, Megan's Law is particularly appropriate when dealing with offenders who have "a significant documented risk of committing future sex crimes," and as a result serves a clear regulatory (and not punitive) goal.[274] This is echoed by the New Jersey courts' invocation of "the statistical information" that calls for this particular regulatory strategy of informing residents of an offender's presence.[275] The basis for referring to Megan's Law as a regulatory scheme (and thereby protecting its constitutionality) is inextricably linked with the reliance on expertise to manage these offenders, and the ability to do so through a rational process that highlights the regulatory, rather than punitive, aspects of community notification. Actuarial expertise in particular is presumed by many commentators to be at the heart of community notification, at times through a mistaken conflation of both actuarial and clinical assessment methods.[276] Wayne Logan positions Megan's Law within broader trends toward "actuarial justice."[277] Jonathan Simon, in turn, concludes that "nobody classified by Megan's Law exists outside of a grid of risk," and that this risk is determined through actuarial expertise.[278]

Yet, even at these two initial stages, expert risk assessments are negotiated in and through non-expert criteria. First, legislatures are making political choices to rely on scientific evidence

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[273]*Guidelines March 2000*, *supra* note 112 at Exhibit E. The members of the panel are identified in G. Ferguson, *An Investigation into the Risk Validity of the Registrant Risk Assessment Scale as a Legal Tool and Clinical Instrument* (Ph.D. Dissertation, The Union Institute 1998) at 3-4 [unpublished] [hereinafter *An Investigation into the Risk Validity*].

[274]*Brief for the United States (filed April 1995)*, *supra* note 105 at 87.

[275]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 373.

[276]Clinical and actuarial expertise differ, and researchers suggest that clinical predictions appear to be far less accurate regarding recidivism. Clinical prediction tends to produce higher rates of false positives: see C. Slobogin, "Dangerousness and Expertise" (1984) 133 University of Pennsylvania Law Review 97; R. Hood, S. Shute, M. Feilzer & A. Wilcox, "Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-Term Reconviction Rates and of Parole Board Members' Judgments of Their Risk" (2002) 42 British Journal of Criminology 371.

[277]"A Study in Actuarial Justice", *supra* note 105.

[278]"Managing the Monstrous", *supra* note 32 at 461.

regarding recidivism rates, choices that are made even more obvious by the contested nature of the scientific evidence on this very point, and the invocation of some studies rather than others.[279] Legislative reliance on these statistical findings, then, is as much a legal and political question as one motivated by science,[280] with law authorizing closure over scientific differences rather than relying on science as autonomous knowledge.[281] In the context of Megan's Law, there is support in both the State and Federal courts for this very point: "[c]onflicting studies and interpretations, especially concerning the precise numbers, abound, but as noted above, *the resolution of the controversy in this area is solely a legislative matter.*"[282] Within the legal field, these scientific conflicts are thereby erased as bases for continued argumentation.[283]

Second, the validity of the Registrant Risk Assessment Scale itself had not been empirically demonstrated prior to being adopted.[284] This is particularly telling: although it includes criteria

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[279]E.S. Janus, "The Use of Social Science and Medicine in Sex Offender Commitment" (1997) 23 New England Journal on Criminal and Civil Confinement 347; K. Heilbrun, C.M. Nezu, M. Keeney, S. Chung & A.L. Wasserman, "Sexual Offending: Linking Assessment, Intervention and Decision Making" (1998) 4 Psychology, Public Policy and Law 138. Even within risk assessments, of course, there is a further policy decision that must be made: since risk assessments do not purport to be accurate in every case, but do appear to result in more false positives than false negatives, decisions must be made regarding the acceptable ratio of false positives that are tolerable. As others conclude, "[w]e need not be satisfied with an unsatisfactory answer to a primitive question such as whether prediction 'works' but, rather, what ratio of hits to false alarms is desirable": "Sexual Predators and Social Policy", *supra* note 52 at 95.

[280]"A Study in Actuarial Justice", *supra* note 105.

[281]The concept of "closure" is fundamental to research in science and technology studies: see S. Beder, "Controversy and Closure: Sydney's Beaches in Crisis" (1991) 21 Social Studies of Science 223; H. T. Engelhardt & A.L. Caplan, eds., *Scientific Controversies* (Cambridge: Cambridge University Press, 1987); S.A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Cambridge, MA: Harvard University Press, 2001). As Beder discusses, closure can occur for a range of reasons, including loss of interest, force, consensus, negotiation, resolution, or redefinition. I would suggest that the form of closure law invokes is reminiscent of closure through force, highlighting the violence that law enacts: see the collection in A. Sarat & T. Kearns, eds., *Law's Violence* (Ann Arbor: University of Michigan Press, 1995).

[282]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 *at* 374 *n*1 [emphasis added]. In the federal courts, see eg. *W.P. (1996)*, *supra* note 179 at 1221 *n*22, allowing the legislature to reach closure on this point but disclaiming any such authority for the courts ("It is not this Court's duty, however, to question the Legislature's choice of support for its conclusions").

[283]V. Roussel, "New Definitions of Risk and Responsibility in French Political Scandals" (Risk and Morality Conference, Green College, University of British Columbia, May 2001) [unpublished].

[284]The efficacy of the RRAS was not measured before being adopted. It has since been the subject of study: see G.E. Ferguson, R.J. Eidelson & P.H. Witt, *RRAS Validity Study: New Jersey's Sex Offender Risk Assessment Scale: Preliminary Validity Data*, online: Inspyte <http://www.asarian-intl.org/inpsyte/njrras.html> (last accessed: 21 October 2002).

found to be positively related to sex offender recidivism, the Scale excludes criteria that, though empirically found to be related to recidivism, are insufficiently concrete, too cumbersome, too expensive to ascertain, or too difficult to reliably gather.[285] Furthermore, the Scale does not provide for clinical interviews of offenders themselves, even though doing so would improve its predictive reliability – an explicit cost-benefit decision that is often neglected in discussing the validity of the Scale itself.[286] Finally, the criteria included in the scale can also be overridden, with exceptions made to use of the Scale based on an offender's statements or physical condition. Once again, however, while Megan's Law sought legislative closure over the scientific process, the system of community notification continued to invoke an expert capacity to predict recidivism, thereby scientifically legitimating notification as regulatory, rather than punitive:

> Although the Scale was not field-tested, it was subjected to intense scrutiny by experts. Empirical validation of the Scale is neither feasible nor practicable. Researchers would have to release offenders and then wait for five or ten years until they have enough data to determine which factors were the best predictors of recidivism. Obviously, it was not the Legislature's intent for the Attorney General to wait ten years before assigning offenders to tier levels. The Legislature concluded that the need to protect children from the risk of re-offense by future offenders and previously convicted offenders warranted registering sex offenders as soon as possible.[287]

Third, the risk assessment scale, itself offered as "rationally derived," and "an objective standard" on which to base community notification, is not limited to risk factors that enjoy empirical support (whether or not field tested),[288] but rather incorporates *legal determinations* of offense seriousness, which thereby entail normative judgements regarding the harm caused

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[285]*In the Matter of the Registrant C.A.*,146 N.J. 71 at 104 (Sup. Ct. 1996) [hereinafter *C.A. (New Jersey Supreme Court)*].

[286]*Ibid.* at 105-106. At 106, the New Jersey Supreme Court found this decision to be reasonable.

[287]*Ibid.* at 107. The Court goes on to shift the debate away from the scientific validity of the Scale, and toward a legalistic assessment of the process that was undertaken in its creation, finding that the Committee "within the time constraints that it faced, created a useful and rational scale ...." (at 107).

[288]Even in such cases, of course, there is a basic move from the aggregate to the individual based on risk assessments of populations. This move away from 'case-by-case' analyses is a hallmark of the "new penology" ("New Penology", *supra* note 5) but as I demonstrate in this section, what appears to be 'actuarial justice' in the Megan's Law context is tempered by a looser conception of risk, the importation of legal and commonsense knowledges, and a general primacy of law over science.

by lewdness and other "lower level offenses."[289] The scale, then, was developed by both mental health and legal experts, and extends beyond clinical factors that might normally be used within the mental health field.[290] As such, clinical factors are relied upon with respect to recidivism; legal factors are relied upon to assess the seriousness of any such violation. An example from the Registrant Risk Assessment Scale Manual clarifies this point: "If, for example, one is dealing with a compulsive exhibitionist, although there may be a high likelihood of recidivism, the offense itself is considered a nuisance offense. Hence, the offender's risk to the community would be judged low, consistent with the low legal penalties associated with such offenses." The converse will also apply: "Conversely, with a violent offender who has a history of substantial victim harm, even a relatively low likelihood of recidivism may result in a moderate or high potential risk to the community given the seriousness of a reoffense."[291]

Beyond these initial stages of design,[292] namely in the daily assessment and management of risk, expertise plays an even decidedly less prominent role.[293] I reiterate that I am not here implying that expertise ought to play a larger role. Drawing together the work of Callon and

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[289]*Guidelines March 2000*, *supra* note 112 at Exhibit E. Commentators often rely on the fact of the Scale to suggest that risk assessment under Megan's Law is an objective process: see eg. "Pursuing Public Protection", *supra* note 82 at 42 ("The revised Guidelines also established a more sophisticated scheme for risk assessment and tier determination, tailored to produce a more objective, uniform and precise means of classification through the utilization of widely recognized criteria").

[290]It is incorrect, however, to make the claim that there is simply *no* science motivating the analysis, an assertion made in passing by Professor John J. Gibbons, a former Chief Judge of the US Court of Appeals for the 3rd Circuit, who asserts that "[t]here is a form to fill out and also a lot of fancy language, but, in fact, none of these categories have any scientific validity at all" (J.J. Gibbons, Remarks in "Critical Perspectives on Megan's Law: Protection vs. Privacy" (1996) 13 New York Law School Journal of Human Rights 1 at 69 [hereinafter "Gibbons Remarks"]). Gibbons goes on to suggest that relying on classification systems to predict "future individual behavior" is "scientific nonsense," and asserts that it is akin to phrenology, a science he derides with reference to a federal court decision that finds it "primitive" (at 70). It is precisely these processes of authorization between law and science, in which Gibbons himself engages, that provide so much of the authority to the RRAS in the context of Megan's Law, through which law is invoked as providing closure over endless scientific debates, while the authority of the science is itself invoked to gain legitimacy for the practice.

[291]*Guidelines March 2000*, *supra* note 112 at Exhibit E.

[292]I do not investigate how the design of the Guidelines itself departs from the design contemplated by the statute. I have seen no evidence that any such departures were deliberate, and as such may simply reflect poor drafting of the Guidelines. This explanation is also offered by the New Jersey Supreme Court: See *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 379 *n*5.

[293]Wayne Logan reaches a more modest conclusion regarding the role of actuarial expertise, suggesting that the centrality of this expertise differs by jurisdiction, and reveals "differing levels of faith in the actuarial capacity of the justice system to predict sex offender recidivism": see "A Study in Actuarial Justice", *supra* note 105 at 597.

Latour with that of Bourdieu, I am here interested in the processes of "translation" or alchemy that the concept of risk and its evaluation undergo when taken from the scientific to the legal fields.[294] This can be highlighted at three points in the process: (1) judicial determinations of an offender's particular risk profile, reviewing prosecutorial decisions based on the Registrant Risk Assessment Scale and evidence presented by offenders; (2) determinations regarding the proper geographic scope of notification, and the role of expert witnesses in that regard; and (3) the form of expertise said to be required in managing the risk of reoffense by community members, and the knowledge formats residents are expected to rely upon in protecting themselves.

b) Determinations of Risk: Prosecutors, Judges and Expertise

As originally contemplated by New Jersey's Attorney General, determining an individual registrant's risk of reoffense was purely a matter for individual prosecutors, with no official notice given to registrants from which they could challenge their assessment.[295] With no opportunity for a judicial hearing, and no opportunity to present evidence or cross-examine prosecutorial witnesses, the stance maintained by New Jersey was that a regulatory system of registration and notification simply did not affect one's constitutional rights.[296] Implementing the Risk Assessment Scale, then, was left to prosecutors, and not clinicians or risk assessment experts – with the Attorney General for New Jersey arguing that the skills and abilities required for risk assessment are enjoyed by prosecutors, through "the learning, the experience, the analytical skills and the insights bred from day-to-day involvement in the work of law

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[294]See B. Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Cambridge, MA: Harvard University Press, 1998); M. Callon, "Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fisherman of St Brieuc Bay" in J. Law, ed., *Power, Action and Belief: A New Sociology of Knowledge?* (Boston : Routledge & Kegan Paul, 1986) 196; P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", trans. R. Terdiman (1987) 38 Hastings Law Journal 805.

[295]It may have been contemplated that registrants would be told that they were to be assessed, but the registrant would not be afforded official notice of the assessment and an opportunity to challenge the assessment. The New Jersey Superior Court finds this 'indirect' notice to be insufficient: see *Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1351.

[296]Brief on Behalf of the Attorney General of New Jersey in *Doe* v. *Poritz*, No. 39,989 (filed 4 April 1995) at 12-32 [hereinafter *Brief on Behalf of the Attorney General of New Jersey (filed 4 April 1995)*]. See also "Gibbons Remarks", *supra* note 290 at 58-59.

enforcement."[297]

In relying on the Risk Assessment Scale, prosecutors were provided with guidelines issued by the Attorney General. These guidelines sought to assist prosecutors in making their determinations, by providing them with examples for Scale criteria. With these examples as their guide, prosecutors were then expected to assess, for individual criteria, whether the offender is best classified as presenting low, moderate, or high risk of reoffense. The examples provided, though, were said not to be exclusive, but merely illustrative, so that prosecutors were to rely on their own discretion in deploying the Scale and in determining the meaning of the factors themselves[298] – relying on all "credible evidence" and taking into account "any information available."[299]

While both mental health experts and the New Jersey state courts were concerned over this reliance on prosecutors to assess risk of reoffense, their respective responses were quite different. Mental health experts have pointed out that this reliance on legal expertise to administer a risk assessment instrument may lead to increased measurement error,[300] with not all states relying exclusively on lawyers to conduct these assessments. The New Jersey courts were also concerned with relying on prosecutors for this purpose – yet, rather than defer to scientific experts, instead maintained risk prediction within the province of legal expertise. Implementation of the Scale is explicitly left to prosecutors, who are said to enjoy a particular form of expertise, generated not through any particular training but instead through an administrative knowledge earned through experience. I focus here on the construction of this hybrid form of legal expertise, said to be neither lay nor expert-driven, and the translations involved in the epistemological shift from actuarial and clinical prognostications, to a knowledge format that is said instead to be the preserve of judges and prosecutors alone.

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[297]*Brief on Behalf of the Attorney General of New Jersey (filed 4 April 1995)*, *ibid.* at 36, quoting from, and seeking to extend, *New Jersey* v. *Litton*, 155 N.J. Super. 207 at 215 (1977).

[298]See, for example, the decision *in In the Matter of Registrant A.I.*, 696 A. 2d 77 (N.J. Super. Ct. 1997), dealing with the question of whether the registrant and the victim had a "prior relationship," and the decision in *In the Matter of Registrant M.A.S.*, 344 N.J. Super. 596 (2001) dealing with the meaning of the term "duration of offensive behavior."

[299]*Guidelines March 2000*, *supra* note 112 at Exhibit E.

[300]"Feel Good Legislation", *supra* note 58 at 99.

In *Doe* v. *Poritz*, the New Jersey Superior Court had, in fact, been concerned over this non-scientific approach to applying risk categories. Explicitly referring to risk assessments as an "inherently sophisticated business," the Court criticized the Attorney General's guidelines as "rather soft," further noting the extensive discretion afforded to partisan prosecutors and the lack of opportunity for registrants to challenge the results of any assessment.[301] In a footnote, the Court was particularly concerned that prosecutors, without the assistance of trained experts, were charged with this function:

> The Court finds it somewhat disturbing that the Legislature in its wisdom did not provide prosecutor offices with any additional resources to implement thorough risk assessments. Traditionally, in civil commitments and in domestic violence cases, the question of predicting future conduct of an individual has been perceived as the province of experts and they are routinely heard from and relied upon in both instances. Both situations are characterized by the idea that a person is unable to control his or her behavior as the result of some underlying active or latent mental or emotional disability or diagnosable character disorder. That same idea undergirds Megan's Law. Yet the law does not provide the prosecutor offices with professional help to assist them in evaluating the risk of re-offense and they must therefore make do with existing staff, whose training as lawyers did not include assessing the potential for recidivism by sex offenders ....[302]

Yet, despite its invocation of risk assessment as being within the province of experts, the Superior Court does not conclude that prosecutors must rely on actuarial or clinical experts in predicting an individual's risk of reoffense. Rather, the Court curiously determines that, though lawyers may not have the required training to assess risk, "[j]udges are particularly well suited to the delicate task of weighing and balancing the private and public concerns inherent in risk assessments, and thus the level of notification merited by a particular case."[303] The expertise that

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[301]*Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1351-1352. Referring to prosecutors as partisan officials appears to be connected with the Court's concern that there will be a "strong bias," not only in favour of notification, but in favour of the highest form of notification (Tier 3): at 1351 *n*1. Perhaps most interestingly, although arguing in favour of prosecutorial control over risk assessment based solely on principled, doctrinal grounds, the Attorney General Brief does not respond to this presumption that prosecutors are "partisan" based on normative presumptions regarding their role as officers of the court. Instead, the Attorney General argues that the Court's conclusion "is not based on empirical data." See
Brief on Behalf of the Attorney General of New Jersey (filed 4 April 1995), supra note 296 at 36-37 *n**.

[302]*Doe v. Poritz, (New Jersey Superior Court), ibid.* at 1351 *n*1.

[303]*Ibid.* at 1352.

the Court notes with regard to risk assessment gives way, instead, to a more limited concern that individual registrants be provided with due process hearings. Such a hearing is based on a liberty interest, found in the 14th Amendment, requiring that evidence be presented and witnesses confronted,[304] with the Court making any final decision.[305] The effect of this move is to prevent the constitutionalization of expertise, and to displace knowledges of risk with a focus on fairness and objectivity. Having explicitly stated that there are presumed mental pathologies at the basis of Megan's Law, the Court then sees no need to rely on the expertise traditionally required to manage a registrant's underlying disability or disorder.[306] All that risk assessment requires, it would seem, is the ability to be "impartial" and "independent," achieved in a legal forum by providing registrants with a judicial hearing.

This move away from substantive risk expertise, and toward a view of risk assessment that focuses on the fairness of the process, is even more prevalent in the appeal of *Doe* v. *Poritz* to the New Jersey Supreme Court. In affirming the judgement of the Superior Court, Judge Wilentz requires judicial review hearings of tier classifications when applied for by individual registrants, due to the liberty interests that are at stake when community notification may be implemented.[307] In so doing, however, the Supreme Court explicitly backs away from suggesting that prosecutors may not be sufficiently objective to carry out the risk assessment process.[308] In

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[304]*Ibid.*

[305]This, of course, raises additional legal issues regarding the role of prosecutors – not only with respect to the scope of prosecutorial discretion, but also with respect to prosecutors as part of the executive branch of government, with the judiciary now "claiming this power for itself": see *Brief on Behalf of the Attorney General of New Jersey (filed 4 April 1995), supra* note 296 at 34.

[306]In this sense, the Court's use of the word "traditionally" when referring to risk assessment as being within the "province of experts" takes on new meaning. It would appear that the Court may, in fact, be suggesting that it was once the case that this type of risk assessment would be dealt with by experts, but this is no longer always necessary. If so, this gives increased credence to Simon Cole's argument that, once we all "know" that sex offenders are "sick," we no longer need experts to deal with them: see "From the Sexual Psychopath Statute to Megan's Law", *supra* note 31 at 312.

[307]Applying for judicial review is up to the individual registrant, who must do so within a specified time frame. Even after missing this deadline, though, a court may still review the tier determination if the registrant demonstrates "good cause" and that to allow a late application is in the interests of justice: see *A.B.*, *supra* note 228 at 204, in which the registrant claims to have misunderstood the date printed on the letter and thereby missed the deadline.

[308]The Court states, for instance, that "there is no reason to believe" that prosecutors will not "discharge their duties competently and fairly": see *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 382.

fact, contrary to the suggestion of the trial court, prosecutors shall be presumptively accepted as experts on the risk of reoffense,[309] given their fair degree of experience with sex offenders and their adequate knowledge of research in this area – and once the prosecutor has provided a prima facie case for a risk determination, the burden will lie on the individual offender to persuade the court otherwise.[310]

While continuing to provide courts with the ability to affirm or reverse a prosecutor's determination, the Supreme Court's opinion in *Doe* v. *Poritz* calls for greater deference to prosecutor's risk assessments. In so doing, the Superior Court's focus on fairness is maintained, while a further move is engaged – while the Superior Court shifted the debate away from risk expertise toward a concern with fairness in the risk assessment process, the New Jersey Supreme Court goes further in arguing that there is no greater expertise that could be engaged in this process. The Court is clearly sceptical of any scientific expertise regarding the risk of reoffense, referring to the research on point as "conflicting in its conclusions," and going so far as to give courts "substantial power, beyond that permitted or used in ordinary litigation, to allow, reject, control, and limit expert testimony" and avoid "long drawn-out contests between experts."[311] As such, although expert testimony can be relied upon, "in limited circumstances" and "if believed," by an individual contesting his tier determination,[312] the Court in *Doe* v. *Poritz* instead privileges knowledges of risk gained through trade knowledges and experience. The required evidence to be presented at judicial review hearings need not be statistical, with the Court defending a looser set of evidence that can be presented due to the very lack of scientific consensus that has been reached: "We realize the generality of the standard against which the court will decide the correctness of the Tier level decision, but given the unavoidable uncertainties in this entire area, we do not believe it is realistic to impose requirements of proof of some statistical differentiation

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[309]*Ibid.* at 384.

[310]*Ibid.* at 383.

[311]*Ibid.* at 384.

[312]*In the Matter of Registrant G.B.*, 669 A. 2d 303 at 307-308 (N.J. Super. Ct. 1996) [hereinafter *G.B. (New Jersey Superior Court)*].

of the risk of reoffense."[313] It is legal knowledge, rather than any expertise that may lie behind the Scale, that is the focus of the judicial review, and courts "are not 'to blindly follow the numerical calculation provided by the Scale, but rather to enter the appropriate tier classification' based on all of the evidence available to them."

In *Doe* v. *Poritz*, this layness of risk becomes a convoluted process of weighing "risk" against "risk," without any requirement of expertise in this assessment, relying instead on terms such as "substantially higher," and "likelihood of its occurrence":

> The only issue for the court on the Tier level of notification is the risk of reoffense. In that sense the factors of the Guidelines noting the characteristics of prior offenses or of the offender are relevant only to the risk of reoffense, i.e. the likelihood of its occurrence. That is the clear intent of the statute ....We conclude that the legislative intent was to use the word 'moderate' in comparison to the 'low' risk that the Legislature found was minimally characteristic of all those sex offenders required to register. Where Tier Two notification is sought, the State's prima facie case shall include a description of the class of sex offenders required to register who constitute low-risk offenders, including a description of that risk, which need not necessarily be statistical; a further description of that class of sex offenders required to register who constitute moderate-risk offenders, including a description of that risk, not necessarily statistical; some proof, in the form of expert evidence or otherwise, that the moderate-risk offender class poses a risk of reoffense substantially higher than the low-risk class, and that the offender before the court is a moderate-risk offender who poses such a substantially higher risk.[314]

Although there are a range of experts that registrants might seek to call – one registrant sought to appoint a psychiatric expert (to evaluate his risk of recidivism), a statistical expert (to prepare an analysis on recidivism more generally), and a human factors expert (to determine whether community notification is effective in preventing harm)[315] – the New Jersey courts have been adamant that experts will generally not be appointed in these hearings. As later cases make clear, the validity of the Scale itself cannot be contested by registrants, even through the introduction of expert evidence regarding the Scale's effectivity, with the New Jersey Supreme Court having authoritatively authorized the Scale's predictive value.[316]

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[313]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 384.

[314]*Ibid.* at 383.

[315]*G.B. (New Jersey Superior Court)*, *supra* note 312.

[316]*In the Matter of Registrant G.B.*, 685 A. 2d 1252 at 1266 (N.J. Sup. Ct. 1996) [hereinafter *G.B. (New Jersey*

Other expert witnesses can be called by individuals contesting their tier determination, but only if their case lies outside the heartland of cases.[317] In addition, the victim may only be subpoenaed if it is "absolutely necessary."[318] With both the victim and expert witnesses only being called in marginal cases, evidence brought by individual registrants contesting their tier determinations will often not offer expertise on either "risk" or on the harm caused by the underlying offense – but may instead reflect attempts to contest tier determinations based on differences in facts regarding the underlying offense,[319] the evidence of mothers, wives, therapists, their own testimony, and so on.[320] There being no rules of evidence that apply to these hearings,[321] risk prediction under Megan's Law is then likely to be based on contestations over character, rather than the more objective process originally contemplated by New Jersey's Risk Assessment Scale. Finally, any consistency that may have been generated, across cases, through reliance on a common Scale by prosecutors is undercut through the introduction of these judicial review hearings, a tension between legal process and objective standards that may ironically render the process even more arbitrary.[322]

This displacement of scientific expertise comes to a head in the New Jersey Supreme Court's 1996 decision *In the Matter of Registrant C.A.* Faced with the registrant's argument that the Scale is insufficiently reliable, the Court responded by shifting the debate away from the Scale entirely, rendering risk assessment an exclusively legal question:

Supreme Court)]. As a result, human factors experts cannot be called.

[317]See *ibid.*, where the Court states that the facts "must be sufficiently unusual to establish that a particular registrant's case falls outside the 'heartland' of cases."

[318]*Alan A. (1997)*, *supra* note 187 at 1168-1169.

[319]As we will see, however, prosecutors need not solely rely on the proven facts of the offense – and may instead rely on other material, such as hearsay evidence, in reaching a tier determination. This makes it more difficult for a registrant to challenge his determination on this ground, either for static or variable factors on the Scale: see *G.B. (New Jersey Supreme Court)*, *supra* note 316 at 1261-1262.

[320]In *Alan A. (1997)*, *supra* note 187 at 1168 *n*13, these specific types of witnesses are explicitly noted as being brought by offenders in Bergen County.

[321]*Ibid.* at 1168.

[322]The potential for prosecutorial consistency across counties is one of the perceived benefits of the Scale: see *C.A. (New Jersey Supreme Court)*, *supra* note 285 at 108. There appears to be some limited empirical evidence to suggest interrater reliability: see *An Investigation into the Risk Validity*, *supra* note 273 at 19-20.

> The Scale, however, is not a scientific device. It is merely a useful tool to help prosecutors and courts determine whether a registrant's risk of reoffense is low, high, or moderate. Yet, the Scale is just that – a tool ... a court should not rely solely on a registrant's point total ... any classification based on the Scale should not be viewed as absolute ... there is still a value judgement that must be made when determining a registrant's risk of reoffense and proper classification.[323]

Yet, the New Jersey Supreme Court does not express law's authority as a tension between legal and scientific paradigms. Rather than argue that risk prediction must give way to legalistic concerns regarding procedural fairness, the New Jersey Supreme Court in *G.B.* instead suggests that judges can also enhance the very accuracy of those determinations.[324] That this requires judges to rely on an apparently loose conception of how an offender 'seems,' does not appear to be of concern:

> The benefit of allowing testimony to override a tier designation is that it can assist a court in arriving at a fairer *and more accurate* tier determination. Although experts opine that actuarial predictors are the best indicators of recidivism, it seems incongruous, given the statute's allowance for registrants to present evidence, to afford a *seemingly rehabilitated offender* no opportunity to alter his tier designation ....[325]

Similarly, in a case involving a statutory sexual assault, the Superior Court concluded that "under the facts in this case, the RRAS is not an accurate gauge of the risk that this registrant will commit another sexual offense,"[326] and that "if Megan's Law is applied literally and mechanically .... the beneficial purpose of this law will be impeded."[327] Instead, the Court protects legal determinations against purely numerical calculations, arguing that "in this case the Scale's numerical calculations do not 'properly encapsulate' the registrant's specific case."[328]

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[323]*C.A. (New Jersey Supreme Court).*, *ibid.* at 108-109.

[324]Courts have not, however, given themselves the authority to change a registrant's scores regarding "static factors" on the RRAS, namely scores regarding the nature and seriousness of the underlying offense, and are not doing so "absent appellate direction": see *In the Matter of Registrant H.M.*, 343 N.J. Super. 219 at 224 (2001).

[325]*G.B. (New Jersey Supreme Court)*, *supra* note 316.

[326]*In the Matter of Registrant E.I.*, 693 A. 2d 505 at 509 (N.J. Sup. Ct. 1997) [hereinafter *E.I.*].

[327]*Ibid.* at 508.

[328]*Ibid.* at 509.

The judicial review process, then, with its attendant capacity for changing the results of risk assessments, is invoked as protecting registrants from potential abuses by relying on the scale – while the scale itself is invoked as protecting registrants from arbitrary decisions that may otherwise have been reached.[329]

As such, the New Jersey Superior Court has determined that the risk assessment scale is neither binding on a court nor on the office of the prosecutor itself.[330] Instead, prosecutors' offices enjoy discretion in applying the risk assessment scale, which "need not be rigidly followed in all cases."[331] This discretion is not only exercised in deciding whether to submit an offender to assessment under the scale, but is also exercised with regard to the results of the assessment. Furthermore, this discretion not only extends to decisions made within the office of the prosecutor, but to status conferences, where registrants who have objected to their assessment can seek to reach an agreement with prosecutors, so that full-blown hearings are not required.[332] Not only might agreements be reached on tier determinations – so that it may be settled that a registrant's score places him in Tier 2, rather than Tier 3 – but even within a Tier, the registrant and prosecutor might agree to circumvent the scope of notification that might otherwise be required. For instance, the parties and the judge might agree on the number of schools within a zone that will be notified;[333] a registrant's score on the scale might be changed;[334] or the scope of notification may be narrowed substantially, rather than following the guidelines based on a registrant's tier classification.[335]

Despite privileging legal knowledge in the risk assessment process, however, courts then rely

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[329]See for example *Michael M.* v. *Verniero*, [1997] U.S. Dist. LEXIS 12596 at 21ff. (Dist. Ct. N.J.), online: LEXIS (New Jersey Federal and State Cases, NJMEGA), where the District Court seems to have it both ways by relying on both judicial review of the tier assessments as well as the risk assessment scale itself, each of them invoked as protecting individual registrants.

[330]*E.I.*, *supra* note 326.

[331]*Ibid.* at 508-509.

[332]This process is discussed in some detail in *Alan A. (1997)*, *supra* note 187 at 1165-1169, where it becomes apparent that these status hearings are similar to plea bargains, in which the cases are "settled."

[333]See case of David D. in *ibid.* at 1166.

[334]See case of Evan E. in *ibid.*

[335]See case of Gary G. in *ibid.* at 1167.

on "risk" itself as a lens through which to renegotiate legal practices and strictures. For instance, in invoking risk as part of a predictive, managerial strategy (thereby invoking, implicitly, the potential to assess risk as a distinct enterprise from standard court proceedings), New Jersey courts have determined that risk assessments can include 'offenses' *which are not the subject of a conviction.* Prosecutors and judges, then, can rely on reports of events in assessing risk levels, even if the registrant was acquitted (or never prosecuted) for that event, and may do so by relying on evidence from a range of sources which the Court can then effectively authorize as reliable:

> We hold that the details of a sexual offense, which is not the subject of a conviction, may be considered in the risk assessment scale calculus. The judge may rely on documentation he or she considers relevant and trustworthy in making a determination ... This may include, but is not limited to, criminal complaints not the subject of a conviction but which are supported by credible evidence, victim statements[,] admissions by the registrant, police reports, medical, psychological or psychiatric reports, pre-sentencing reports, and Department of Corrections discharge summaries.[336]

This inclusion of nonconviction offenses is justified, however, by reauthorising the experts that were displaced by the courts in the risk assessment process[337] – with the New Jersey Supreme Court stating that nonconviction offenses need to be included in this calculus because

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[336]*In the Matter of Registrant C.A.*, 285 N.J. Super. 343 at 347-348 (1995), aff'd *C.A. (New Jersey Supreme Court)*, *supra* note 285 [hereinafter *C.A (New Jersey Superior Court)*]. The Superior Court suggests that, in most cases of this sort, live testimony would be required to assess the credibility of a disputed fact (at 349). This will not always be the case, however: the judge can determine the reliability of a factual account even without live testimony: for example, "[a] judge might well conclude that a registrant's unsubstantiated claim that an elderly grandmother or a nun was engaged in a consensual sex for drugs transaction is unworthy of belief. Under those circumstances, no further inquiry would be required" (at 350). This is no small point: a judge's image of community relations, and likely patterns of association, is critical to this determination, including judicial views on urban inequality and implicit geographic boundaries. Suggesting that, in this case, live testimony would be required to assess the credibility of unproven facts (and thereby the risk level of the registrant), the Court concludes: "Here, A.Z., a middle class resident of the suburbs, was driving in a drug area late at night with her passenger door unlocked when the assault allegedly occurred. In her hospital records she verified continued drug use from the age of 16 as well as the fact that she had experienced purchasing drugs 'on the street' ... the story of the registrant told about a drug transaction with A.Z. was simply not so farfetched on its face and on the record ...." (at 350).

[337]A similar process is implicated in the deference of courts to the Scale itself – which, although it privileges "static" factors over "dynamic" factors (itself running contrary to conventional legal paradigms suggesting that past conduct does not predict future conduct), is readily deferred to by both state and federal courts: see e.g. *W.P. (1996)*, *supra* note 179. The US Court of Appeals appears particularly concerned with this very point, and is concerned that the State's *reliance* on a registrant's past conduct to predict his future conduct is a different matter than simply requiring him to register with law enforcement, which does not (explicitly) include this normative judgement: see *Artway (1996, 3rd Cir.)*, *supra* note 174 at 1266-1267.

of 'experts generally agreeing' that past conduct is the best predictor of future criminal sexual behaviour.[338] Yet in so doing, the courts must make discretionary determinations regarding the reliability of unproven evidence, and must thereby invoke their legal expertise.[339] Of course, relying on judicial review opens the door to a constitution of community that takes place in the risk assessment process, with judges deciding what information from a registrant's "whole life"[340] will play a part in an individual's exposure level to the community at large, and whether to abide by the results of the scale in individual cases. This itself leads to normative judgements regarding offenders' lifestyles and community norms,[341] and when assessed quantitatively leads to the very 'making up of people' that Ian Hacking discusses in his history of statistics.[342]

It is important to note that, in contrast to the New Jersey courts, the Federal courts addressing Megan's Law are significantly more sceptical of this process, and are less confident in the ability of courts to predict future dangerousness – in fact, the U.S. Court of Appeals is quite sceptical that courts can even fulfil their more traditional legal roles of determining the facts of any underlying offense.[343] As a result, the Court of Appeals assigns the legal burden of proving the facts on which it relies (including the facts of incidents which are not the object of a conviction) by "clear and convincing evidence," and not merely present enough evidence for a prima facie case.[344] In so doing, the Court of Appeal explicitly notes the private harm that erroneous

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[338]*C.A. (New Jersey Supreme Court)*, *supra* note 285 at 90.

[339]The legal expertise for establishing the existence of what is called a "nonconviction offense" itself increases the likelihood of finding that the event did, in fact, occur. Rules of evidence do not apply, hearsay is admissible, and so on. The hearing is said to be different from both administrative and criminal hearings, and "more like an evidentiary and investigatory hearing." *Ibid.* at 94-95.

[340]K.R. Reitz, "Sentencing Facts: Travesties of Real-Offense Sentencing" (1993) 45 Stanford Law Review 523 at 553.

[341]See eg. *In the Matter of Registrant R.F.*, 317 N.J. Super. 379 at 383 (1998), referring to how "[r]egistrant's squalid life style and failure to conform to societal norms naturally excite one's punitive instincts."

[342]See I. Hacking, *The Taming of Chance* (New York: Cambridge University Press, 1991). In the case law, see eg. *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 373.

[343]*E.B. (1997)*, *supra* note 196 at 1108.

[344]*Ibid.* at 1108-1111.

publicity would have on a registrant[345] – but, as concerned as it is with due process rights, the Court of Appeal's decision effectively ignores the constitutional concerns inherent in risk prediction, especially when conducted by non-experts. It simply asserts, rather, that the risk of error can be reduced through legalistic assignments of the burden of proof – an assertion that, regardless of its empirical validity, does nothing to break the epistemological loop in which these judicial review hearings proceed.

The invocation of scientific expertise, then, not only opens a space to circumvent law's strictures, but in so doing courts retain the authority to determine which prior events will be included within the risk assessment process. A similar process is at play in determining the rules of evidence for judicial review hearings in these cases, with courts relying on the expertise of risk assessment to dilute the rights of registrants at these hearings (since the process is, thereby, solely regulatory). Throughout, though, the conflict between legal and scientific paradigms – which not only posits a tension between these two paradigms, but goes so far as to argue that legal knowledge will heighten the Scale's predictive *accuracy* – displaces this expertise in favour of risk assessments based on norms of fairness and objectivity.[346] This, as I discuss later in this chapter, opens the door for community-based approaches to managing risk, and a relieving of the State in that process; but before doing so, the following section further explicates the link between risk, expertise, and community.

c) Scope of Notification

This negotiation of expert and non-expert rationales is a critical move from a doctrinal perspective. Since the risk assessment paradigm itself cannot be challenged (and the scientificity of the paradigm at this stage is unquestioned), the constitutional questions become limited to concerns over procedural due process – registrants cannot claim that the very process of risk assessment renders community notification unconstitutional.

At the end of the day, the goal of the risk assessment process in New Jersey is to determine

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[345]It does not, interestingly, note the public harm that might result from poor prediction, which might lead to a decline in public trust in any individual notification.

[346]It is somewhat disingenuous, then, for courts to rely on the Scale's scientific basis in reaching conclusions regarding the constitutionality of Megan's Law (see, for instance, the claim made by the US Court of Appeals in *E.B. (1997)*, *supra* note 196 at 1098).

the proper scope of community notification. The identity of Tier One registrants is only released to certain law enforcement agencies, and not the community at large; Tier Two registrants are identified to specific organizations that are likely to encounter the registrant; and Tier Three registrants are identified to a broader scope of individuals and institutions that are likely to encounter him.[347]

The scope of notification, then, is closely tied to the image of "community" that is deployed in notifying the public of a registrant's presence – bringing concepts of risk and community together in mutually constitutive ways. As with the previous section focusing on assessing the risk posed by an individual registrant, New Jersey courts have similarly rejected the availability of scientific expertise in determining the proper scope of notification, relying instead on more amorphous knowledges and assumptions regarding community life and interactions.

While courts have focused on ascertaining what information a particular community requires when faced with a particular registrant, in so doing courts have sought to develop sociological theories of how communities function. The effect of doing so is to presume that communities function in similar ways to each other, across New Jersey, based on a few abstracted characteristics for which judges have not sought any empirical support, yet which themselves motivate results in individual cases. When dealing with community notification, this process leads to a definition of community that engages two aspects: community is defined wholly as a geographic spatiality, while also engaging a formal sociology of community, in which it is the very *form* of community that is operative across individual situations. My interest in pursuing this analysis is not to suggest that these conceptions are somehow illegitimate. Drawing from Latour, I am not seeking to police the accuracy of the concepts being deployed, but am instead "following the translation" in order to determine how the logic of risk is here taken up and operationalized within the context of community.[348]

Once a registrant has been assigned to a tier based on the risk assessment scale, the scope of notification is determined by way of a "likely to encounter" standard. For Tier One registrants, only those law enforcement agencies likely to encounter the offender are notified. For Tier Two

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[347] *Guidelines March 2000*, *supra* note 112 at 18-19.

[348] T.H. Crawford, "An Interview with Bruno Latour" (1993) 1 Configurations 247 at 266.

registrants, "likely to encounter"-based notification expands to also include schools, day care centers and summer camps, as well as registered community organizations, agencies, and groups.[349] Even Tier Three registrants are governed by this standard, with the scope of Tier Two notification being expanded to include members of the public likely to encounter the registrant.

Since the 'likely to encounter' standard is a central element in the community notification process, it is perhaps surprising that the Attorney General Guidelines provide little direction to prosecutors making these determinations. Notifying selected organizations or community members under Tiers Two and Three remains, instead, a discretionary process: even inclusion on the list of registered organizations does not guarantee that notification will be forthcoming, and prosecutors are instead informed that determining the scope of notification "should be made on a case-by-case basis," so long as it is done "following careful review."[350] There are illustrative guidelines for prosecutors, suggesting that in the case of incest, broad notification may not always be warranted, and that in the case of offenders whose victims were all adults, notification to elementary schools may not always be warranted – but the central point is that community is to be defined geographically, and prosecutors are to rely on their "sound discretion" in each case.[351] One prosecutor, when pressed for proposing that the scope of notification range for 2 miles, simply asserted that "those locations that were within a two mile radius of [registrant's] place of residence and place of employment, he would likely encounter people in that area."[352]

In this vein, prosecutors have asserted their authority to render discretionary decisions on the basis of their "expertise and knowledge" regarding the proper scope of notification.[353] This aspect of the Guidelines has been upheld by the New Jersey courts, which have explicitly sought to deprivilege any expert evidence that may be offered as to who a registrant is 'likely to

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[349]The process of inclusion on the list of registered organizations requires that the organization is one where children gather or which cares for women: *Guidelines March 2000*, *supra* note 112 at 10.

[350]*Ibid.* at 25. This language is specified for Tier Two notification, but it is clear from a reading of the Guidelines that this same standard is what motivates Tier Three notification as well.

[351]*Ibid.* at 27-29.

[352]This is from the status conference held in *G.B. (New Jersey Superior Court)*, *supra* note 312 at 307.

[353]*In the Matter of Registrant E.A.*, 667 A. 2d 1077 at 1079 (N.J. Super. Ct. 1995) [hereinafter *E.A.*].

encounter.' The New Jersey Supreme Court instead adopts a somewhat tortuous reading of the standard, determining that "[t]he word 'likely' shall be taken in its usual sense: to mean not 'possibly' but 'likely,' not in the sense of 'probably' but rather in the sense of 'having a fair chance to encounter'."[354] Having maintained, however, that Megan's Law must be restricted by this standard – despite the fact that a registrant may, of course, travel far from his home and workplace[355] – what knowledges of community can guide prosecutors in determining the range of institutions and members of the public that ought to be notified?

This problem is dealt with by the Appellate Division of the New Jersey Superior Court in *In the Matter of Registrant E.A.*[356] Classified as a Tier Three offender, E.A. sought to challenge the scope of notification decided upon by the prosecutor, while not challenging the fact of his classification as "Tier Three." The prosecutor had developed a specific set of standards that were relied on in E.A.'s case, through which the scope of notification was tailored to population density – with a much smaller scope of notification (1000 foot radius) for registrants living in urban, high population areas, up to a 2 mile radius for schools, day care centers, and community organizations when faced with registrants in rural and suburban areas. These standards, though, were not based on any empirical evidence regarding the actual density of the population, nor any studies suggesting that population density itself is a reasonable method for determining the scope of notification.[357] The Superior Court, however, provides judicial authority for this proposition, despite the lack of any evidence in this regard:

> Common sense projects that population density and societal mobility have a mutual relationship. The more concentrated the population, the more likely an adult is to limit his or her range of contact with members of the public. In high-population density areas, it is more likely that available resources, such as food stores, places for socializing, places which provide legitimate personal service, and the like, will be found with greater concentration.[358]

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[354]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 385.

[355]This is explicitly acknowledged by the New Jersey Supreme Court (*ibid.*), which then determines that despite this danger, broad-based community notification is not commensurate with legislative intent.

[356]*E.A.*, *supra* note 353.

[357]*Ibid.* at 1079.

[358]*Ibid.* at 1081.

This theory of community – *that population density itself structures community relations* – is simply invoked as "common sense." This theory is itself built on a second proposition that is provided without empirical support – *that population density itself leads to organized economic development.* Each of these propositions are somewhat controversial. Some theorists of the city have, indeed, suggested that the city provides for a denser web of interactions than are available in rural communities, and the availability of social and economic resources is at least partially dependent on factors that stem beyond population density, such as crime rates, racial composition, economic policies, and historical patterns of development. And yet, the Superior Court not only asserts this theory of community, but further contextualizes it as a difficulty inherent in modern forms of social organization, with individuals in rural and suburban areas having to travel greater distances "to reach work places and resources," further enhanced by the "ready mobility of today's society."[359] All of this is simply asserted:

> We reach these conclusions despite the fact the prosecutor presented no statistical data or studies on the reasonableness of the particular distances selected ... Moreover, we are satisfied that common sense can dictate reasonableness, a concept that when applied here demonstrates the establishment of a prima facie case for the scope of notification determinations to residences in the area of E.A.'s places of residence and work.[360]

Although what is meant by "common sense can dictate reasonableness" is never made clear, it would appear that the Court is willing to simply determine the scope of notification based solely on the theory of community that it has devised. This centrality of the Court's theory of community is perhaps most apparent when the Court develops a new request for prosecutors presenting evidence at these hearings:

> Recognizing the need to facilitate the judicial review process, we direct the prosecutor in the future to prepare a grid, color-coded, large-scale map of the county to identify the low-, moderate-, and high-population density areas on a municipality-by-municipality basis. The map can be based on census data, county planning board data, or information provided by local planning boards and law enforcement officials to assist in refining the correctness of the prosecutor's knowledge of the county. The prosecutor, utilizing such a map, can then specifically locate a registrant's residence or place of business within

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[359] *Ibid.*

[360] *Ibid.*

the identified population zones and apply the distance criteria approved.[361]

"Population density zones," then, become the central element in defining community for the purposes of notification, and without these maps, courts appear less willing to support prosecutors' decisions regarding the scope of notification.[362] This is not, however, simply an elaboration on earlier views of the New Jersey courts that community is to be defined geographically for the purposes of notification (itself a theory of community that is left unelaborated).[363] Rather, the theory of community developed in *E.A.* does not solely determine the external boundaries of community, but a legal conception of the ways in which individuals interact *within* those boundaries, relying exclusively on one demographic variable. Since *E.A.*, the New Jersey Supreme Court has explicitly concluded that courts may rely on these presumptions of community life, and that prosecutors need not demonstrate that any particular registrant is likely to encounter the groups being notified as a result of his tier and notification assessments. Instead, once "epicenters for notification" are developed, demographic characteristics of the community become formulaic, with "the radius of notification being dependent on the urban, suburban, or rural nature of the location."[364] Even so, having dismissed expert evidence as unnecessary to assessing the scope of community for the purpose of notification, courts may instead rely on their discretion[365] and "the common sense of the situation"[366] to expand the scope of notification beyond the technical limits of the statute.

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[361] *Ibid.*

[362] See e.g., *G.B. (New Jersey Superior Court)*, *supra* note 312 at 307-308, finding the record inadequate for determining whether the radius selected by the prosecutor is reasonable.

[363] *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 385 ("The factor that will ordinarily be critical to a determination of 'likely to encounter' is geography").

[364] *In the Matter of Registrant M.F.*, 169 N.J. 45 at 60-64 (Sup. Ct. 2001). Of course, a registrant can demonstrate that, in his case, there are limiting circumstances that suggest a more confined form of notification (at 63). Furthermore, there are some 'standardized' limiting circumstances – the one most often cited is referred to as the "household/incest exception" – that courts can rely on in assessing the proper scope of notification. When combined with notification, this may have effects in perpetuating myths of the 'stranger' in sexual offenses: see *Democracy in Governance*, *supra* note 59 at 36-37.

[365] *G.B. (New Jersey Supreme Court)*, *supra* note 316 at 1261.

[366] *E.D.*, *supra* note 230.

As I state earlier in this chapter, I do not suggest here that the theories developed by the courts are less valid than theories that may be developed through other forms of knowledge or expertise. Instead, I have sought to demonstrate the hybridity of knowledges that are deployed in developing Megan's Law, and how each knowledge format (or form of expertise) is used with varying effects: how actuarial expertise is relied on, for instance, in conceiving of community notification as non-punitive, while the courts engage in a construction of an exclusively legal expertise (which itself draws on hybrid knowledges and assumptions) to produce a daily, practical, professional knowledge that is not subject to ongoing contestations in the scientific domain.

d) Managing Risk Through Common Sense

The hybridity of risk, then, allows Megan's Law to fulfil two functions. Expert knowledges on risk are invoked as evidence that community notification can be carried out in a manner that is not punitive – and as such, is central to the argument that the statute is merely regulatory, and cannot be challenged as unconstitutional punishment – a position which also opens new spaces for legal authority while avoiding some more conventional strictures that a legal epistemology might imply. Yet, the very undercutting of this expertise throughout the Guidelines and the adjudication reinforces a lay understanding of risk and its management, thereby relieving the need for state expertise in the everyday management of offenders. Finally, with community simply defined geographically, and with courts theorizing that individuals interact, across communities, in ways that can be predicted by abstracted characteristics, no knowledge of any individual community is required for notification to proceed effectively. Expertise can thereby more easily be decentred, shifted onto local communities whose members can make prudent choices for themselves, and thereby be active citizens in their own government.[367]

With risk assessment and notification marked by a focus on non-scientific knowledge, it is perhaps not surprising that the risk management function is similarly conceptualized as requiring no expertise, focusing instead on 'common sense.' This is where the "decline of the

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[367]"Governing Advanced Liberal Democracies", *supra* note 267 at 60.

rehabilitative ideal" that Allen describes[368] is brought together with a populism in which expertise is no longer necessary – under the logic of Megan's Law, if 'nothing works,' then the solution is to have neighbourhood residents themselves control sexual offenders, even with little formal training or expertise. Once information regarding an individual's risk assessment is communicated by the state, women and children are said to no longer be placed at risk of victimization, since they can now simply "take the common-sense steps that might prevent such an occurrence."[369]

Despite the original emphasis on risk as an actuarial category that can be objectively determined through a regulatory program of assessment and notification, community notification goes on to presume that no expertise is required for community members to protect themselves effectively. Communities do not require the ability to ascertain, statistically, the precise degree of monitoring required or the precise risk of reoffense; rather, risk functions to provide a non-punitive, regulatory space in which the community can act without taking over the state role of punishment. It is through lay assessments of risk, then, that communities participate, as non-state actors, in the prevention of crime and the managing of offenders. Even when faced with some worry that community members may lack the capacity to properly monitor offenders, New Jersey's Deputy Attorney General simply responded: "They're the community," she said. "They asked to cope with it."[370]

To presume that communities can simply take "common sense" steps to protect themselves, however, implicates a very specific image of community. This image differs from both liberal and statist visions of the public, and instead fashions a community that is much closer to advanced liberal conceptions of how communities ought to behave and be governed, in which education, common-sense, and self-help are at the core – reliance on the state is generally conceived of as imprudent, and communities are instead conceived of as "communities of

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[368]*Decline of the Rehabilitative Ideal*, *supra* note 55.

[369]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 373.

[370]M. Ruess, "Second Thoughts about Megan's Law: Concern Growing over Ripple Effects" *The Record* (19 February 1996) A1.

contract,"[371] with individuals seeking to protect themselves and their families rather than the collective as a whole.[372] It is this contemplation of community that serves to shield the state from any responsibility for the effects community notification may have.

Argument 3: Risk, Community, and Sex Offenders: Accountability and the State

Having created both a role for the state and a role for communities to engage in crime control, common-sense, risk, and community also come together to help shield the state from accountability toward registrants, or for any harm that may result from notification. This occurs in two broad ways, one relying mainly on risk, while the other mainly on community.

With respect to risk, any information communicated by the state is said to be tailored to an individual offender's risk profile – here, risk assessment takes on an inflection of fairness and individuality. It is the very reliance on risk tiers that leads the New Jersey Supreme Court to determine that the community notification provisions are "carefully tailored," since an offender "will not be lumped together with all sex offenders but will be placed either in Tier One, Two or Three, depending on his characteristics alone," and that this points to the fact that the provision is not punitive, but a regulatory measure designed to enhance public safety.[373] Risk – which has functioned to subject all sex offenders to registration and possible notification – is now refigured as a tool for individuality and fairness. This lies in contrast to most interpretations of risk, which generally conceive of reliance on risk classifications as a de-individuating

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[371]C.D. Shearing, "Reinventing Policing: Policing as Governance" in O. Marenin, ed., *Policing Change: Changing Police* (New York: Garland, 1995) 285 [hereinafter "Policing as Governance"].

[372]See also N. Rose, "The Death of the Social? Re-Figuring the Territory of Government" (1996) 25 Economy & Society 327; *Powers of Freedom*, *supra* note 21 at 167-196; *Culture of Control*, *supra* note 5; D. Garland, Book Review of *The Local Governance of Crime: Appeals to Community and Partnerships*, by A. Crawford (1998) 38 British Journal of Criminology 516; P. O'Malley, "Policing Crime Risks in the Neo-Liberal Era" in K. Stenson & R.R. Sullivan, eds., *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan, 2001) 89 [hereinafter "Policing Crime Risks"]; "Post-Keynesian Policing", *supra* note 247; "Risk and Responsibility", *supra* note 29; *Local Governance of Crime*, *supra* note 29; N. Lacey & L. Zedner, "Discourses of Community in Criminal Justice" (1995) 22 Journal of Law & Society 301. On liberal and statist versions of community in a similar context, see "Shame Sanctions", *supra* note 215. On the self-help aspects of community notification, see R. Teir & K. Coy, "Approaches to Sexual Predators: Community Notification and Civil Commitment" (1997) 23 New England Journal of Criminal & Civil Confinement 405.

[373]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 404, 415.

process.[374]

Furthermore, by allowing for a judicial review of one's tier classification, the New Jersey courts understand risk as a legal concept that can be negotiated in individual cases, and thereby in the domain of judges and not experts. Through the individualized nature of legal adjudication, judicial review hearings are said to provide an individualized spin on a profoundly de-individualizing process. Yet, in these hearings, courts need not engage with whether or not the offender will, himself, be likely to reoffend; rather, the court must simply determine whether this particular offender is more likely to reoffend than those not subject to notification, to determine whether "the risk – however quantified – was sufficient to warrant such notification."[375] Perhaps most to the point, these hearings are not actually geared to an individual's propensity for reoffense: as determined by the District Court, this risk assessment is simply "a calculation of *relative* or *comparative* risk of re-offense."[376] As such, even at this purportedly individualized stage, plaintiffs cannot challenge the inclusion or exclusion of scale items that might otherwise have affected their raw score:[377] "Where the relevant inquiry is one of relativity," the Court declares, "this argument is not persuasive."[378]

The second way in which the state is shielded from accountability stems from positing the consequences of registration wholly within the private sphere of individual communities, rather than the public sphere of the State. While some courts have focused more heavily on legislative *intent* in determining whether Megan's Law is punitive, nearly all courts have included an analysis of the *effects* of Megan's Law in determining whether community notification constitutes punishment – even if they differ on the extent to which such effects ought to be taken

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[374]See eg. "Managing the Monstrous", *supra* note 32. There is growing recognition in the literature of "positive" ways of imagining risk: see eg. T. Baker & J. Simon, "Embracing Risk" in T. Baker & J. Simon, eds., *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago: University of Chicago Press, 2002) 1 [hereinafter "Embracing Risk"].

[375]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 384. The reliance on 'quantification' is ironic in this context, with the same court having explicitly determined that expertise is not required in the management of these risks.

[376]*W.P. (1996)*, *supra* note 179 at 1221.

[377]*Ibid.* [emphasis in original].

[378]*Ibid.*

into account.[379] This is critical: in upholding Megan's Law, the community that has been constituted is said not to be acting to punish sex offenders, but is rather conceived of as being vigilant in maintaining its own security, and simply takes common-sense measures – construed as unexceptional as a result – in maintaining their security. The state, in partnership with this community, is simply providing a service which is too costly and complicated for individuals to engage in on their own. Government, according to these courts, are not to blame for any "sting of punishment" that may result, since the intent of the legislation is to protect, not punish, and any possible sting is simply a result of "the compelling necessity to design a remedy' to a public safety problem."[380]

This state-community partnership, then, changes legal analyses of accountability; the state, having acted preventively, shields itself from any legal accountability by interposing the community as the proximate, and responsible, actor.[381] Whereas earlier in this chapter I analysed the image of community contemplated to be *calling for notification*, in the remainder of this section, I analyse the devices through which Megan's Law constitutes a particular form of community that is the *recipient of notification*. This question directly relates to how courts conceive of the power to punish, and the mechanisms through which the preventive state can mobilize non-state actors to promote security. If communities engage in punitive measures, for instance, it may begin to take over the punitive role that remains the preserve of the state.[382]

Throughout the adjudication, the New Jersey State Courts have emphasized the importance of community action in securing safety from sex offenders. Yet, these decisions do not ignore that there is a constitution of community that must take place here. How can the community be provided with the task of self-governance, while not overtaking the role of the state by acting punitively? In *Doe* v. *Poritz*, the New Jersey Supreme Court goes about this process in two

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[379]In fact, the only Court I find to have ignored the question of "effects" is the Superior Court decision in *Doe* v. *Poritz*, and even this Court engages with effects (though minimally) in considering the procedural due process issues at stake in community notification (*Doe v. Poritz, (New Jersey Superior Court), supra* note 99 at 1350). The New Jersey Supreme Court in *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 includes "effects" in its analysis, though it gives it little attention and is concerned with the significance attributed to it by the federal courts.

[380]*Ibid.* at 396, 422

[381]This point is similarly asserted, though without evidence, in "Strange Bedfellows", *supra* note 238 at 304.

[382]"Limits of the Sovereign State", *supra* note 33.

ways. First, the Court rejects the use of broad community notifications, even for the most 'risky,' Tier Three offenders. In so doing, the Court revises the original Attorney General's Guidelines which allowed for notification to "community meetings, speeches in schools and religious congregations," and instead limits notification to those "likely to encounter" the offender. The Court seems to presume this will reduce the chances of a mob-like mentality acting punitively, arguing that those likely to encounter the offender "are quite different from the implied makeup of groups that will attend 'community meetings, speeches in schools, and religious congregations'."[383] It would seem that the more active the community members are in seeking to police these offenders, the more concerned the Court is of their intent and possible effects. The New Jersey Supreme Court invokes a particular form of community, composed of families seeking to maximize their own self-interest, rather than interested in any form of punishment or expressions of collective, social, morality:

> We do not perceive in this case a society clamouring for blood, demanding the names of previously-convicted sex offenders in order to further punish them, but rather families concerned about their children who want information only in order to protect them. Presumably, some citizens will harass, and presumably they will be prosecuted, but we believe that overwhelmingly our citizens are law-abiding citizens. We do not share the certainty of the dissent in the probability of community reaction that would gut the protective purpose of these laws and convert them into punishment. We decline to decide this case on that assumption.[384]

As such, the New Jersey Court maintains that "[w]e must not prejudge society with the ogre of vigilantism or harassment," since its citizens are fundamentally law-abiding.[385] The community here is operationalized as a zone of safety, both for registrants whose presence may become known, and for families themselves, in which the prevalence of sex offending is entirely glossed over. This is a family of the pre-feminist sort: one which, when invoked, stands as a unit in opposition to outsiders, rather than one which can also admit of internal trouble and potential

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[383] *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 385.

[384] *Ibid.* at 377. This passage, with its echoes of Margaret Thatcher's similar claims that "there is no such thing as society," but instead "there are individual men and women, and there are families," is itself indicative of the form of community response courts imagine: M. Thatcher, "Interview" *Women's Own* (8-10 October 1987) at 10, cited in *Governmentality*, *supra* note 14 at 151.

[385] *Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 377, 422.

for abuse.[386] The family, then, is not only deployed to govern crime, but is itself governed in this process – offenders are family-less, and families are devoid of offenders.

Second, the Court places stock in the educative and punitive roles of the state in constituting a certain community response (though not able to ensure it):

> The Attorney General has strongly warned that vigilantism and harassment will not be tolerated ... despite the branding, stocks, and pillory of prior centuries, we have no right to assume the public will engage in it. We assume the strongest message will be delivered, and repeated, by the Governor and other public officials at all levels, as well as by community and religious leaders and the media, that this is a law that must be used only to protect and not to punish, and that all citizens must conform their conduct accordingly, a message given at community meetings, schools, churches, synagogues, and everywhere throughout the state.[387]

The Court thereby cites with approval the Attorney General's "emphasis on providing ... advice concerning the consequences of vigilante activity," and "the need for community education" to ensure that the information released is relied upon properly.[388] This advisory/educative function is backed up with the State's penal power: private responses that go beyond the pale – though it is unclear what activity lies within the pale, since courts rely on vague terms such as 'harassment' – will result in prosecution by the State.[389]

Those federal courts upholding Megan's Law appear somewhat more willing to admit that registrants may face deleterious effects as a result of community notification, not relying on the trope of families to analyse community reaction. Recognizing that members of the public will

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[386]See A. Wolfe, "Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary" in *Public and Private in Thought and Practice*, *supra* note 36, 182 at 191-192 [hereinafter "Public and Private in Theory and Practice"].

[387]*Doe* v. *Poritz (New Jersey Supreme Court)*, *supra* note 12 at 376.

[388]*Ibid.* at 386.

[389]Similarly, there are competing policy considerations that are often dealt with in this area when considering the 'effects' of notification. Some of the most salient of these are concerns over how to deal with juveniles in this process (*B.G.*, *supra* note 227; *In the Matter of Registrant J.G.*, 777 A. 2d 891 (N.J. Sup. Ct. 2001)), implications of notification for the sanctity of the family (*J.S.* v. *R.T.H.*, 693 A. 2d 1191 (N.J. Super. Ct. 1997), aff'd 714 A. 2d 924 (N.J. Sup. Ct.); *Paul P.* v. *Verniero*, 982 F. Supp. 961 (Dist. Ct. N.J. 1997) [hereinafter *Paul P. (New Jersey District Court 1997)*]; *Paul P.* v. *Farmer*, 80 F. Supp. 2d 320 (Dist. Ct. N.J. 2000) [hereinafter *Paul P. (New Jersey District Court 2000, motion for summary judgment)*]; *Paul P.* v. *Farmer*, 92 F. Supp. 2d 410 (Dist. Ct. N.J. 2000) [hereinafter *Paul P. (New Jersey District Court 2000, motion to enforce injunction)*]), and implications of notification on values of work (*Doe* v. *Fauver*, 3 F. Supp. 2d 485 (Dist. Ct. N.J. 1997)).

surely take *some* action to protect themselves, the District Court in *W.P.* provides a litany of measures community members might take, including eviction, name calling, refusals to hire or engage in business dealings with registrants, and so on. While the Court finds some of these actions offensive, it not only finds them legal, but even "the natural and anticipated outgrowth" of community notification.[390] The Court of Appeals reaches similar conclusions in *E.B.* v. *Verniero*, with the majority of the Third Circuit finding that any negative consequences of community notification that the registrant may bear – be it private violence, harassment, vandalism, or injury to reputation – are beyond the state. Rather, that registrants may be harmed simply reflects that "there is unfortunately a background risk of private violence that is necessarily assumed by everyone in our society."[391] This is, of course, an ironic position to take in a community notification case – where the risk of private violence caused by sex offenders is the basis for the legislation, and where the risk of violence is said to be society's concern that justifies public intervention.[392] Yet, even some extreme possible consequences can be dismissed, not only as private, but as flowing from natural community reactions. Dealing with a New Jersey statute requiring disclosure of juvenile records, Judge Kreizman refused a 13 year old's motion to be exempt from the disclosure requirements, concluding that there would be no "specific and extraordinary harm" that he would suffer:

> [Registrants] might be ostracized by their community. Their self-esteem would drop. They might harm themselves. They might harm others. They have increased anger. They would be looked upon as pariahs by their community. There might be isolation, all those things. And I think that that's really the bottom line in this case, that this is really not extraordinary.[393]

While the Federal Courts adopt a somewhat more Hobbesian view of the private sphere – one

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[390] *W.P. (1996)*, *supra* note 179 at 1212. The District Court wryly states that "[p]rivate witch hunts and self-promotional demagoguery have no place in the administration of Megan's Law" (at 1213 *n*13).

[391] *E.B. (1997)*, *supra* note 196 at 1104.

[392] This is also the position taken by the Second Circuit federal court in *Doe* v. *Pataki*, in which the court decides that the acts of individuals responding to community notification are not 'attributable' effects of New York's version of Megan's Law; '[t]hough the Act is doubtless the 'but for' cause of some of these incidents – those perpetrated by persons who gained knowledge of the offender's past crime and current location only because of notification, these incidents are not consequences imposed by the Act.' See *Doe* v. *Pataki*, 120 F. 3d 1263 at 1280 (2nd Cir. 1997).

[393] *New Jersey ex. rel. K.B.*, 701 A. 2d 760 at 762-763 (N.J. Super. Ct. 1997).

in which a registrant will simply have to fend for himself against others[394] – they continue to cling to a vision of the community that is generally law-abiding and conscientious.[395] At the core of this assumption lies a deference to the safeguards, education, and affirmative steps taken by the Attorney General's office in seeking to control the dissemination of community notification, and to thereby restrict the deleterious effects of Megan's Law on registrants.[396] In the remainder of this section, I argue that these measures are successful at deflecting the consequences of community notification away from the State by allowing it to 'govern at a distance' – constituting a community through contractual obligations and educational material, that will function as a recipient of notification, but in which each individual will honour his/her contractual commitment with the state above any shared sense of obligation to other community members. Through these measures, in short, Megan's Law creates a thin version of community, bound through being 'at risk' but invested with contractarian values through which its members are aware of their dependency on the State for the very information they require to maintain their shared alliance.[397]

The contractual system envisaged by Megan's Law includes two versions of community notification notices. For each Tier Two and Tier Three offender, both unredacted and redacted notices are prepared. While unredacted notices include the full gamut of information regarding the offender's present address and employer, redacted notices do not specify the precise street number of the registrant's home (though it can include both the street and cross-street), nor do they identify the business name of his employer. However, whether an individual resident receives a redacted or unredacted notice does not turn on his/her need for the information, or

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[394]The Third Circuit explicitly relies on the argument that the state has not incapacitated registrants from taking steps to protect themselves against private violence: see *E.B. (1997)*, *supra* note 196 at 1104.

[395]See eg. *W.P. (1996)*, *supra* note 179 at 1212-1213.

[396]See eg. *ibid.* at 1211-1213; *E.B. (1997)*, *supra* note 196 at 1104; *Alan A. (1997)*, *supra* note 187 at 1190-1196; *Artway (1996, 3rd Cir., Petition for Rehearing)*, *supra* note 178 at 596-598 (Judge Alito, dissenting).

[397]The term "contractarian" is generally relied on in "social contract" literature. By "contractarian," I am simply invoking liberal contractual values (see P. O'Malley, "Uncertain Subjects: Risks, Liberalism and Contract" (2000) 29 Economy and Society 460), and am thereby invoking Clifford Shearing's conception of "contractual communities" (see "Policing as Governance", *supra* note 371).

proximity to the registrant's home.[398] Receiving an unredacted notice, rather, requires entering into a contract with the State, and signing a Megan's Law Receipt Form provided by law enforcement at the time of notification. Through this Receipt Form, residents attest that they will comply with the Megan's Law Rules of Conduct – Rules of Conduct which must also be reviewed by law enforcement with those residents who refuse to sign the Receipt Form. These Rules of Conduct make it clear that residents ought not seek comfort or alliances with other members of their community, but rather must work solely within the context of their own family, protecting themselves and their children, rather than organizing the community at large:

1. Do share and discuss the information you have received with those residing in your household, such as family members.
2. Do share the information you have received with anyone caring for your children at your residence in your absence.
3. Do take appropriate precautions to protect your children, based on the information provided.
4. Do discuss with your children how to act and what to do when dealing with strangers.
5. Do use the information responsibly, in a manner that will facilitate the safety and well-being of those in your care.[399]

In contrast, residents are told that sharing the information "with anyone outside of your household or anyone not in your care," or even displaying the flier in a place where it is visible to persons who are not members of the household, may result in court action or prosecution. The Rules explicitly state that it is the role of the State to inform other residents, and that for residents to do so without State authority is inappropriate.[400] This lack of community engagement is similarly evident in the instructions to law enforcement, who must make every effort to keep even the fact of notification a secret. Even when asked what they are doing while disseminating notification forms (during which time officers will be holding a great deal of Megan's Law material: unredacted notices, redacted notices, rules of conduct forms, and receipt forms), officers are requested to simply answer "confidential police work," and neither confirm

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[398]The Attorney General Guidelines include specific rules for when schools and community institutions ought to receive redacted or unredacted notices: *Guidelines March 2000*, *supra* note 112.

[399]See "Megan's Law Rules of Conduct" in *ibid.*

[400]*Ibid.*

nor deny that a notification is in progress.[401]

Instructed not to harm or harass the offender, his family, or his property, community members are now also instructed not to engage in any community-building efforts to cope with an offender's presence. Even those residents who choose not to sign the Form, and thereby received a redacted notice, are told that they are bound by the Rules of Conduct.[402] This vision of community, which despite accounts of vigilantism and harassment continues to presume that individual residents will simply look to avoid registrants in their neighbourhood, works to isolate individual families and render the notification process as one linking families with the State, eliminating "community" altogether.[403] This has generated some confusion among residents:

> "Let's say you and I are neighbors," said Montclair Police Chief Thomas Russo, who was watching his words in an interview, for fear of violating Megan's Law, which has inspired a degree of paranoia among officials and residents alike. "One of my people hand-delivers you and me a notice. You and I can't discuss this? Come on, give me a break."[404]

Regardless of the actual effects of notification, the Rules of Conduct, along with the education and advice the State offers regarding proper responses to notification, allow the community to be presented as a reasonable actor that can be entrusted with the information offered by the State. Part of this occurs through contract, and through a background assumption that individuals will privilege a contractual relation with the State (backed up through the State's power to punish) over their interest in protecting and communicating with fellow residents. When individuals *act*, furthermore, they are acting neither as individuals nor as members of the community. The Megan's Law Rules of Conduct instead govern civil society through the

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[401]"Law Enforcement Guidelines for Community Notification" in *Guidelines March 2000*, *supra* note 112.

[402]*Report on Implementation*, *supra* note 118 at 3.

[403]The federal courts, in particular, have raised important concerns over the possibility that this information may be leaked: see *Paul P. (New Jersey District Court 1997)*, *supra* note 389; *Paul P. (New Jersey District Court 2000, motion for summary judgment)*, *supra* note 389; *Paul P. (New Jersey District Court 2000, motion to enforce injunction)*, *supra* note 389; *A.A.*, *supra* note 117.

[404]See C.J. Cooper, "Megan's Law Notice an Awkward Exercise: Limits Stir Confusion, Free-Speech Issues" *The Record* (28 May 2000) A1.

"family," rather than governing through individuals or through the collectivity as a whole.[405] As Olsen argues, the family thereby stands in contrast to the untamed private sphere.[406] Cooperative and internally altruistic, the family represents a trustworthy site through which to release information regarding sex offenders, without fear of vigilantism or reprisal.[407] And in contrast to the individual citizen, the family is, at once, both public and private: the family's public nature allows it to be guided by shared norms, while the family's private nature protects its members from external threats.[408] It matters little, in the context of Megan's Law, whether the "family" enjoys the resources it requires to effectively protect its members, including the flexibility to monitor children at play and to be on the lookout for potential threats. Megan's Law simply demands that the family shoulder this additional role[409] – and in so doing, perniciously discounts the work that mothers already do to promote their family's security.[410] Yet, by displacing the dangers of an unregulated private sphere of individuals guided solely by self-interest, while also displacing the dangers of a collective "mob" that can be overly guided by its passion,[411] Megan's Law posits a third way through the tropes of both contract and the family. Individuals are contractually bound not to communicate the information to other residents, and are exhorted to respond to that information as members of families rather than as members of a broader community.

This problem of determining how the community can be made responsible enough to govern itself while not overstepping its bounds was further explored in *Artway* v. *Attorney General of*

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[405]The Guidelines similarly focus on other meso-level institutions, ie. schools and community organizations. See *Guidelines March 2000*, *supra* note 112.

[406]K. Kumar, "Home: The Promise and Predicament of Private Life at the End of the Twentieth Century" in *Public and Private in Thought and Practice*, *supra* note 36, 204 at 221-222.

[407]"Family and the Market", *supra* note 25 at 1516-1528.

[408]"Public and Private in Theory and Practice", *supra* note 386 at 196-197.

[409]P. Ariès, "The Family and the City in the Old World and the New" in V. Tufte & B. Meyerhoff, eds., *Changing Images of the Family* (New Haven: Yale University Press, 1979).

[410]See a similar argument made in "Challenging the Public/Private Divide", *supra* note 45.

[411]"Shame Sanctions", *supra* note 215.

New Jersey,[412] which found Megan's Law to be unconstitutional as a retroactive state punishment. Although later overturned, the decision in *Artway* focuses on the response that sex offenders will likely face from community members. Rather than assume that they will take 'common-sense' precautions to protect themselves, the decision in *Artway* flips this logic by finding that it will have severe effects on an offender's ability "to return to a normal private law-abiding life in the community."[413] In determining that community notification is punitive, and not regulatory, the Court inquires into whether Megan's Law promotes either of the traditional aims of punishment, namely retribution and deterrence. In its analysis, the Court determines that the very nature and function of Megan's Law achieves deterrence through widespread community surveillance and social control. As Judge Politan argues, the community, in a sense, becomes a state agent in this regard, arguing that "Megan's Law, in application, would deputize every member of registrant's community and thus achieve the ultimate deterrent against reoffense by the registrant. This stated objective, regardless of how innocuously it has been couched by the Legislature, clearly constitutes a traditional element of punishment: deterrence."[414]

Rather curiously, though, the Court declines to find that Megan's Law also promotes retribution, despite possible effects of ostracism and harassment:

> While being sent to Coventry/boycotted, being ostracized within a community, or being excluded from participation in certain areas of community life may have a drastic effect on an individual, they cannot be labelled as an attempt by the government to extend retribution beyond a convict's period of imprisonment. Such a reaction by the community to an individual because of his erstwhile offense might occur even in the absence of laws such as Megan's Law. The government cannot enjoin or preclude community's response to conduct which that community finds deplorable or its treatment of those who carry out such conduct.[415]

The basis for the Court's premise that a community might, even without notification, engage in

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[412]*Artway (1995), supra* note 163.

[413]*Ibid.* at 689.

[414]*Ibid.* at 690. See also *Artway (1996, 3rd Cir.), supra* note 174 at 1250, suggesting that since this does not involve state agents, it is difficult to predict how they will respond.

[415]*Artway (1995), ibid.*

exclusion and ostracism, but not in surveillance and deterrence, is left unexplained.

The distinction the Court draws, however, reflects the dilemma that lies at the heart of community notification. Why is it that the *Artway* Court argues that Megan's Law would deputize communities – in that communities would not otherwise engage in surveillance and deterrence – while it steadfastly holds that, with or without Megan's Law, an individual community may have been retributive, and as such those acts cannot be attributed to the state? Making this distinction, again, does not change the Court's result, since the deterrent function is sufficient to render community notification punitive. Why, then, does the Court engage in this analysis?

A clue to the *Artway* Court's reasoning, I suggest, can be located in its view of community members' capacity to engage, on an everyday level, in an activity that seeks to manage the future rather than the past. The community is imagined as being able to express moral outrage, but without the state's capacity for cool-headed attempts to manage risk; when community notification, then, governs the community by engaging community members in risk management, the court reads this partnership as fundamentally altering the nature of civil society, and thereby making civil society a part of the state – what it refers to as 'public involvement in the state's police function.'[416] The state police, rather than being concerned with moral order, are concerned with keeping the peace; the community is imagined as an angry mob, akin to that perceived in the statist tradition, which "imagines a public that is always ready to riot."[417] The *Artway* Court thereby draws on historical analogies of Nazi Germany and Nathaniel Hawthorne's Scarlet Letter, and observing that, "in generation after generation, the majority in society have found ample justification for continuing such practices."[418] Deterrence and risk calculation are perceived to be a state form of punishment – cool-headed and rational – a role more properly attributable to the state.

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[416]*Ibid.* at 690 (Dist. Ct. N.J. 1995).

[417]"Shame Sanctions", *supra* note 215 at 1087.

[418]*Artway (1995)*, *supra* note 163 at 686-689.

VII. Conclusion

In his article on "Managing the Monstrous," Jonathan Simon lays out the ways in which community notification of sex offenders reflects the 'new penology,' often through a calculation of risk and a focus on actuarialism.[419] Simon concludes that community notification implies a restructuring of responsibilities for responding to sex offending, with Megan's Law insulating the State from "responsibility for failure," and presenting instead a "new hybrid of public and private vengeance."[420] Similarly, Simon Cole suggests that changes in sex offender laws signal a shift from a medical to a punitive discourse, in which the sex offender is presumed to be "sick," but this pathology is to be punished rather than treated by experts.[421] Building on both these papers in this chapter, I have instead sought to explore some of the ways multivocal concepts of risk and community have been mobilized in the adjudication of community notification statutes, and the complexities that this hybridisation has presented to courts adjudicating these measures.

This chapter does not seek to identify risk as a somehow new technology of government – my focus, rather, is in analyzing the ways in which risk is constructed and deployed for a variety of governmental ends, within the context of a particular political programme. It is not that we live in a "risk society" that interests me, but rather what the logic of risk is presently making possible, and the truths that are constructed in its name.[422] In breaking with welfarism, advanced liberal citizens are said to be reconstructed into rational consumers and innovative entrepreneurs, with expertise reformulated to engage actors from below. Knowledge, skills, and resources are

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[419]"Managing the Monstrous", *supra* note 32.

[420]*Ibid.* at 462-464. See also J. Pratt, "Sex Crimes and the New Punitiveness" (2000) 18 Behavioral Sciences and the Law 135.

[421]"From the Sexual Psychopath Statute to Megan's Law", *supra* note 31. This shift, however, may not be as linear as Cole's argument suggests. For instance, in *Waterman* v. *Verniero*, 12 F. Supp. 2d 364 (Dist. Ct. N.J. 1998), the District Court focuses on the constitutionality of barring inmates at the ADTC from possessing sexually oriented materials. New Jersey justified this measure on the basis of rehabilitation, which would then enhance public security more generally; and the District Court in fact focuses on the adequacy of the record as to the effect of this measure on rehabilitation. Rejecting New Jersey's request to defer to the expertise of prison administrators regarding rehabilitation, the Court instead requires New Jersey to provide evidence regarding rehabilitation – a decision that suggests that there continues to be room not only for the rhetoric of rehabilitation, but for expert evidence from experts on rehabilitation, even in the context of other shifts away from rehabilitation in managing sex offenders.

[422]See *Risk Society*, *supra* note 2. Beck's thesis is totalizing, and suggests a coherency of risk that empirical analyses do not bear out: see "Governing Risky Individuals", *supra* note 7 at 180-181.

provided by the state and other agencies so as to encourage individuals to personally calculate dangers and avert risks. Rather than being managed and pooled socially, risk is thereby increasingly controlled at the individual level through a renewed focus on individual prudentialism. In this shift, O'Malley situates a correlative change in the role of the State and of citizens:

> State and private agencies take on the role of providing empowering knowledge and skills. Information is provided about local crime rates, about how to recognize suspicious persons, how to make the home and its contents secure, how to recognize and avoid high-risk situations ... In this process, security becomes the responsibility of the private individuals, who through the pursuit of self-interest, and liberated from enervating reliance on the State, will participate in the creation of the new order ... The welfare model of dependence on State professionals is modified to one more in keeping with a nation of enterprising individuals ... To rely on the State to deal with the harmful effects of known, calculable and individually manageable risks appears feckless and culpable.[423]

Although drawing much of its analytical perspective from this governance literature, this chapter has sought to demonstrate that these moves are not as linear as some suggest. The adjudication of Megan's Law demonstrates that reliance on 'risk' need not imply a stable technology of government, but that it may rather function in different ways within the very same political programme.[424] Risk, then, may be actuarial when determining that sex offenders are likely to recidivate; in other cases, it may rely on legal interpretations and subjective factors; it may be de-individualizing or it may be the hallmark of a tailored criminal justice system; and it may imply the need for lay, common-sense precautions to be taken by community members. In so doing, risk can excuse the state from the need to prevent sex offending; it can recode the problem as information management rather than crime control;[425] it can change the forms of state accountability; and they can lead to shifts in conceptions of public and private. It is, in that sense, an overgeneralization to consider the focus on risk as a linear move away from other

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[423]"Risk and Responsibility", *supra* note 29 at 201-202.

[424]This expands Rose's argument on the heterogeneity of risk thinking: see "Governing Risky Individuals", *supra* note 7.

[425]R.V. Ericson & K.D. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997) [hereinafter *Policing the Risk Society*].

forms of crime control – contrary to many scholars focusing on risk governance, we ought not impute an essential nature to the ways in which this concept functions. And contrary to the arguments posed by several risk theorists,[426] risk discourses do not always rely on scientific logics, there is no neat division in knowledges relied on for risk design and for assessing risk in everyday life,[427] and risk as a conceptual device can in fact gain considerable strength precisely through more complicated, nuanced, and contradictory processes.

In addition, risk ought not to be thought of autonomously, as if it matters on its own. In the context of Megan's Law, risk seems to work very closely with concepts of community: Not only is the existence of a 'community' a central element in being able to implement risk management strategies that go beyond the state, but in negotiating legal questions it is a particular form of community that is imagined. The community is a trusting place that is in need of state information in order to protect itself properly, and which will take common-sense precautions to protect itself, rather than engage in systematic harassment of named offenders. This then has a recursive effect on ways of imagining risk: with sex offenders being both within and without the community, the state's role in disseminating information is central to the community's ability to protect itself, and to organize inclusion and exclusion;[428] and with community members acting in certain ways (and not in others), the communication of risk takes on an unobjectionable quality, with any harassment that may result being attributable to individual abuses of the information provided.

When brought together with conceptions of community, risk thereby plays a dual and internally contradictory role in the context of Megan's Law. While the offender is held to be unavoidably 'risky', a person who cannot be trusted/expected to calculate, let alone govern, his own behaviour, reliance on risk and common-sense is what allows Megan's Law to open a space for community involvement in crime control that is separate from the role of the state. The

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[426]See eg. *ibid.* at 89; *Risk Society*, *supra* note 2 at 162.

[427]On risk in everyday life, see A. Hunt, "Risk and Moralization in Everyday Life" (Risk and Morality Conference, Green College, University of British Columbia, May 2001) [unpublished].

[428]*Policing the Risk Society*, *supra* note 425 at 41; K. Stenson & A. Edwards, "Crime Control and Liberal Government: The 'Third Way' and the Return to the Local" in K. Stenson & R.R. Sullivan, eds., *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (Cullompton: Willan, 2001) 68.

community is governed as a rational calculator of risk that, with sufficient education, information, and guidance, will govern itself and others through rational, common-sense, and protective measures. Any future offenses will not, as a result, be a failure of the state to protect or accurately assess risk, but rather the failure to take appropriate quotidian precautions against those offenders. The role of the state is redesigned to ensure the smooth functioning of these logics – providing the necessary information, constituting a community to act upon that information, ensuring due process hearings for offenders, and prosecuting non-compliant community members (or at least 'advising' them of the consequences of vigilantism).

Some of this is borne out in empirical evidence on community notification. Across various states, the empirical evidence on Megan's Law suggests that the effects of community notification may be greater for community residents than for reducing sex offender recidivism. Community members appear just as or more concerned than before,[429] and the process involves significant fiscal costs and workload,[430] but there appear to be no statistically significant differences in recidivism nor arrest rates.[431] Despite a very low level of vigilantism directed against registrants, researchers and registrants themselves have expressed concern over the long-term implications that will be caused by high rates of threats and harassment, exclusion from their residence, jobs, and the community at large.[432] And finally, although expressing significant support for community notification programs, empirical evidence suggests that this support wanes when residents are presented with alternative measures to respond to sex offender recidivism – suggesting that residents are expressing support for *some* solution, rather than

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[429]R.G. Zevitz & M.A. Farkas, "Sex Offender Community Notification: Examining the Importance of Neighborhood Meetings" (2000) 18 Behavioral Sciences and the Law 393; S. Matson & R. Lieb, *Community Notification in Washington State: A 1996 Survey of Law Enforcement* (Olympia, WA: Washington State Institute for Public Policy, 1996) [hereinafter *1996 Survey of Law Enforcement*]; D.M. Phillips, *Community Notification as Viewed by Washington's Citizens* (Olympia, WA: Washington State Institute for Public Policy, 1998).

[430]*1996 Survey of Law Enforcement, ibid.*; C. Poole & R. Lieb, *Community Notification in Washington State: Decision-Making and Costs* (Olympia, WA: Washington State Institute for Public Policy, 1995).

[431]D. Schram & C. Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism* (Seattle WA: Urban Policy Research, 1995).

[432]R.G. Zevitz & M.A. Farkas, "Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?" (2000) 18 *Behavioral Sciences and the Law* 375; S. Matson & R. Lieb, *Megan's Law: A Review of State and Federal Legislation* (Olympia, WA: Washington State Institute for Public Policy, 1997).

notification in particular.[433] Megan's Law is, then, having important effects on the ground, but those effects appear to be most centred on the processes of community behaviour, and processes of inclusion and exclusion, than any particular reduction in sex offending.

Subject to internal and external contestation, "risk" and "community" exert power in ways that are often ignored from a purely doctrinal perspective. The knowledge systems created by these hybridizations are, to be sure, local, and generalizations to the preventive state as a whole cannot easily be made.[434] This is not, then, a meta-narrative of public and private,[435] but rather an analysis of one set of contestations, and the "complexities and contradictions" that it brings to the fore.[436] Yet, as Cotterrell concludes in his study of law's images of community, these images may help define "the general limits within which debate and disagreement take place in many diverse social and political contexts."[437] If so, it is important to recognize that the instability of "risk" and "community" in the Megan's Law context begins to document the instability of this preventive state. Contrary to what is sometimes implied, neither risk nor community can provide such a state with any particular coherence, since both these constructs can be imagined in so many different ways.[438] As such, rather than debate the legality of this or that measure of the preventive state, it may be more useful to consider just how these measures have come to be,[439] and the contestations over authority that occur in their name – and how

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[433]M.E. Perrien, *Community Notification and Treatment of Sex Offenders in Hawaii: The Nature and Modifiability of Knowledge, Attitudes and Behavioral Expectations of College Students* (Ph.D. Dissertation, University of Hawaii 1998) [unpublished].

[434]See *Toward a New Common Sense*, *supra* note 269.

[435]I follow, instead, Weintraub's emphasis on the variability of the public/private distinction, and here focus on the ways in which specific problematics of public and private are mobilized: see "Theory and Politics of the Public/Private Distinction", *supra* note 43.

[436]D. Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (New York: Rivers Oram, 1998) at 11.

[437]*Law's Community*, *supra* note 209 at 241.

[438]This is the object of some disagreement in the literature. While some scholars of risk are particularly concerned with determining one's *actual* level of risk, others adopt an approach to risk that focuses on the cultural and social questions that relying on risk opens up. See "Embracing Risk", *supra* note 374.

[439]For a discussion of legislative deliberations in the context of the Federal and New York versions of Megan's Law, see D.M. Filler, "Making the Case for Megan's Law: A Study in Legislative Rhetoric" (2001) 76 Indiana Law Journal 315.

different conceptions of risk and community, for instance, may lead to different, though admittedly unpredictable, results for future developments of any preventive state.[440]

[440]In a recent essay, Pat O'Malley calls for scholars to 'rethink our certainties about neoliberalism and risk,' suggesting that these concepts remain politically contested: see "Policing Crime Risks", *supra* note 372.

Chapter Three

Policing Harm by Governing Nothing: The Criminogenic Properties of Having No Apparent Purpose in Chicago

> For someone first entering the Addams area [in Chicago], the most striking aspect is its street life. This institution plays an interstitial role that bridges the privacy of the area's family life and the seclusiveness of its internal segments. On the streets, age, sex, ethnic, and territorial groups share boundaries that open them to mutual inspection, thus giving the occasion for transient interaction between groups, for gossip, and for interpretive observation. Street life, then, is a vital link in the communication network of the Addams area and, as a result, governs much of what the residents know of one another beyond the range of personal acquaintance ... Among teenage boys this attachment to street life is especially great. After being arrested and released they do not speak of going home but of going 'back to the streets.' (Suttles, 1968).[1]

> Many concerned citizens testified poignantly about the disruption that the latest wave of gang violence [in Chicago] had worked in their lives. A mother of four, for instance, asserted that in her neighborhood, children no longer played hopscotch or jacks in the street: 'I wish you could see the rust that has accumulated because they cannot ride [their] bikes.' Eighty-eight-year-old Susan Mary Jackson spoke forcefully of the fear she expressed in public spaces: 'We used to have a nice neighborhood. We don't have it anymore ... I am scared to go out in the daytime ... you can't pass because they are standing. I am afraid to go to the store.' (Livingston, 1999).[2]

I. Introduction

Just over 20 years after Suttles' exploration of the diversity and excitement offered by street life in a Chicago "slum," Chicago City Council enacted the 1992 Gang Congregation Ordinance as part of a broader community policing program.[3] This ordinance, designed to police urban disorder, targeted public loitering by individuals who are reasonably believed to be gang

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[1]G.D. Suttles, *The Social Order of the Slum: Ethnicity and Territory in the Inner City* (Chicago: University of Chicago Press, 1968) at 73-75.

[2]D. Livingston, "Gang Loitering, The Court, and Some Realism about Police Patrol" (1999) Supreme Court Review 141 at 149 [internal citations omitted] [hereinafter "Gang Loitering, The Court, and Some Realism about Police Patrol"].

[3]City of Chicago, Substitute Ordinance, amending the Municipal Code of Chicago by adding a new Section 8-4-015 (17 June 1992) [hereinafter Substitute Ordinance (17 June 1992)]. The community policing program in Chicago, which had been perceived as having the potential to make significant changes in the city's policing strategy, has since been the subject of numerous empirical studies: see *eg.* W.G. Skogan & S.M. Hartnett, *Community Policing, Chicago Style* (New York: Oxford University Press, 1997) [hereinafter *Community Policing, Chicago Style*] ; W.G. Skogan, S.M. Hartnett, J. DuBois, J.T. Comey, J.H. Lovig & M. Kaiser, *On the Beat: Police and Community Problem Solving* (Boulder, CO: Westview, 1999).

members, as well as loitering by anyone "with" such an individual. While discussions of the ordinance often refer to the broadness of its scope, a reading of the ordinance reveals that it applied to a limited situation. To "loiter," according to the ordinance, means "to remain in any one place with no apparent purpose."[4] Somewhat ironically, then, it was not designed to be relied upon if the individuals in question are engaging in any apparent activity, even if that activity is to actively intimidate passers-by, to recruit members, or to sell drugs.[5]

The ordinance was designed to remedy the City's concerns that, in the presence of police officers, gang members abstain from illegal behaviour,[6] yet that their very presence leads to the creation of a criminogenic environment resulting from disorder.[7] This strategy problematizes conventional notions of governable harm.[8] Rather than focus simply on the harms experienced when a discrete act of aggression or disruption is committed, the harm that is being policed is one that stems from the very presence of gang members and the resulting social disorganization that is said to follow.[9] According to the City of Chicago:

> [As disclosed by residents testifying before City Council] criminal street gangs are menacing and destructive regardless of whether their members are, at a particular moment, violating other laws. *The intimidating presence of gangs itself has a palpable detrimental effect on a family's sense of well being, on the willingness of parents to*

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[4]Substitute Ordinance (17 June 1992), *ibid.*, s. 1(c))(1).

[5]This is focused on by the ACLU, which points to this as evidence of a poorly construed ordinance: see the comments of Harvey Grossman, "Gang Loitering" Featured Show, (Justice Talking, 26 April 1999), online: Justice Talking <http://justicetalking.org/getshow.asp?showid=158> (last accessed: 17 November 2002) [hereinafter "Gang Loitering (Justice Talking)"].

[6]Petition for a Writ of Certiorari to the Supreme Court of Illinois in *Chicago* v. *Morales* (filed 2 January 1998) at 3, 8-9 [hereinafter *Petition for a Writ of Certiorari to the Supreme Court of Illinois*].

[7]*Ibid.*; see also *Chicago* v. *Morales*, 117 Ill. 2d 440 at 445ff (Sup. Ct. 1997) [hereinafter *Morales (Illinois Supreme Court)*].

[8]There is instead an emphasis on social order, what one might think of in 18th century terms as a focus on Industry, Frugality, Order and Regularity: see E. P. Thompson, *Customs in Common* (New York: New Press, 1993) at 387 [hereinafter *Customs in Common*].

[9]Note that the Ordinance, as written, required police officers to police these individuals, with the Ordinance reading that a police officer "shall order all such persons to disperse and remove themselves from the area" (Substitute Ordinance (17 June 1992), *supra* note 3, s. 1(a)). In the U.S. Supreme Court, the majority notes that the use of the mandatory "shall" is not argued by either party to eliminate police discretion: see *Chicago* v. *Morales*, 527 U.S. 41 at 62 *n*32 (1999) [hereinafter *Morales (U.S. Supreme Court)*].

> *allow their children outside, and on the willingness of Chicago residents to remain in the City.*[10]
>
> [T]he mere presence of a large collection of brazen, lawless, and violent gang members and others on the public way intimidates residents, who become afraid even to leave their homes. *Thus the gang loitering ordinance is designed to provide residents and communities with a greater measure of control over those who disrupt community stability, detract from property values, and intimidate their neighbors.*[11]
>
> The public presence of gangs, like other visible signs of disorder, *emboldens law-breakers and frightens law-abiders.*[12]

The Gang Congregation Ordinance was thereby designed to police the doing of "nothing," not only in an effort to prevent the doing of "something" – the conventional form of preventive policing that is often decried as being beyond the state – but in an effort to address the community harms said to result from physical disorder and social disorganization.[13] This is a different form of crime prevention than that dealt with in chapter two. Whereas Megan's Law focuses on monitoring a specific individual in case he engages in harmful activity in the future, the Chicago ordinance not only sought to prevent apparent gang members from committing offences, but also focused on the present harms caused to community members when an overt offence is not occurring.[14] While the ordinance was preventive in some senses (to prevent the

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[10]*Petition for a Writ of Certiorari to the Supreme Court of Illinois, supra* note 6 at 3 [emphasis added].

[11]*Ibid.* at 8 [emphasis added, internal footnotes omitted].

[12]*Ibid.* at 24, quoting D. Kahan, "Defending the Gang-Loitering Law" *The Chicago Tribune* (31 December 1995) 19 [emphasis added].

[13]The Chicago Municipal Code is a treasure trove of such ordinances, many of which reflect the type of governance epitomized in German Police Science. On this form of governance, see generally W. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) [hereinafter *The People's Welfare*]. The connection between police science and contemporary approaches to crime is chronicled in D. Garland, "'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology" (1997) 1 Theoretical Criminology 173, demonstrating the differences between Colquhoun's vision of the police with the Peelian legacy of professional public police. The Chicago Municipal Code demonstrates that the Colquhoun and Peelian theses can coexist, a theme also picked up in R. Levi & M. Valverde, "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness" (2001) 26 Law & Social Inquiry 819 [hereinafter "Knowledge on Tap"]. See also M. Neocleous, "Social Police and the Mechanisms of Prevention: Patrick Colquhoun and the Condition of Poverty" (2000) 40 British Journal of Criminology 710 [hereinafter "Social Police and the Mechanisms of Prevention"].

[14]Megan's Law, as we saw in the last chapter, does not suggest that the mere presence of the sex offender is, in and of itself, harmful (and certainly does not suggest that his presence is criminogenic), but rather seeks to prevent reoffense in the future. Similarly, the harm being addressed by Megan's Law is the lack of visibility of sex

deterioration of neighbourhoods and their collapse into criminogenic spaces, as well as to prevent future offending by gang members), it was also designed to act on present harms caused by the doing of "nothing" by apparent gang members.

Though based on very serious concerns regarding gang violence and violent crime in Chicago,[15] this measure raised important legal questions.[16] In *Chicago* v. *Morales,* a majority of the US Supreme Court in fact declared the Gang Congregation Ordinance unconstitutional,[17] and a revised ordinance has since been enacted. Although not consistently articulated as such, the Court's major concern was whether individual loitering ought to be understood as harmful, in a legal sense, and thereby governable by the state.[18] This was perhaps not unexpected: as Larry Rosenthal, Deputy Corporation Counsel for the City of Chicago has since admitted, "we certainly did our best" in drafting the ordinance, "but no one knew how to write a constitutional anti-loitering law in 1992."[19]

This emphasis on the harms and potential liberty interests implicated by the ordinance has also been the focus of most legal scholarship on point. This literature focuses on the constitutional issues implicated in proscribing loitering,[20] rather than administrative law

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offenders, whereas the Chicago Ordinance perceives the harm to be the visibility of apparent gang members.

[15]See C.R. Block & R. Block, *Street Gang Crime in Chicago* (Washington, D.C.: National Institute of Justice, 1993).

[16]As the Illinois Court of Appeal concludes, "Gang membership itself is not a crime, and standing in a public place with no apparent purpose is not a crime. Adding these actions together does not make them any more criminal. When you add nothing to nothing, you get nothing." See *Chicago* v. *Youkhana*, 277 Ill. App. 3d 101 at 114 (Ct. App. 1995).

[17]*Morales (U.S. Supreme Court)*, *supra* note 9.

[18]The Court expressed its concerns in terms of police discretion, vagueness, and the like. These issues focus on how the state ought to act, rather than what it is acting upon (although these are closely related).

[19]City of Chicago, Committee on Police and Fire, *An Ordinance amending the Municipal Code of Chicago, Section 1, Chapter 8-4 repealing Section 8-4-015 and adding new Sections 8-4-015 and 8-4-017 as follows: Gang Loitering. Mayor Richard M. Daley and various other Alderman of the City Council* (2 February 2000) at 97 [hereinafter *Committee on Police and Fire Testimonies (2 February 2000)*]. This is not particularly surprising: some courts have even found the loitering statute proposed by the Model Penal Code to be unconstitutional: see F. J. Wozniak. "Annotation: Validity, Construction, and Application of Loitering Statutes and Ordinances" (1999) 72 American Law Reports 5th 1 [hereinafter "Validity, Construction, and Application of Loitering Statutes and Ordinances"].

[20]The legal issues have been debated most strenuously in student articles. See B. Bjereegaard, "The Constitutionality of Anti-Gang Legislation" (1998) 21 Campbell Law Review 31; A.J. Mann, "A Plurality of the Supreme Court Asserts a Due Process Right to do Absolutely Nothing in City of Chicago v. Morales" (2000) 33 Creighton Law Review 579; A.L. Clark, "City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community

questions concerning police discretion.[21] In assessing the harms said to be caused by loitering – and counterposing these against the liberty of individuals to loiter – the debate in the legal literature echoes some of the classic questions that Joel Feinberg asks in his treatise on harm: must harm be linked to a particular event, or can harm be said to exist even without any overt conduct (for instance, the "harm" that is experienced when people feel uncomfortable, or unsafe, in public places, as a result of the social meaning that is attributed to a behaviour, or as a result of the accumulated harm caused by what would be, individually, harmless)? As Feinberg notes, the liberal principle that law should only prohibit harmful activities (the "harm principle") provides no guidance in determining which harms ought to be considered governable by the state,[22] and as a result the literature has been dominated by scholars engaged in this very debate.[23]

There remains, however, little sociolegal analysis of the ordinance or its history. While some legal scholars have relied on behavioural economics in their analyses,[24] this has generally been

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Safety" (1999) 31 Loyola University Chicago Law Journal 113; T.L. Doerr, "A Failed Attempt to Take Back Our Streets – A Constitutional Triumph for Gangs: City of Chicago v. Morales" (1999) 82 Marquette Law Review 447; G.S. Walston, "Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions" (1999) 54 Miami Law Review 47; M.M. Werdegar, "Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs" (1999) 51 Stanford Law Review 409. Part of this discussion is picked up also by A.W. Alschuler & S.J. Schulhofer, "Antiquated Procedures or Bedrock Rights? A Response to Professors Meares and Kahan" (1998) University of Chicago Legal Forum 215 [hereinafter "Antiquated Procedures or Bedrock Rights?"].

[21]As a student note argues, "[t]he Court's failure with regard to discretion was disappointing," and "[t]he Court should have instructed Chicago on how to constitutionally utilize administrative regulations." See M. Wawrzyn, "Chicago v. Morales: Constitutional Principles at Loggerheads with Community Action" (2000) 50 DePaul Law Review 371 [hereinafter "Constitutional Principles at Loggerheads with Community Action"]. On the possibility of a more administrative take on criminal law, see S. Greenberg, "Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability" (1996) 58 University of Pittsburgh Law Review 1 and D. Kahan, "Is Chevron Relevant to Federal Criminal Law?" (1996) 110 Harvard Law Review 469.

[22]J. Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, vol. 1 (New York : Oxford University Press, 1984) at 203 [hereinafter *Harm to Others*]. In this context, it is interesting to note that the Ordinance has since described by a lawyer for the City of Chicago as "absolutely on the cutting edge" and a "guinea pig": *Committee on Police and Fire Testimonies (2 February 2000)*, *supra* note 19 at 90.

[23]"Gang Loitering, The Court, and Some Realism about Police Patrol", *supra* note 2 at 143. See *e.g.* T.L. Meares & D.M. Kahan, eds., *Urgent Times: Policing and Rights in Inner-City Communities* (Boston: Beacon Press, 1999); D. Cole, "Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship" (1999) 87 Georgetown Law Journal 1059.

[24]See eg. R.C. Ellickson, "Law and Economics Discovers Social Norms" (1998) 27 Journal of Legal Studies 537; R.A. Posner, "Social Norms, Social Meaning, and Economic Analysis of Law: A Comment" (1998) 27 Journal of

done to provide evidence for advocating a normative position as part of an ongoing debate over how constitutional protections ought to be defined.[25] In contrast, this chapter does not engage the normative debate over whether gang loitering ought to be proscribed: rather, drawing on work in the sociology of knowledge, I focus on the ways in which the concept of "harm" was framed and recoded in the ordinance's development, and the tensions that were negotiated in its adjudication. To date the dominant sociological approach to loitering laws was developed by William Chambliss, who linked vagrancy laws with the interests of those who "control the economic institutions of the society."[26] Following Becker, however, I here focus on *how* doing "nothing" was converted into a harm that needed to be managed for community protection,[27] rather than determining the interests driving the ordinance or why it was enacted.[28]

Methodologically, this chapter includes an analysis of the United States Supreme Court decision in *Morales*, but also includes an analysis of the testimony of Chicago residents before the City Council's Committee on Police and Fire. While legislative hearings receive little attention in legal scholarship, they can be a particularly rich sociolegal source, providing insight into the contested nature of changes in legal governance, centring in this case around the question of harm. Rather than leading to simple conclusions, for instance, that 'risk management has displaced morality' or that 'our notions of harm have changed,' these materials remind us

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Legal Studies 553; D.M Kahan, "Social Meaning and the Economic Analysis of Crime" (1998) 27 Journal of Legal Studies 609; L. Lessig, "The New Chicago School" (1998) 27 Journal of Legal Studies 661. In contrast, the literature on legal pluralism seeks to compare law with other normative systems in order to decenter "law first" analyses. See eg. S.E. Merry, "Legal Pluralism" (1988) 22 Law and Society Review 869; B. Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20 Journal of Law and Society 192. For a general discussion on the relationship of the "social norms" literature to law and society scholarship, see M. Tushnet, "Everything Old is New Again: Early Reflections on the 'New Chicago School'" (1998) Wisconsin Law Review 579; T. Rostain, "Educating *Homo Economicus*: Cautionary Notes on the New Behavioral Law and Economics Movement" (2000) 34 Law and Society Review 973.

[25]T.L. Meares & D. Kahan, "Law and (Norms of) Order in the Inner City" (1998) 32 Law and Society Review 805; T.L. Meares & D. Kahan, "Black, White and Gray: A Reply to Alschuler and Schulhofer" (1998) University of Chicago Legal Forum 245; T.L. Meares & D. Kahan, "The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales" (1998) University of Chicago Legal Forum 197.

[26]W. Chambliss, "Elites and the Creation of Criminal Law" in W. Chambliss, ed., *Sociological Readings in the Conflict Perspective* (Reading, MA: Addison-Wesley, 1973) 430 at 442.

[27]B.E. Harcourt, "The Collapse of the Harm Principle" (1999) 90 Journal of Criminal Law and Criminology 109 [hereinafter "The Collapse of the Harm Principle"].

[28]See also H.S. Becker, "Becoming a Marihuana User" (1953) 59 American Journal of Sociology 235.

that historical changes are rarely linear, and that the contestation over these shifts may reveal more fluid conceptions of citizenship than would otherwise be apparent. A study of these documents reminds us that legal scholars, even without delving into sophisticated empirical analyses, can rely on a broader range of materials when considering law as a process of governance – at times as the "governance of governance"[29] – rather than as the search for doctrinal conclusions. These forms of contestation are classically demonstrated in the work of E.P. Thompson,[30] and for which a history of the present is particularly well suited.

In some sense, this is a chapter on the social construction of harm, focusing on how certain knowledges of harm are invoked with legal effects. Yet I do not claim that this deployment of "harm" is unfortunate or incorrect. I simply suggest that these visions of harm are "not determined by the nature of things."[31] Furthermore, what I am investigating is not the fact of the harm – whether or not it exists – but the knowledges relied on in determining that this is a governable harm. In that sense, the harm being spoken of may be epistemologically objective (people seem to know when they have been harmed, though even this may require reference to an exogenous construction), but is ontologically subjective (there can be no sense of governable harm without the institutions of law and law enforcement).[32] In so doing, my interest is in the strategies that the present definition of community harm opens up, the forms of power it makes possible, and the devices that are then relied on to legitimate this definition.

II. Harm in Criminal Law: Conceptual and Empirical Approaches

In a recent article on "Homelessness and Community," Jeremy Waldron engages with an argument advanced by Robert Ellickson that what some perceive to be annoyances in everyday life, such as panhandling, constitute "harms." In response, Waldron asks "whether the

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[29]D. Cooper, *Governing out of Order: Space, Law and the Politics of Belonging* (New York: Rivers Oram, 1998) at 17. Novak traces this perspective to Bourdieu, summarizing Bourdieu's perspective as "legal ideas and texts are peculiarly performative, having a special power to produce immediate social effects – to make things happen simply by saying so" (*The People's Welfare*, *supra* note 13 at 51).

[30]*Customs in Common*, *supra* note 8.

[31]I. Hacking, *The Social Construction of What?* (Cambridge, MA: Harvard University Press, 1999) at 6.

[32]*Ibid.*; J. Searle, *The Construction of Social Reality* (New York: Free Press, 1995).

discomfort caused to ordinary pedestrians by the presence and activities of homeless people should even be considered a harm at all."[33] This response typifies work on "harm" in legal scholarship to date: although responding to some of the most current debates in policing and criminal law, and engaging with a wider range of materials than many others in this area, Waldron's piece remains an exercise in moral philosophy.

The normative approach to the concept of harm is part of a long history in criminal law. Much of the debate has turned on whether the criminal law ought to turn on the presence of a "harm," and whether liberal theory provides any conceptual signposts to help determine what constitutes "harm." In seeking to provide an ideal-type concept of harm, these debates have proceeded from pre-existing theoretical standpoints, rather than building an understanding of how harm works through empirical observation of the ways in which harm is debated, defined, and struggled over in legal analysis.[34] This is not an internal critique of the work on harm to date. In his treatise on the topic, for instance, Joel Feinberg is clear that an empirical project is not his concern.[35] This is rather a disciplinary critique of the exclusive focus on moral validity in this literature, which has done little to advance our empirical understanding of the knowledges on which "harm" tends to be built or problematised.

The origin of the harm principle is rooted in classical liberal theory, having been taken up in varying degrees by Hobbes, Locke, and Mill. The classic statement, espoused by Mill, is that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[36] Harm is here counterposed to immorality, most classically instantiated by debates between Hart and Devlin over the

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[33]J. Waldron, "Homelessness and Community" (2000) 50 University of Toronto Law Journal 371 at 379 [hereinafter "Homelessness and Community"].

[34]As E.P. Thompson states in "The Moral Economy of the English Crowd in the Eighteenth Century," "[t]hey do not wish to know how ideas presented themselves as actors in the market-place, between producers, middlemen and consumers, and they imply that this is an improper light in which to view them" (*Customs in Common*, *supra* note 8 at 275).

[35]*Harm to Others*, *supra* note 22 at 16-19.

[36]J.S. Mill, "On Liberty" in R.B. McCallum, ed., *On Liberty and Considerations on Representative Government* (Oxford: Basil Blackwell, 1946) 1 at 8. As Bernard Harcourt describes, Mill's vision of harm was intricately tied with his distinction between rights and interests, with the harm principle being defined as harm to that subset of interests which reflect one's rights ("The Collapse of the Harm Principle", *supra* note 27 at 121).

criminalization of homosexuality – with Lord Devlin arguing that activities deemed to be immoral ought to be criminalized without any necessity of inquiring into whether such activities cause harm, either to rights or to broader interests.[37]

Lord Devlin's focus on immorality, it should be noted, continues to invoke the concept of harm. The difference is this: rather than solely conceiving of harm as being suffered by individuals, he presents a community-or society-based notion of harm.[38] As one legal commentator has suggested, "the differences between Devlin and liberals such as John Stuart Mill seem not as interesting as one might have initially thought" since "[m]ost of the differences are not on deep issues of ultimate principle, but rather on issues of empirical evidence of social harm."[39] The debates over harm and immorality, then, can be interpreted as debates over the viability of "community harm," and the mechanisms for determining when such a harm can be said to exist.

In recent years, the question of harm has been taken up vociferously by Joel Feinberg, who has written a four volume treatise on the Moral Limits of the Criminal Law. Taking up Hart and Mill's focus on harm – and not morality – in determining the limits of the criminal law, Feinberg's treatise ranges from discussions of "Harm to Others," "Offenses to Others," "Harm to Oneself," and "Harmless Wrongdoing."[40] In each of these volumes, Feinberg seeks to provide a framework for when an ideal legislature ought to legislate by way of the criminal law, thereby providing an analysis of what offenses ought to be understood as harms and what ought to be understood as simply offensive. In a contemporary analysis of social problems, ranging from

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[37] Lord Devlin's focus on moralism, of course, was not new. See eg. J.F. Stephen, *Liberty, Equality, Fraternity: And Three Brief Essays* (Chicago: University of Chicago Press, 1991).

[38]Kent Greenawalt has made the same observation in the converse, stressing the role of moral judgement in determining what qualifies as relevant harm, and determining that "the principles guiding legal regulation must include moral judgements" as a result: K. Greenawalt, "Legal Enforcement of Morality" (1995) 85 Journal of Criminal Law & Criminology 710 at 712-713 [hereinafter "Legal Enforcement of Morality"]. Other questions also arise, particularly the question of perception: to what extent does harm require "objective" definitions? For an article that tries to negotiate the subjective/objective problems, see for instance, M.J. Shaney, "Perceptions of Harm: The Consent Defense in Sexual Harassment Cases" (1986) 71 Iowa Law Review 1109.

[39]J.G. Murphy, "Legal Moralism and Liberalism" (1995) 37 Arizona Law Review 73.

[40]*Harm to Others*, *supra* note 22; J. Feinberg, *The Moral Limits of the Criminal Law: Offense to Others*, vol. 2 (New York: Oxford University Press, 1988); J. Feinberg, *The Moral Limits of the Criminal Law: Harm to Self*, vol. 3 (New York: Oxford University Press, 1989); J. Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol. 4 (New York: Oxford University Press, 1990).

violence to disgusting public behaviour, Feinberg defends Mill's principle of harm throughout, and seems to reject the possibility of a harm to the community that does not relate to the infringement of individual interests.[41]

Of course, Feinberg's analysis is a normative exercise, an attempt to define what a liberal notion of harm ought to entail.[42] The questions being asked, then, are the following: How ought we rely on the criminal law? How ought the concept of harm be defined? May we rely on concepts such as "immorality" to criminalize conduct? What limits does liberal theory provide on interference with liberty?[43] May we punish conduct that results in "undesirable consequences to the social fabric"?[44] Can the harm principle be extended to include the "long term risk of harm to others"?[45] As Feinberg asks:

> What then is the sense of 'harm' employed by the harm principle, as we will here understand it? Since we have distinguished harms (setbacks to interest) from wrongs ('harm' in the third sense), and allowed for the existence both of rare nonharmful wrongs and common nonwrongful harms, which of these combinations captures the sense of 'harm' in the liberty-limiting principle? ... The sense of 'harm' as that term is used in the harm principle must represent the overlap of senses two and three: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense.[46]

This approach, though, does little for understanding the concept of harm empirically, as a sociological matter. It does little, in that regard, to define harms as a subset of "setbacks to interests," unless one has a predetermined view of what ought to count as an "interest," what ought to count as a "setback," and a predetermined view that there is a best way to answer those

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[41]Feinberg's stance seems to deny the possibility of a community-level harm, emphasizing instead the large number of individuals that can be harmed in "public harms."

[42]*Harm to Others*, *supra* note 22 at 17.

[43]The latter question is the emphasis of Feinberg's project, focusing on the interplay of morality, harm and paternalism. With respect to the other questions, see discussion in "The Collapse of the Harm Principle", *supra* note 27 at 131-133.

[44]"Legal Enforcement of Morality", *supra* note 38 at 725.

[45]A. von Hirsch, "Extending the Harm Principle: 'Remote Harms' and Fair Imputation" in A.P. Simester and A.T.H. Smith, eds., *Harm and Culpability* (New York: Oxford University Press, 1996) 259.

[46]*Harm to Others*, *supra* note 22 at 37.

questions.[47]

This is evident in the recent debate between Robert Ellickson and Jeremy Waldron. Arguing that panhandling and visible homelessness constitute a "community harm," Ellickson argues that "the harms stemming from a chronic street nuisance, trivial to any one pedestrian at any instance, can mount to severe aggravation," that "the amount of damage from a single act of panhandling or bench squatting is typically insignificant; for a given onlooker, the harm can become substantial only after it has accumulated over time," and that as a result, "cities can be expected to continue to adopt ordinances that authorize their police forces to curb street misconduct."[48] Ellickson concludes that the harm caused by "chronic street misconduct,"[49] such as panhandling or bench squatting, is compounded when the activity is witnessed repeatedly, over time, and that this makes it unlikely for any one individual to have the capacity to recognize and act on this harm.

While Ellickson simultaneously argues that there are individual level-harms that result from chronic street misconduct,[50] his more unique argument is that chronic street misconduct also results in a community-level harm. Focusing on panhandling, he makes this argument in a

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[47]In a recent article, Finkelstein stresses the importance of these sorts of underlying questions, and the importance of developing a coherent understanding of "harm":

> What exactly is a harm and what kinds of harms are of sufficient gravity to justify infringing the liberty of citizens? A more precise specification of the proper objects of criminal prohibitions would ultimately require a more thorough account of the notion of harm. ... There are certain concepts the law must borrow from ordinary practices. But a theory of harm is nonetheless necessary if legislatures and judges are to apply a harm principle to judge actual legislation, and thus the notion of harm will have to be a well-defined one.

See C. Finkelstein, "Positivism and the Notion of an Offense" (2000) 88 California Law Review 335. In contrast, others, such as Paul Robinson, have interrogated the ways in which criminal law punishes attempts without resulting harms. See P.H. Robinson, *Structure and Function in Criminal Law* (New York: Oxford University Press, 1997) at 109-111.

[48]R. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid-Rows, and Public-Space Zoning" (1996) 105 Yale Law Journal 1165 [hereinafter "Controlling Chronic Misconduct in City Spaces"].

[49]This is articulated most clearly by Ellickson: "The following test (for lawyers, prima facie case) can serve to identify the gravamen of the offense: A person perpetrates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces. This is a strict-liability test, like that for a public nuisance; there is no required element of negligence or wrongful intent." See *ibid.* at 1185.

[50]*Ibid.* at 1183-1184.

variety of ways. First, he deploys the logic of the "broken windows" theory of crime and disorder, arguing that chronic street misconduct signals a lack of social control, and that responses to disorder (such as architectural changes designed to discourage bench squatting) may further accentuate this sense of disorder. This is said to lead to disastrous community-level effects on poor areas, the exacerbation of "skid rows," and the relocation of wealthier individuals to more orderly (and often private) areas. Second, Ellickson argues that, in cities where panhandlers are disproportionately black, chronic street misconduct may reinforce negative stereotypes, and make people less supportive of causes that would benefit blacks as a group. Third, the visibility of misconduct such as chronic panhandling "is likely to signal erosion of the work ethic," a "degeneration of one of the most fundamental social norms." Fourth, chronic street misconduct may serve to erode other community norms, such as "informal time limits" in using public spaces. And fifth, although this is most precisely an aggregation of individual harms rather than a meso-level harm, Ellickson argues that the visibility of chronic street misconduct can "harm" hundreds, or even thousands, of individuals per hour. Since any one individual that would try to improve this situation would bear a high private cost, but the benefit would be enjoyed by all, Ellickson concludes that public order is a public good, and further builds his argument that there is a harm that extends to the community as a whole on that basis.[51]

Ellickson's argument reflects the basic structure of work on harm to date, seeking first to demonstrate that these community effects are themselves harms, and going on to argue that they are caused by a particular set of behaviours, in this case by chronic street misconduct. Responding to Ellickson's argument, Jeremy Waldron agrees that a harm may exist even when,

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[51]The foundation for some of these arguments is weak. Ellickson himself notes, in a footnote, that pollsters were reporting increased support for both street control measures and for higher taxes that would be targeted to the homeless, and thus it is somewhat unclear why he believes that chronic street misconduct would reinforce negative stereotypes about panhandlers, rather than frustration with government for insufficiently addressing the problem. This mistake seems to stem from Ellickson's conflation of public order as a "public good," with disorder as a "public bad," an implication that runs throughout his argument yet which requires its own foundation that he has not provided. Arguing in favour of a zoning scheme that would range from "green zones" to "yellow zones" and "red zones," Ellickson largely ignores the balkanization of many US cities, which exhibit a de facto separation of areas with high signs of disorder from others (see D. Massey & N.A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993)). Finally, it is not clear why Ellickson has chosen to focus on these particular annoyances to the exclusion of others. For instance, a recent article describes similar concerns being expressed over suburban youth enjoying themselves at the movies: see F. Chambon, "Comment répondre aux actes d'incivilité?" *Le Monde Interactif* (16 July 2001), online: Le Monde <http://www.lemonde.fr/article/0,5987,3226-5194-207999,00.html> (last accessed: 4 August 2002).

at a particular moment, it appears trivial.[52] Waldron takes issue, however, with Ellickson's conclusion that street misconduct is harmful, thereby also interrogating the logic of the "broken windows" theory of disorder. For Waldron, the discomfort that pedestrians may experience as a result of panhandling, for instance, need not be conceived of as harms at all – such discomfort may instead provide them with knowledge of how fellow residents must live. As he states, "it seems crazy to say, as the tenor of Ellickson's analysis would seem to imply, that people of decent sensibility are harmed by their distressing knowledge of the historical existence of slavery, for example, or genocide."[53] Community, for Waldron, must include a recognition of the actual social circumstances in which members find themselves, rather than – as Ellickson's proposal might suggest – imposing norms of social order on those who some in the political community find offensive.[54]

Stepping aside from the normative emphasis of the Ellickson-Waldron debate, my focus is instead on providing empirical attention to the way in which the concept of harm is in fact deployed, and the forms of knowledge that are drawn upon by legal authorities in determining whether a governable harm exists. Attention to this question emphasizes the effects that different knowledges of harm can produce within legal sites, and the avenues of power that different invocations can open up. Although this perspective has been largely absent from legal scholarship on harm to date, two recent papers have begun to introduce this perspective, both methodologically and substantively.[55]

The first article is Mariana Valverde's essay comparing Canadian cases dealing with obscenity law and indecent exposure. Valverde compares *R.* v. *Butler*, which dealt with whether certain forms of pornography are harmful and criminally obscene, *R.* v. *Jacob* which applied the "risk of harm" test in the context of female public toplessness, and *R.* v. *Mara*, in which the harm of lap dancing was assessed. Rather than seeking to determine whether the Court has

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[52]"Homelessness and Community", *supra* note 33 at 378.

[53]*Ibid.* at 382.

[54]*Ibid.* at 406.

[55]See also Note, "Expressive Harms and Standing" (1999) 112 Harvard Law Review 1313, which seeks to negotiate the doctrine of harm with other legal doctrines, and the relevance of expressive harms in R. Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism" (1998) 27 Journal of Legal Studies 725.

elaborated the proper test for determining what constitutes "harm" in each of these cases, Valverde focusses instead on interrogating the vision of harm being articulated by courts in these three cases, and seeks to distill the forms of knowledge that provide content to the Court's use of the term. Finding, for instance, that the Supreme Court has relied on a diverse assemblage of knowledges in creating a "risk of harm" test in this context, thereby interpreting obscenity as a question of *harm*, and not a question of *morality*, Valverde interrogates the Supreme Court's willingness to draw on diverse sources to achieve this conclusion:

> As if the marriage of liberal feminism and 1950s structuralist functionalist sociology were not awkward enough, the *Butler* text goes on to add yet another rationality for governing pornography, another, quite incommensurable source of harm: the Christian rationality of the fallen flesh and its need for redemption.[56]

This, for Valverde, demonstrates the contingency of legal determinations of harm, but also opens a space for analysing the concept of harm as a tool for governance. Reliance on the concept of harm, Valverde demonstrates, has certain effects, and the remainder of her article seeks to distill the ways in which the concept of harm allows for certain forms of regulation while foreclosing others.

The second article to develop a different focus on the question of harm is Bernard Harcourt's article on "The Collapse of the Harm Principle." After reviewing the legal scholarship to date on the concept of harm, Harcourt seeks to catalogue ways in which the concept of harm has been expanded in recent years in an effort to regulate activity that was once considered immoral, but not harmful.[57] Harcourt demonstrates this shift across a wide array of activity – including alcohol, loitering, pornography, homosexuality, and drugs – and documents the increased reliance on the banner of harm reduction rather than morality.[58] For Harcourt, the effect of this shift to "harm"-based rationalities is clear: whereas the harm principle, as originally envisaged by Mill and expanded on by Feinberg, was designed to limit state regulation (ie. the state can intervene only to remedy a harm), the harm principle is now invoked to *expand* state regulation.

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[56]M. Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8 Social and Legal Studies 181 at 188.

[57]"The Collapse of the Harm Principle", *supra* note 27 at 109.

[58]On this move to "harm reduction," see *ibid.* at 112.

The problem, according to Harcourt, is that the original harm principle had little way to weigh whether a harm was sufficiently harmful to mandate intervention. With an expansion in harm-based arguments, there is now little way to resolve whether a harm is sufficiently important to be addressed.[59] What is most striking about Harcourt's analysis is that it is profoundly empirical. It builds its critique of the harm principle on existing claims that are being made about harm (whether or not these claims are successful), and does not seek to dispute whether those claims ought to have been made, whether those claims ought to be accepted by courts, or whether those claims are in line with broader liberal values.

In this chapter, I take a similar approach to both Harcourt and Valverde. Rather than seeking to determine whether gang loitering ought to be considered a "harm," I examine the ways in which the concept of harm was deployed and the ramifications that this claim has had on legal argumentation. In so doing, I focus on Chicago's Gang Congregation Ordinance, and the ways in which the concept of harm has been relied upon as a focus for regulating a harm to the community for which there appears to be strong empirical support (in contrast to the weak empirical claims made by Lord Devlin), yet which, by being a community-level harm, is more difficult to pinpoint based on classic (individual-level) understandings of the harm principle. Though analysed from the vantage point of sociolegal history, rather than normative political theory, this discussion of the Gang Congregation Ordinance provides insight into some of the classic questions in this area: the status of a community-level harm as a legal harm; the perception of inactivity as constituting a governable harm; whether intention to cause harm is required; and the status of restrictions on liberty designed to prevent future harms. Yet, rather than seeking to address the correctness of this measure, I focus instead on how claims about community and harm are made and disputed in legal sites, by whom, and with what effects.[60]

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[59]*Ibid.* at 192-193.

[60]See M. Foucault, "Power and Strategies" in C. Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, trans. C. Gordon (New York: Pantheon, 1980) 134 at 145, stating that "The role of theory today seems to me to be just this: not to formulate the global systematic theory which holds everything in its place, but to analyse the specificity of mechanisms of power, to locate the connections and extensions, to build little by little a strategic knowledge."

III. Crime, Community, and City Politics

Analyses of the Gang Congregation Ordinance typically begin with a short summary of hearings held before City Council, in which Chicago residents voiced their concerns regarding gangs before the City's Committee on Police and Fire. Yet a history of the harm that is being policed through the ordinance, and the choice of a logic centered on "community," cannot be divorced from shifts in the illegal drug market in Chicago in the late 1980s and early 1990s.

Beginning in the mid-1980s, while other major US cities were witnessing the emergence of crack cocaine – in 1985, the New York Times reported on its front page that crack was "for sale on the streets of New York," after appearing in the Bronx in 1984[61] – Chicago's gangs had, perhaps ironically, worked at keeping crack cocaine out of the city. Crack cocaine, carrying with it lower prices and the need for smaller amounts of the drug (given its potency), is easily sold by small-time dealers and less easily controlled by established networks of drug dealing. With crack having resulted in turf wars in other major US cities, Chicago's gangs had worked together to avoid its sale in the core of the City, a strategy which appears to have worked until 1991.[62] As one individual stated, "Crack made people too crazy and weakened control. Profits were safer without crack."[63]

Once crack cocaine was introduced, however, the market for drugs in Chicago turned more violent, and more precarious for neighbourhood residents, than ever before.[64] The introduction of crack cocaine to the US has since been linked to an "epidemic of homicide" among young black men,[65] related to a corresponding shift in violence and the availability of guns in inner-city

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[61]J. Gross, "A New, Purified Form of Cocaine Causes Alarm as Abuse Increases" *The New York Times* (29 November 1985) A1 [hereinafter " A New, Purified Form of Cocaine"].

[62]Crack cocaine had been available in suburbs of the City of Chicago earlier: see Associated Press, "Crack Arrives in Chicago" *The New York Times* (28 August 1989) A10.

[63]See J. Jacobs, "Don't Rely on Gangs' Promises" *The Chicago Sun-Times* (29 October 1992) 37.

[64]As reported in The New York Times, 1991 was "shaping into the deadliest year in Chicago history, surpassing the rate during the bloody years of the Al Capone era." One resident stressed that "People are in agony. People are being held hostage in their own neighborhoods," with another asking "What do we have to do? Do we have to get on our knees to stop this?" See I. Wilkerson, "Crack Hits Chicago, Along With a Wave of Killing" *The New York Times* (24 September 1991) A1 [hereinafter "Crack Hits Chicago"].

[65]A. Blumstein & D. Cork, "Linking Gun Availability to Youth Gun Violence" (1996) 59 Law and Contemporary Problems 5.

neighbourhoods.[66] The harms associated with crack are not so much a result of the drug itself[67] (despite the widely publicized rhetoric surrounding its use),[68] but the changes it effected in the market for drugs, and prostitution, in US cities, with attendant spikes in the violence surrounding these markets,[69] and with homicide increases systematically related to crack distribution.[70] As Professor Allen has suggested, the introduction of crack cocaine to Chicago created "a more active market" in which, "rather than cutting prices and putting out a better product," dealers "kill each other."[71] By 1991, the tightly controlled drug market of Chicago had given way to a diffusion of drug dealers, each trying to find their niche, and an attendant violence that led to a spike in the City's murder rate, with August 1991 being recorded as the 'deadliest month' in Chicago history.[72]

Although the link between drugs and guns is often unclear,[73] the introduction of crack cocaine

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[66]See *ibid.*, and see D.L. Wilkinson & J. Fagan, "Understanding the Role of Firearms in Violence 'Scripts': The Dynamics of Gun Events among Adolescent Males" (1996) 59 Law and Contemporary Problems 55.

[67]B.D. Johnson, A. Golub & J. Fagan, "Careers in Crack, Drug Use, Drug Distribution and Nondrug Criminality" (1995) 41 Crime and Delinquency 275. See also the following comments by Jim Hester: "The spread of crack cocaine is associated with violence not because the drug makes people violent, but the business is violent itself. Dealers punish or discipline subordinates. This makes the carrying of guns a normal practice in our inner cities" (see T.J. Morgan, "United States is 'The Most Violent Society'; the Director of a Foundation that Studies Aggression Examines its Causes and Cures" *The Providence Journal-Bulletin* (8 November 1995) 5C).

[68]See, for instance, the concerns raised by experts in " A New, Purified Form of Cocaine", *supra* note 61. Concerns raised are the ways in which this will ruin the lives of middle-class, college-bound teenagers ("They were in the top half of their class, college bound, and they were addicted almost instantaneously"), the effects it will have on women's promiscuity ("According to Mr. McEneaney, patients have told him that crack houses are the scene of ''uncontrollable, outrageous'' sexual activity, with women frequently exchanging sex for drugs when they have run out of money ... "These women wake up one day and they cannot believe the degrading and bizarre things they've been involved with."), and the "overwhelming compulsion to repeat the experience."

[69]M. De La Rosa, E.Y. Lambert & B. Gropper, eds., *Drugs and Violence: Causes, Correlates and Consequences* (Rockville, MD: U.S. Dept. of Health and Human Services, 1990).

[70]P.G. Goldstein, H.H. Brownstein, P.J. Ryan & P.A. Bellucci, "Crack and Homicide In New York City, 1988: A Conceptually Based Event Analysis" (1989) 16 Contemporary Drug Problems 651.

[71]"Crack Hits Chicago", *supra* note 64

[72]*Community Policing, Chicago Style*, *supra* note 3 at 22.

[73]As Fagan and Wilkinson note, "While gun homicides among adolescents increased rapidly following the onset of the crack crisis in the mid-1980s, it is unclear whether these homicides can be traced to business violence in the drug trade or to other situational and ecological forces during that time." See J. Fagan & D.L. Wilkinson, "Guns, Youth Violence and Social Identity in Inner Cities" (1998) 24 Crime & Justice 105 at 109 [hereinafter "Guns, Youth Violence and Social Identity"]. Fagan and Wilkinson (at 125) also state that "[o]ne reason to doubt a direct causal

and the attendant disintegration of established drug dealing networks[74] resulted in dramatic shifts in Chicago's drug markets and in the economic structures, and violence, of the city's gangs.[75] Though initially marked by a breakdown in traditional gang networks and territories, decentralization of the drug market soon resulted in a redrawing of territories and an attempt to establish control over distribution networks, though now with an increase in weaponry and a decrease in trust that had marked earlier drug networks. An amicus brief filed with the US Supreme Court echoes these empirical findings: "[a]lthough criminal gangs have long been part of the urban landscape, they have taken a dramatic new direction in recent years, away from small-scale and localized activities to highly organized takeovers of entire neighborhoods based on the acquisition of lethal weaponry financed by lucrative trading in crack cocaine."[76]

Faced with increased violence, resident groups petitioned their aldermen, who in turn engaged in heated arguments with the Mayor – who tried to deflect responsibility for this situation to the courts and to the federal government, while admitting that Chicago was "becoming like Colombia."[77] A poll on Chicago's West Side indicated that 96% of residents would not object to bringing in the National Guard to fight crime, with the Ward's alderman adding that "[w]hen you live in crime and are grossly inhibited by crime activity, and people in front of your house are shooting, then you look at this thing differently than someone on the outside."[78] This Hobbesian focus on security is echoed by aldermanic comments in City Hall,

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link is that the precise relationship between drugs and guns is uncertain."

[74]P.J. Cook & J.H. Laub, "The Unprecedented Epidemic in Youth Violence" (1998) 24 Crime & Justice 27.

[75]See especially A. Blumstein, "Youth Violence, Guns, and the Illicit-Drug Industry" (1995) 86 Journal of Criminal Law and Criminology 10. Even Fagan and Wilkinson suggest that the initial increase in guns may have been related to the crack cocaine market, despite their broader skepticism as to the relationship between drugs and guns: see "Guns, Youth Violence and Social Identity", *supra* note 73.

[76]Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner in *Chicago* v. *Morales*, No. 97-1121 (filed June 1998), [1997] U.S. Briefs 1121, online: LEXIS (BRIEFS) at 20. Debate in the empirical literature would be the extent to which these gangs were able to organize themselves into strong groups and establish control over geographic areas, following the introduction of crack cocaine to the City's drug market.

[77]"Crack Hits Chicago", *supra* note 64. This deflection of responsibility was highly criticized . As Former Mayor Jane Byrne, a staunch rival of Mayor Daley, suggested, "With Daley, it's always somebody else's fault." See F. Spielman & R. Long, "What Will Stop the Killing? Daley's Finger Points Nowhere; Issues Can't Be Dodged Any Longer" *The Chicago Sun-Times* (18 October 1992) 29 [hereinafter "What Will Stop the Killing?"].

[78]J. Klepitsch, "Laws Multiply as Neighborhood Fears Rise" *The Chicago Sun-Times* (30 August 1992) 26.

which reached "oratorical heights in crying out against the rising crime rate," with city and police officials all suggesting that drastic steps needed to be taken.[79]

What to do about this increased violence, however, was another matter. The State Attorney and the Chicago Police Superintendent could not agree on what strategy to pursue:

> Police Supt. LeRoy Martin on Monday pledged more foot patrols throughout Chicago to combat what he fears may be "a long, violent summer." Martin's announcement came after a bloody weekend marked by 12 killings, bringing this year's total to 224, compared with 195 at this time last year. Chicagoans also survived 51 shootings and 15 stabbings over the weekend, records show. Speaking at police headquarters, Martin ticked off a series of crime-fighting initiatives, including plans to seek State's Attorney Jack O'Malley's help in writing an effective "legal loitering law" to break up gangs "that are out there intimidating people" (April 9, 1991).[80]

> Cook County State's Attorney Jack O'Malley says he cannot support a legislative crackdown on loitering as a means of combatting increased violence. O'Malley, reacting to a proposal offered this week by Chicago Police Supt. LeRoy Martin, said legislation cracking down on loitering would conflict with constitutional protections, including those of freedom of expression and public gathering. But the new county prosecutor said he has not changed his mind about the need for stiffer penalties and tougher prosecution of criminals, particularly in crimes involving use of firearms, and he renewed his call to expand the county and state prison systems. "I think it will be tough to come up with a constitutional anti-loitering law," O'Malley said ... "It will face some constitutional difficulties." ... "I say give us more prisons and more prison beds," O'Malley said (April 13, 1991).[81]

The eventual decision to enact a loitering law appears to have been largely based on financial concerns, with Chicago City Council concerned that dealing with crime not unduly impinge on the municipal budget.[82] This fiscal impetus drove a larger-scale community policing endeavour

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[79]R. Davis & W. Recktenwald, "Angry Aldermen Target Gangs: Daley Backs City Council Call for Extra Police Powers" *The Chicago Tribune* (24 October 1991) 1 [hereinafter "Angry Aldermen Target Gangs"].

[80]J. Casey, "City to Put More Cops on the Street: Killings Bring Pledge to Boost Foot Patrols" *The Chicago Sun-Times* (9 April 1991) 1.

[81]R. Hanania, "O'Malley Rejects Martin's Call to Ban Loitering" *The Chicago Sun-Times* (13 April 1991) 36. This was pursued through Project Triggerlock, a project of the U.S. Department of Justice which sought to arrest convicted felons who remained in possession of firearms: see P. Franchine, "W. Side Raids Just the Start, Officials Say" *The Chicago Sun-Times* (20 October 1991) 20 [hereinafter "W. Side Raids Just the Start"].

[82]Although the Mayor initially sought to demonstrate his commitment to fighting crime by hiring 600 additional police officers (a centerpiece of his 1990 reelection campaign), the cost of such a strategy made it unworkable. See "What Will Stop the Killing?", *supra* note 77; *Community Policing, Chicago Style*, *supra* note 3 at 28.

being developed in Chicago throughout this time (and of which the Gang Loitering Ordinance is a part), even in the face of opposition from some in the police department.[83] Community policing further provided political advantages for the City's Mayor, who could thereby satisfy the crime fears of white residents without alienating minority communities.[84] On the advice of an international management and technology consulting firm,[85] the decision was taken to pursue community policing – visible police practices that would reassure frightened residents by policing public space, yet which would require more limited budgetary increases (and hence please the Mayor's electoral base of homeowners and business operators),[86] and relatively uncomplicated political manoeuvring.[87] The logic of community expressed in this vision soon became "the mayor's bible of police administration,"[88] holding out political, financial, racial, and rhetorical appeal in the City.[89]

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[83]The focus on community policing in Chicago reflected the Mayor's distrust of the City's police force to work efficiently, his desire to not spend additional city money on crime control, and his ability to implement this change locally, without requiring the support of the State's Republican Governor. See *Community Policing, Chicago Style*, *ibid.* at 20-37.

[84]The Mayor was thereby able to tackle a problem which both frightened white residents and which was ravaging minority areas in the City, and forestall political challenge to his office from minority aldermen, in what was referred to as the possibility of a Rainbow Coalition (*ibid.* at 20). Yet, he could not advocate a "tough on crime" position, given Chicago's relatively small white middle class and concerns in minority communities regarding expanding powers of the police. As such, "the rhetoric of community policing played better than hard-nosed enforcement in this political environment" (*ibid.* at 33).

[85]To find methods through which to reform policing more cheaply, City Hall commissioned Booz-Allen & Hamilton, an international management and technology consulting firm, which prepared two reports with explicit recommendations regarding how to reorganize the police department and its administrative structure. Although most of the first report focused on cost-cutting measures, it included a short appendix, inserted at the last minute, describing a plan for community policing; although it met with substantial opposition, this type of reorganization was more fully fleshed out in the consultants' second report, and was pushed for by the Booz-Allen & Hamilton expert in this area, whose personal style succeeded in catching the attention of the Mayor. See *ibid.* at 35-37.

[86]*Ibid.* at 27.

[87]With other City Hall proposals being defeated by the State's Republican Governor, a reform proposal that did not require support at the State level, and did not require additional tax increases, carried significant weight: *ibid.* at 20-37.

[88]J. Kass & S. Stein, "Daley Weighs Racial Politics in Picking Police Chief" *The Chicago Tribune* (12 April 1992) 1.

[89]Implementing community policing as a strategy required additional years of detailed work to convince both community members and the police force of its viability. See *Community Policing, Chicago Style*, *supra* note 3 at 37. There appears to have been some resentment among police officers that external management consultants would be shaping their training. As one lieutenant expressed, the trainers "initially used Booz-Allen stuff and got lots of

This emphasis on community policing was very much in the air when, on October 23rd 1991, four aldermen submitted proposed ordinances to City Council, including an early version of the Gang Congregation Ordinance[90] drafted by Alderman Banks.[91] Three of these aldermen were white, representing predominantly white wards; the fourth alderman was black, representing the City's Far South Side.[92] Although a similar ordinance had been opposed by Mayor Daley just two years prior,[93] these Gang Congregation ordinances were now heavily supported by the Mayor – and often contextualized as part of a broader community policing strategy – who referred to the frustration experienced by city residents under siege by gang members.[94] Relying on a similar ordinance in Los Angeles, the anti-loitering ordinance drafted by Alderman Banks was then revised by Alderman Wojcik with the help of the Northwest Neighbourhood Federation (a community group located in a predominantly white area[95]) and Chicago's Law Department.[96] Echoing much of the language surrounding community policing efforts, Alderman Wojcik, whose Ward has a heavy concentration of senior citizens and new immigrants,[97] explained that the struggle was over public space, a perspective that Mayor Daley also adopted:

> [Gang members will] stake out a grocery store, for instance, and then put maybe two people on each corner and stand there, or sit with their legs out, or say things to people. After a while, the people in the community get scared and stay away, and the gang

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complaints, so they went back to the materials developed by the subcommittees. They saw the light. They put it together from an operational standpoint. It's more down to earth." See A. Lurigio, S. Houmes, & S. Davidsdottir, *Spring 1994 Supervisor Training Evaluation Report* (Chicago: Loyola University of Chicago and The Chicago Community Policing Evaluation Consortium, 1994).

[90]R. "Angry Aldermen Target Gangs", *supra* note 79.

[91]J. Kass, "Old Tactic Sought in Crime War" *The Chicago Tribune* (15 May 1992) 1 [hereinafter "Old Tactic Sought in Crime War"].

[92]"Antiquated Procedures or Bedrock Rights?", *supra* note 20 at 217.

[93]R. Davis, "New Police Arrest Power Lights City Council Fuse" *The Chicago Tribune* (18 June 1992) 1 [hereinafter "New Police Arrest Power Lights City Council Fuse"].

[94]"Angry Aldermen Target Gangs", *supra* note 79.

[95]"Antiquated Procedures or Bedrock Rights?", *supra* note 20.

[96]"Angry Aldermen Target Gangs", *supra* note 79.

[97]*Ibid.*

> members have succeeded in making that their turf (Alderman Wojcik).[98]
>
> It's basically a response from block organizations, churches and community groups ... It's the frustration of people saying, 'Hey. There's 30, 40 people on this corner. I live on this block. I can't even walk around the corner.' (Mayor Daley).[99]

This emphasis on regulating public space and enhancing social and economic opportunities for residents was echoed by community groups. The Executive Director of the Northwest Neighborhood Federation expressed concern that "[w]henever gang members are in the neighborhood, even if they're just hanging around, they intimidate the neighborhood, and scare other kids – that's an invitation to violence."[100] Similarly, the president of the South Austin Coalition Community Council stated that "We are being overwhelmed ... You are hampered walking down the street because so many people are involved in loitering and standing around selling drugs in the wide open. That creates a lot of fear."[101] And this also resonated with the Mayor's agenda to rebuild the city piece by piece rather than investing in the large-scale infrastructure projects of years past.[102]

It is in this context of community policing reform that 'hanging around,' regardless of whether overtly aggressive activity was engaged in, was perceived as harmful to community order and to residents' ability to participate in civic life. Community policing requires authorizing certain knowledges and strategies while marginalizing others, what Lyons calls

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[98]*Ibid.*

[99]F. Spielman, "Daley Endorses Anti-gang Law; Rodriguez Wary" *The Chicago Sun-Times* (20 May 1992) 14.

[100]See R. Leung, "Taking Back the Community: Chicago's Anti-Gang Loitering Law up for Review" abcnews.com (2 December 1998), online: ABC News Internet Ventures <http://www.abcnews.go.com/sections/us/DailyNews/gangloitering981202.html> (last accessed: 18 November 2002).

[101]"W. Side Raids Just the Start", *supra* note 81.

[102]This is in contrast to his father's penchant for building the City's infrastructure and core areas. For a history of Chicago from this perspective, see G.D. Suttles, *The Man-Made City: The Land-Use Confidence Game in Chicago* (Chicago: University of Chicago Press, 1990). As a recent story in the popular press describes, "the city puffs its chest out from the moment you walk off the plane": J. Lorinc, "The City that Really Works" 34 *Toronto Life* (Summer 2000) 72. On loitering, it is also important to note that Daley followed this strategy by also regulating outdoor pay phones: see F. Spielman & R. Long, "City Council Tags Ban on Sale of Spray Paint" *The Chicago Sun-Times* (21 May 1992) 3; F. Spielman, "Loitering Ban Passes: Aldermen Bitterly Split On Anti-Gang Measure" *The Chicago Sun-Times* (18 June 1992) 1 [hereinafter "Loitering Ban Passes"].

"discursive struggles to define *community* and *policing*."[103] Yet it is this attempt to respond to the crisis wrought by crack cocaine through a focus on "community" harm[104] that becomes a difficult line to hold in the legal context.

IV. The City Council Hearings: Residents' Testimony and Community Harm

On May 15th, 1992 on the second floor of City Hall, Chicago's Committee on Police and Fire, a Committee of City Council, held a meeting to discuss the proposed Gang Congregation Ordinance. This meeting had been recessed for nearly two months, with a number of subcommittees having been appointed on March 23rd to hold hearings throughout Chicago regarding this proposal. There were two days of hearings, both of which were chaired by the Chair of the Committee, Alderman William Beavers, a 21-year veteran of the Chicago Police Department, where he worked on narcotics, gambling, prostitution, and gang crime.[105]

Although later touted as an expression of the public's need for relief from gang loitering, these two days of hearings did not represent a spontaneous outpouring of community sentiment regarding gangs and gang loitering. While the hearings were certainly not a sham – actual residents did appear before the Committee, and there is no suggestion made that they were not, in fact, extremely concerned with problems in their neighborhoods – residents appear to have been most concerned over *general disorder* in their neighbourhoods, and with problems regarding the inefficacy of *state law* (and its perceived conceptual limits) and *state law enforcement* (and its perceived failures in practice), and not solely with gang loitering (or even

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[103]W. Lyons, *The Politics of Community Policing: Rearranging the Power to Punish* (Ann Arbor: University of Michigan Press, 1999) at 4 [emphasis in original] [hereinafter *The Politics of Community Policing*].

[104]As I suggest earlier in this chapter, there are comparatively rare cases in the criminal law that focus on harm to the community, since most criminal law offences are tailored to the regulation of specific harms, even if there is a broader harm that one might impute (such as the broader community harm caused by a murder). The most notable of these are obscenity statutes, which focus on harm to the community's moral fabric (though, in Canada, this has been redefined by the Supreme Court as an attitudinal harm to men who consume obscene materialism, and not to the community generally), and prohibitions on flag-burning.

[105]A reading of the transcripts suggests that much of the tone is set by Beavers, an alderman whose own website refers to him as "a master of the back-room deals," who looks for results quickly and who maintains that "I don't care what they do in other wards, but when a problem comes up, I solve it." See City of Chicago, "7th Ward", online: City of Chicago <http://www.ci.chi.il.us/Ward7/Beavers.html> (last accessed: 18 November 2002). For more, see C. Plys, "Leave it to Beavers to Shake Up the Status Quo" *The Chicago Sun-Times* (11 June 1999) 43, describing Beavers' style and dominating presence.

gangs) per se.[106] It is true that, as legal academics advocating the ordinance have suggested, "[m]any concerned citizens testified poignantly about the disruption that the latest wave of gang violence had worked in their lives," and "testimony was elicited concerning a proposal for enactment of an ordinance regulating loitering by gang members in public places."[107] Yet, a careful reading of these testimonies reveals that the tone and structure of the meeting tended to indicate more general concerns over disorder, ambivalence over the underlying values in state law, and disappointment with state law enforcement as a specific problem with gang loitering – and these testimonies were then relied on as evidence for a discrete neighbourhood concern that could be addressed through a municipal ordinance.

That the hearings were designed to develop this testimonial evidence, rather than as a more phenomenological exercise to identify the problems faced by neighbourhood residents, is suggested in the following statement by Lawrence Rosenthal, Deputy Corporation Counsel for the City of Chicago, before the Committee on Police and Fire:

> When the Law Department was discussing this matter with Alderman Beavers, and Alderman Beavers was interested in getting our view as to whether the ordinance was constitutional, our response to Alderman Beavers was, well, we can't tell you in advance.

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[106]I argue that these testimonies were then translated, adapted, and transformed into a concern with gang loitering by City Council Aldermen, all the while relying on "locally resonant justificatory rhetorics" drawn from these broader concerns voiced by neighbourhood residents. In generating these locally resonant justificatory rhetorics, claims-makers engage in a process of cultural and symbolic framing. In the context of the City Council hearings in Chicago, residents certainly came out to express a range of dissatisfactions and concerns. Yet, a close reading of these hearings suggests that they were structured so as to provide the City's legal department with the evidence it needed to pursue the drafting and defence of the gang loitering ordinance, by framing citizens' concerns as harms throughout the hearings. In so doing, I draw on F. Polletta, "The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966" (2000) 34 Law & Society Review 367 [hereinafter "The Structural Context of Novel Rights Claims"]. Although Polletta's work focuses on how rights claims are developed – a different circumstance than a claim for increased policing of gang members – her framework calls attention to the social, political, and organizational conditions that are required for developing novel legal arguments, and for generating the support these arguments require. Drawing on sociological research on cultural resources, Polletta argues that in order to successfully develop novel rights claims, activists tend to combine conventional rights discourse with other normative languages (such as religion), successful activists tend to be distant from national centres of state and movement power (and are thus better able to rely to transpose other normative languages to bolster rights claims, through what she refers to as locally resonant justificatory rhetorics), and there tends to be interorganizational competition among novel rights claimants, such that claimants seek to differentiate their ideological innovations from those of other groups. In the context of the Chicago Ordinance, modifications need to be made to Polletta's framework, since it is not a novel rights claim that was advanced, but rather a reformulation of legal principles to increase state enforcement and avoid what had been perceived limits on state power.

[107]"Gang Loitering, The Court, and Some Realism about Police Patrol", *supra* note 2 at 149.

> We can only tell you when we analyze the type of testimony that we would go into [sic] at a hearing like the hearing that Alderman Beavers, with great patience, has conducted. A hearing that would have to establish whether there indeed is a legitimate, regulatory interest in addressing what seems at first thought to be perfectly proper conduct; people standing on the public way.[108]

After which, Rosenthal goes on record to express his opinion as to whether these hearings were effective:

> Only the Council can decide what has been proven at these hearings in the last few days, but I certainly think that the members of this committee have heard a substantial amount of testimony that indicates that there is legitimate reason to address this problem when it's engaged in not by just anyone but my [sic] by members of ongoing criminal organizations who use the public way to further their criminal activity.[109]

Prior to the hearings, Rosenthal further argues that the "whereas" clauses of the Ordinance – the preamble that details the evidentiary findings on which the Ordinance is developed – will be important to ensuring that the Ordinance's constitutionality is upheld. Not only does this suggest that at least some of the "findings" detailed in the preamble were drafted *before* the Committee's hearings took place (though later expressed as having been based on the evidence discovered at those very hearings) but perhaps more importantly, it demonstrates that the very purpose of the hearings was to provide the evidentiary foundation for a predetermined exercise of municipal power:

> And what I think is often important about this ordinance are the whereas clauses. Because if you concluded that the whereas clauses have been proven by the evidence in front of this committee, that [sic] one of the things that you will conclude is that members of criminal street gangs use their access to the public way in order to engage in criminal activity, in order to harass, in order to intimidate, in order to deal drugs, that that kind of gang loitering, to use the shorthand phrase, is a fact conjoined with criminal activity and appropriately regulated by the municipality.[110]

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[108]City of Chicago, Committee on Police and Fire, *Meeting Held on May 18, 1992* (18 May 1992), Appendix II of City of Chicago's Memorandum in Opposition to Defendant's Motion to Dismiss in *Chicago* v. *Avilar*, No. 93 MC1 376001 (filed 10 May 1993) at 196 [hereinafter *Committee on Police and Fire Testimonies (18 May 1992)*].

[109]*Ibid.* at 197.

[110]*Ibid.* at 200-201.

Alderman Beavers is explicit about this point on the first day of testimony. The purpose of the hearings would not be to elicit public testimony as to whether a gang loitering ordinance was the proper remedy to neighbourhood problems. Instead, the hearings would seek to provide the City's Law Department with testimonial evidence with which to back up the drafting of an already drafted Ordinance:

> It's not against the law to stand on the corner. It's not against the law to stand on the corners anywhere in the City of Chicago. It's not against the law so the police cannot arrest them, and *this is why we are here today to try to see can we get some support for this ordinance, and hopefully that we will,* and maybe we will be able to alleviate some of the problems.[111]

Taken together, it is important to note that – despite the later reliance on these testimonies as a ground-up expression of the problems facing neighbourhood residents – the explicit goal of the hearings was to locate a regulatory justification for an existing loitering ordinance. The hearings were thereby designed to demonstrate (rather than investigate) that loitering by apparent gang members effects a palpable harm in people's everyday lives, and to argue that this harm ought to be regulated by the state through a mechanism that emphasizes the promotion of "community" order. It is, in short, disingenuous to divorce the Gang Congregation Ordinance from the politics of community policing more broadly, a factual point that has been glossed over in every account of the Ordinance to date. But this is not to say that there is no "meaning work" over harm that is done in these hearings, in order to bring it in line with prevailing conceptions of community and of policing, and to secure a place for the State in responding to residents' concerns, rather than treating the problem as one that ought to be responded to by local communities.[112]

As the next two sections demonstrate, these hearings presented the problem to be addressed as a general community harm, rather than the harm experienced by any one individual (in this case, a harm that stems from a complex relationship between community residents and the

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[111] *Ibid.* at 148 [emphasis added].

[112] On "meaning work," see R.D. Benford & D.A. Snow, "Framing Processes and Social Movements: An Overview and Assessment" (2000) 26 Annual Review of Sociology 611 at 613 [hereinafter "Framing Processes and Social Movements"], defining it as "the struggle over the production of mobilizing and countermobilizing ideas and meanings."

operation of state law) – while also framing the problem as sufficiently specific that it can be responded to through the legal expertise of the state and the efforts of the public police. In fact, it would appear that what residents complain of, in large measure, is the failure of state law (at times, the failure of enforcement, and at times a failure of the values inherent in state law themselves) to respond to their problems. Yet, rather than forsake state legality in favour of private (or community) measures, the hearings generate a call for more law to respond to residents' concerns.[113] *In so doing, these hearings (1) mobilize the concept of "community" as a locus of the harm that is experienced and (2) privilege the "community" as being able to determine which harms ought to be responded to, while also (3) deprivileging "community" (non-State) measures to respond to that very harm and (4) deprivileging broad-based solutions that would not fit the policing paradigm that had been developed.* As Boaventura Santos discusses, this mobilization of "community" works to open a space for State agency, rather than opening a space for the development of "community" outside of, and independent from, the State.[114] Similarly, Nikolas Rose sees the turn to "community" as preserving a role for the State, even while encouraging individuals to engage in self-help.[115] And yet, although both Santos and Rose describe the move to "community" as opening new possibilities for State agency (as well as the government of conduct by non-State actors), neither of them engage in a close exploration of how this comes about. What I ask are *how* questions: How are relations of power built that invoke the community for governmental ends, without abandoning governance to this (now defined, demarcated, and authorized) community itself? How does the State maintain a role for itself while at the same time invoking the expertise and needs of those outside of its scope? How does the State deflect citizen concerns into something that it can act upon (within the limits it itself must negotiate), while avoiding criticisms that call its effectivity into question more

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[113]Lyons makes a similar point regarding "prevailing" and "competing" stories in the community policing context: *The Politics of Community Policing*, *supra* note 103 at 7.

[114]B. de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism" in R. Abel, ed., *The Politics of Informal Justice*, vol. 2 (New York: Academic Press, 1982) 249.

[115]N. Rose, "The Death of the Social? Refiguring the Territory of Government" (1996) 25 Economy and Society 327. As Rose says, "what is happening here is not the colonization of a previous space of freedom by control practices; community is actually instituted in its contemporary form as a sector for government": see N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999) at 176 [hereinafter *Powers of Freedom*].

radically? *How, in short, does government through community work, without becoming government by community?* I do not here claim that particular strategists are behind this work (though at times, Chicago Aldermen did play a key role). Instead, by emphasizing the Foucauldian concept of "strategies without strategists,"or "intentionality without a subject,"[116] I seek to draw out the logic generated by and during the hearings, and not the specific actor to whose interests this logic corresponds.

In conceptualizing the move to community in these hearings, and the development of a community harm, divergent visions of law – its present impotence and its potential power – dominate the testimonies. These visions draw on three dominant cultural narratives of law that have recently been articulated by Patricia Ewick and Susan Silbey in *The Common Place of Law.*[117] In their study, Ewick and Silbey relied on extensive open- and closed-ended interviews with over 400 New Jersey residents, that sought to draw out the manner in which individuals perceive, negotiate, and mobilize law in a range of areas, including their interactions with state officials but also in local workplaces, schools, street corners, and the like. Their goal is to draw out common themes from these interviews regarding how state legality is perceived and understood in everyday life. In analysing their interviews, Ewick and Silbey draw three common themes from the testimonies: a reverence for law that places it above everyday problems and immune from individual actions (what they refer to as being "before the law"), a very different sense that law can be competed over and manipulated (the ability to be "with the law"), and frustration over not being able to successfully manipulate the legal system, or play the legal game (and thereby being "against the law").[118] Ewick and Silbey do not themselves suggest that these common themes are in fact accurate, nor do they suggest that state legality ought to be understood in this way. Their project is empirical, seeking to describe the ways in which New Jersey residents experience law, from which they draw out a typology of legal consciousness based on the three dominant themes they identify. At a more analytical level, Ewick and Silbey

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[116]H.L. Dreyfus & P. Rabinow. *Michel Foucault. Beyond Structuralism and Hermeneutics* (Chicago: The University of Chicago Press: 1983) at 187.

[117]P. Ewick & S.S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) [hereinafter *The Common Place of Law*].

[118]*Ibid.*

go on to suggest that these narratives may at times be contradictory, but that it is through these very contradictions that state law appears to maintain its strength among these residents,[119] by maintaining a relevance to everyday life while not being reduced to its efficacy in everyday operation.[120] As one political scientist summarizes, "any claim that law is neutral and impartial immediately calls out many counter-examples; but, similarly, any claim that law is merely a tool of power and individual interests is typically developed in reference to a higher aspiration of legal neutrality and impartiality."[121]

While Ewick and Silbey emphasize this apparent tension in how law is perceived in everyday life, I draw on their framework for a different purpose. Relying on their empirical research, I am most interested in using the three thematic categories they identify as a framework for reading the testimonies of Chicago residents before the Committee on Police and Fire. I focus on how engagement with these multiple meanings of legality opens spaces for particular solutions, as they are harnessed, interpreted, and mobilized by actors through what Hall refers to as the "politics of signification."[122] As such, I draw on Ewick and Silbey's categories, but not in order to demonstrate that there is an inherent tension between them. Ewick and Silbey themselves have difficulty maintaining the analytical position that these experiences of law are contradictory, as with their suggestion that any apparent contradictions are what gives law its strength – a claim that appears to suggest, through a new lens, that maintaining a gap between the law in action and the law on the books is *productive* for law, providing it with a presence in the everyday while maintaining an aspirational status that prevents conflating law with everyday practices in its name. Rather than develop a broad account of how "law" functions through these three narratives, I instead rely on Ewick and Silbey's findings to focus on the development of

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[119]P. Ewick & S.S. Silbey, "Common Knowledge and Ideological Critique: The Significance of Knowing that the 'Haves' Come out Ahead" (1999) 33 Law and Society Review 1025 at 1036 [hereinafter "Common Knowledge and Ideological Critique"].

[120]As Ewick and Silbey conclude, "it is precisely because law is both god and gimmick, sacred and profane, objective, disinterested, and a terrain of legitimate partiality that it persists and endures": *ibid.* at 1040.

[121]C. Epp, Book Review of *The Common Place of Law: Stories from Everyday Life*, by P. Ewick & S.S. Silbey (2000) 10 Law & Politics Book Review 24 at 25.

[122]S. Hall, "The Rediscovery of "Ideology": Return of the Repressed in Media Studies" in M. Gurevitch, T. Bennett, J. Curran, & J. Woollacott, eds., *Culture, Society and the Media* (London: Methuen, 1982).

one specific legal initiative. I thereby rely on the cultural schemas that Ewick and Silbey identify in order to develop a more "situated" account of how these work in one aspect of the legal process,[123] and the effects that these schemas can have on legal practices and problematizations. In short, I rely on Ewick and Silbey's categories as a lens through which to draw out the ways in which everyday experiences are brought to bear in this legal process – relying in this way on their exhaustive empirical research – without taking a position on what these competing narratives suggest about law and its stature in everyday experience.

As I develop in the following section, residents at these Chicago hearings articulate all three of these views of law and legality simultaneously: a frustration at being up against the law, a belief that they are involved in a competitive struggle to be with the law, and the maintaining of an idealistic belief that they can successfully appeal to the legal system for relief from the everyday. Within Ewick and Silbey's model, this is to be expected: the three narratives of law they describe are not meant to be imagined as static. At the same time, however, the present analysis is somewhat more dialectical than Ewick and Silbey tend to provide: rather than seeking to typologize the life of law, I instead emphasize the interplay of these dominant cultural schemas, and a more fluid understanding of the "work" that these legal narratives can do in particular instances.

In these hearings, the simultaneous reliance on all three of Ewick and Silbey's narratives appears to produce a result in which residents document the harm they are experiencing as being borne by the entire community (eg., 'law is not on our side,' a position that shifts any harm away from specific experiences of disorder, and toward a more general claim about the relationship of residents to state legality). Yet, despite this dissatisfaction with law, these narratives provide proponents of the ordinance with rhetorical and normative tools from which to make claims regarding community harm, the failure of present legal measures to protect the community, and the community's need for new legislation (and state expertise) to tackle the problem. Brought together – rather than classified as separate parts of a typology – the multiple positions toward legality can be understood as legal capital, contested and negotiated in strategic attempts to get

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[123]I draw here on L.B. Nielsen, "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 34 Law & Society Review 1055.

things done.[124] In this instance, I now turn to the ways in which the intersection of these narratives resulted in the state agency that Santos and Rose describe – in which government through community remains a state function – while developing the location of community as a bearer of the harm that can be addressed through new state practices.[125]

a) Community, Expertise, and the Harms of Law

The first step in this process lies in the articulation of residents' concerns as being broader than simply each individual resident's plight. This allows for the demarcation of a community harm which is not simply the accumulation of individual experiences (thereby adding up to a set of individually-experienced harms), but as Ellickson alludes to, a harm that is affecting the collection of residents as a whole. This begins by elevating "law" away from any particular piece of legislation that may be ineffective, and arguing that it is "law" more generally that is getting in the way – a process that then serves to change the unit of analysis away from any individual incident, and provide support for the view that the harm to be addressed extends beyond individual experience. When articulated in this way, the problem is not with *this* law (or its absence), or with *this* incident of disorder, but with *law* as such. This stance is suggested by the first witness at the hearings, Jack O'Malley, who at the time was State Attorney and a former police officer. Perhaps surprisingly given his professional training and position, O'Malley's testimony opens by naming suggestions grounded in legal arguments to be a source of consternation:

> [I] suggest that critics of the ordinance, principally the ACLU, I ask them to come forward, and rather than just say no, this can't be done, come forward and given us some ideas of what can be done, and suggest a joint drafting session *where they can make some constructive suggestions rather than just the legal ones.*[126]

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[124]See Y. Dezalay & B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996).

[125]See generally "Framing Processes and Social Movements", *supra* note 112 and "The Structural Context of Novel Rights Claims", *supra* note 106.

[126]City of Chicago, Committee on Police and Fire, *Meeting Held on May 15, 1992* (15 May 1992), Appendix I of City of Chicago's Memorandum in Opposition to Defendant's Motion to Dismiss in *Chicago* v. *Avilar*, No. 93 MC1 376001 (filed 10 May 1993) at 7 [emphasis added] [hereinafter *Committee on Police and Fire Testimonies (15 May 1992)*].

The position of critics of the Ordinance – who offer "just the legal" suggestions – is counterposed to "constructive" suggestions that could otherwise be made.[127] The irony of this statement – that the *State Attorney*, a former police officer, is suggesting that *lawyers* from his office, along with *lawyers* from the ACLU, engage in a joint *legal drafting session*, in which 'legal suggestions' would not be central, since they are not "constructive" – is lost on O'Malley. The values conventionally enshrined in legal approaches, O'Malley suggests, do not have the capacity to solve this problem, and place limits that are out of touch with the knowledge of those who have more practical forms of knowledge regarding gangs and crime. At one level, O'Malley is obviously maintaining that legal solutions ought not be displaced entirely: he is, after all, advocating a municipal ordinance, and his comments thereby suggest that he is more straightforwardly arguing that it is conventional legal approaches that cannot meet the problem posed by gang loitering. And yet, in making this claim, O'Malley appears to rhetorically counterpose – as he does in the quotation above – "constructive" and "just legal" suggestions, a move that appears to counterpose legal values with common sense and practical measures for approaching this urban problem. This implication can be seen at other points in his testimony. For instance, in responding to an Alderman's question regarding how police officers would determine that someone is a member of a gang, O'Malley highlights police officers' personal knowledge of these individuals, and then contrasts what an officer might hope to rely on with what the law allows that officer to do:

> It's going to be difficult to [identify a gang member] – frankly, one can observe based on the way they dress and act. *It's a very safe conclusion that they are gang members, but that is not going to be sufficient legally to act on that basis because people have a right to freedom of expression, and they can wear different colors if they choose* ... But it would be based mostly on the police officer's personal knowledge of the individual, which again is getting into the community policing idea.[128]

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[127]When read in conjunction with later comments, it is clear that O'Malley refers to "legal" perspectives as counter-productive. As he says, an ordinance that is both effective and safeguards civil liberties can be accomplished if "we try to get more people involved in positive attempts rather than just critical attempts, rather than just saying this can't be done" (*ibid.* at 14).

[128]*Ibid.* at 36 [emphasis added].

In this passage, O'Malley does not simply counterpose the law on the books and the law in action. Rather, he suggests that community policing provides an avenue for circumventing legal values – not simply those values enacted by statute, but constitutional values as well, generally invoked as prime examples of law's grandeur – and that programs such as community policing can achieve this result by diverting attention away from an individual's right to engage in certain activity, and toward a reliance on the on-the-job expertise of police officers. As such, whereas law's principles may not allow for arrests based on general observations, community policing – through which O'Malley distinguishes the "personal knowledge" enjoyed by police officers – renders legal principles more negotiable than they may have appeared.

This account of law's negotiability is further evident in other comments by O'Malley. Admitting that his office was now working with the City due to "some problems of a constitutional nature on the earlier drafts,"[129] passing the Ordinance is, as he states more than once, "doable,"[130] and that "it's an ordinance along these lines that would really prevent the kind of activity that leads to more violent and serious crime."[131] Negotiating legal limits, as O'Malley puts it, is a craft: "what you want to do is the basic goal of meeting the constitutional challenge is to craft the ordinance that limits the discretion of the police, and that is a difficult thing to do ... but the more that one can limit the discretion of the individual police officer on the street the better chance one has of passing constitutional mustard [sic]."[132]

By first invoking the tension between legal values and everyday needs, but then moving on to suggest that hard work and skill can in fact overcome this tension, O'Malley develops an account in which relying on state expertise can convert law from its otherwise lack of attention to the everyday, to a situation in which law can be a resource for solving everyday problems. In so doing, however, O'Malley ignores laws that are already in place, not addressing why the State of Illinois chooses not to rely on the statutes already at its disposal to curb the problem of

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[129] *Ibid.* at 4.

[130] *Ibid.* at 6.

[131] *Ibid.*

[132] *Ibid.* at 33.

gangs.[133] Rather, in a remarkable expansion of the everyday powers of police officers, O'Malley relies on "community" policing, combined with his focus on how law can be negotiated through 'crafting,' to invert the *structuring* of police discretion into an opportunity to *expand* the power of the police:[134]

> If you look at this ordinance in combination with the possible upcoming focus on community policing, which I think the City of Chicago is moving in the direction of, and *putting that community policing concept together with additional tools in the arsenal of the police to walk up to groups of people* and request them to explain a variety of reasons and things like that. That is what this ordinance is designed to do ...[135]

And enacting this ordinance is not, in effect, bounded by bright-line legal limits, but rather by the very skill of (government) lawyers drafting it:

> This is a difficult task to strike the balance between individual liberty and the concerns of public safety. It's a difficult, legal task to do, but that is why I have committed the full resources of my office to help your [the City's] attorneys to craft this ... *If it's not constitutional, we have to work harder to find a way to make it constitutional* ....[136]

O'Malley's testimony, then, embodies all three narratives identified by Ewick and Silbey. Law is, at once, the problem and the solution – legal values are unduly restrictive, ignorant of the harms that need to be addressed, but a legal ordinance can provide the police with more effective investigatory powers to address those harms. Law is, at once, both too abstract for everyday life – contradicting what police officers "know," for instance, regarding who presents a harm to the community – yet remains a resource that can be relied on to enhance the quality of daily life. And law is both a formally ordered set of known rules, such as the limits imposed by constitutional rights, and a more malleable space in which the Ordinance is "doable," pursued through the "craft" of legal drafting. It is not that these logics are contradictory: rather, they

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[133]Alderman O'Connor asks O'Malley this question, referring to "state statutes which allows [sic] you to indict for felony gang members who are recruiting other individuals from being involved in gang activity": *ibid.* at 10.

[134]O'Malley relies on the argument that this Ordinance "relies on specific delineation" in order to differentiate it from ordinances in other parts of the country: *ibid.* at 33-39.

[135]*Ibid.* at 21 [emphasis added].

[136]*Ibid.* at 28 [emphasis added].

present the relationship between law and the everyday differently at each moment. By initially speaking of law as getting in the way of constructive solutions, and by suggesting that legal values prevent efficient policing of suspected gang members, O'Malley initially presents law's grandeur as a source of the problem (rather than police practices, enforcement, or the lack of any specific piece of legislation); but by then moving on to a view of law as more malleable, O'Malley suggests that law *can* be made relevant to the everyday, so long as one relies on the skill of government lawyers.

O'Malley's perspective, then, interdependently calls upon law while continually displacing it, blames law's rigidity while working within its scope, and exalts it beyond everyday life while lamenting its absence in, and irrelevance to, the everyday. This has the effect of privileging state authority in two ways: first, any failure to protect residents is not attributable to the skill of the police, a lack of resources, or a broader social failure – the brunt of the responsibility, rather, falls on a metaphysical "law" that stands in the way of proper policy formation. Second, in order to respond to this failure of law and to convert law into a resource that can achieve desired results, one must rely on lawyers and on their specialized expertise in negotiating law's strictures – thereby deprivileging, as we will see later on, non-state (or "community") attempts to resolve these problems, and focusing instead on the skill of government lawyers. In so doing, O'Malley does not present contradictory views on legality, as Ewick and Silbey's paradigm seems to suggest; instead, his testimony appears to place state law as a cultural object whose nature *tends* to get in the way of achieving results, but which can be finessed through lawyers' skill and state expertise.

Turning to the testimony of Chicago residents,[137] however, one finds that the frustration they express has less to do with law or legality as a *general* matter. Instead, these residents are most frustrated with the lack of state response in implementing existing laws, or in a gap they perceive in the existing legal tools available: in so doing, these residents appear to locate the responsibility either on the lack of assistance provided by legislators or on the administrative failure of police officers. In contrast to O'Malley's account, in which the State is portrayed as

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[137]Of course, those residents who choose to come to these hearings are a self-selected group. Whether these residents, who have no mandate "represent" the community is an empirical question that has not been investigated, though this assumption is made by most proponents of the Ordinance who seek to suggest that these residents' concerns are the concerns of the community.

having to negotiate the constraints of legality, several residents point to the failure of the State to deal with their problems – shifting between failures in the scope of authority granted to police, and administrative failures of the police themselves. While these could be parcelled out, I do not explicitly do so here (although the comments make these differences apparent in individual cases): my focus is instead on understanding these complaints within the context of how state legality is experienced, which for most residents is likely to be connected with their experience to the public police.[138]

In this context, Laura Cella describes how, despite gang members ("hoods") "hanging out," "the police would have to leave because there was absolutely nothing they could do," since they "couldn't do anything about disbursing [sic] them."[139] Percy Jackson's testimony focuses on the length of time that it takes the police to arrive when called by neighbourhood residents, and also suggests that the courts are partly to blame for their lack of efficacy.[140] Calls to 911, and the invocation of standard police practices, are described by an Alderman as a "bureaucratic nightmare";[141] another resident describes their frustration with police officers who won't follow a suspect into another police district, because that "ain't none of his area,"[142] and their frustration at having to identify themselves to the police when phoning a complaint (which then publicly identifies the resident when the police come to their door to follow up).[143] Several residents focused on their view that police officers' hands are tied by the functioning and requirements of the law – either that the activity they need to police is not considered criminal, or that courts release those arrested within a couple of days – with Chairman Beavers agreeing, concluding that "[y]ou have to give the police officer something to fight with."[144] One by one, residents

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[138]T. Oberweis & M. Musheno, "Policing Identities: Cop Decision-Making and the Constitution of Citizens" (1999) 24 Law and Social Inquiry 897.

[139]*Committee on Police and Fire Testimonies (15 May 1992)*, *supra* note 126 at 50-51.

[140]*Ibid.* at 71.

[141]*Ibid.* at 80.

[142]*Ibid.* at 89.

[143]*Ibid.* at 108. Others echoed Percy Jackson's focus on the length of time police take to respond to calls for service.

[144]*Ibid.* at 120.

noted the state failure to respond to quotidian problems, either because of a lack of police authority or because of an ineffective police response. As many of these residents' comments suggest, they do not blame a metaphysical law that stands beyond state authorities, conceiving instead of law as a set of tools rather than posing any innate constraints:

> Fortunately, through the hard work and determination of dozens of Cragin residents three years ago, the Latin Kings [a street gang] were forced out of their community. *It was a long and bitter fight that may have been avoided if the police had been empowered in the beginning to break up the gang before they gained a strong foothold in the neighborhood* (Laura Cella, May 15, 1992).[145]

> We have been in constant contact with the local police commander, as well as the person in charge of community relations, as well as the police officers on the beats, and all of them, right down to the foot patrolmen, agree that we have to have an ordinance in order to get these corners clear. It's an impossible task otherwise. *They all tell us they have no legal authority to clear these corners* (George Kyros, May 15, 1992).[146]

> And when you call the police, the police gonna come to your house and asking you questions when he could go on and take care of the problem, you know, without coming to your house. *That is giving you away, so a lot of people don't call the police no more ... They [the police] don't never catch them [the gang members] because they come in there with the sirens on, and if they walk up there, they could get them* (Lawrence McElvaine, May 15, 1992).[147]

> Citizens are scared by this, and *there is a gap right now in the law* that this law fulfills ... When the police show up currently, *there is no mechanisms* that they have possible to deal with this situation. *So the police disappear, and what it does is it starts to frustrate residents* (Jim Fields, May 15, 1992).[148]

> The police was there. It was such a heavy incident that the police came in and to get heavy control, and they really worked the area pretty good for a couple weeks there, *until they got things fairly back in hand and they disappeared* ...(Arthur Mitcham, May 15, 1992).[149]

> ... I think a lot of times *they [the police] don't come on time*, you know (Edward

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[145]*Ibid.* at 51 [emphasis added].

[146]*Ibid.* at 64 [emphasis added].

[147]*Ibid.* at 89-92 [emphasis added].

[148]*Ibid.* at 138-139 [emphasis added].

[149]*Ibid.* at 79 [emphasis added].

> Whitelow, May 15, 1992).[150]
>
> When we call the police, sometimes they are *busy some place else*, and they don't get there until 15 or 25 minutes later, and they [the groups of people hanging around] are gone (Anna Clay, May 15, 1992).[151]
>
> After a while this cat and mouse game wore down the residents as well as the police. We simply got tired of calling the police and seeing nothing happen to the gangs ... *The police, their hands are tied ... Well, until they break in and stab you, we [the police] aren't going to do anything* (Joan Manshrek, May 18, 1992).[152]

For these residents, then, the harm is what can be referred to as a harm to law and legality: the problem is not simply the actions of some individuals that community members find threatening (or disturbing), but rather extends to the lack of legal tools, and a failure of the state, to combat this problem effectively. This frustration extends beyond processes of legislation and enforcement, to the court process itself. According to Percy Jackson, not only do police take too long to arrive, but residents become frustrated with the length of judicial proceedings:

> We follow through on these [court] activities, but they keep continuing, continuing, continuing until it wears you out. So when you do keep continuing to go back, it cost [sic] you money.[153]

This focus renders the testimonies of the residents quite different from O'Malley's. Unlike O'Malley, neighbourhood residents express critiques not of a metaphysical "law" that gets in the way of effective control by the municipality, but of the way in which they experience law enforcement in the everyday, and their knowledge of the limits of the State and its resources. In addition, whereas O'Malley's testimony focuses on the *lack of law* available to protect residents (and at times, the suggestion that legal values are not attuned to present realities), with the remedy being a vision of law that can be crafted to meet the needs of residents, the testimony of residents appears to be equally attuned to the possibility that their problems stem from the

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[150] *Ibid.* at 61 [emphasis added].

[151] *Ibid.* at 108 [emphasis added].

[152] *Committee on Police and Fire Testimonies (18 May 1992), supra* note 108 at 33-36.

[153] *Committee on Police and Fire Testimonies (15 May 1992), supra* note 126 at 71.

ability of *others* to play the legal game, and on the ability of *others* to "successfully deploy and engage the law."[154] As such, any failure of law inheres in the competition over legal resources that these residents experience. So, for instance, Laura Cella explained the ways in which gangs in her neighbourhood established control over the public streets by knowing the legal limits of their conduct, and her views of how this affected the legal rights of other, more deserving, individuals:

> On any given night 30 to 40 gangbangers [members of the Latin Kings] hung out at the intersection blocking traffic, throwing gang signs, intimidating residents and, in general, just disrupting life in the entire community.
> Once the gang established the street as their own, they were free to conduct business openly and without fear of the law. Residents became frustrated because they called police to report what was obviously gang activity, no doubt in anybody's mind, and drug dealings. The police never saw it because the gang members have their own [police] scanners.
> The police would show up. They would see a group of hoods hanging out, but they weren't showing signs, blocking traffic, or selling drugs. Drugs were hidden. They hid everything and stopped their blatant gang activity, and the police would have to leave because there was absolutely nothing they could do.
> Granted there might be 30 or 40 of these kids just hanging out with no, no good reason for being there at all. But the police couldn't do anything about disbursing [sic] them.
> ...
> *What is an 80-year-old person suppose [sic] to do when you have got a group of five or six 15 and 16-year-old kids standing in front of you. Senior citizen ends up walking out in the middle of the street to go around them. That is not fair. The senior citizen's rights are gone. They have none left at all.*[155]

Similarly, residents noted that the gang members had the technology required to play the legal game: either they pay salaries to scouts ("watches") who would warn them when the police were approaching,[156] or they rely on their own police scanners,[157] and are able to then conform their conduct to the legal requirements when they need to. Residents speak of these gang members' "hiding places, their techniques, how they avoid the police."[158] A large part of the

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[154]"Common Knowledge and Ideological Critique", *supra* note 119 at 1031.

[155]*Committee on Police and Fire Testimonies (15 May 1992)*, *supra* note 126 at 50-52 [emphasis added].

[156]*Ibid.* at 89-92.

[157]*Ibid.* at 51.

[158]*Ibid.* at 75.

problem is that "[t]hese people *know* that they cannot be arrested for standing on the corner."[159] As Jim Fields, director of the Northwest Federation Coalition of Community Groups, explains:

> This is an epidemic, a crime that is happening in our communities, and there is a gap in this law. There needs to be a loitering and a curfew ordinance that can fulfill that need. Again, I think without the passage of this work – *gangs are very aware of how much leeway they have. They are very sophisticated*, and I think it's very clear this ordinance is needed.[160]

Or as one Alderman suggests, gang members know how to *use* law, and know how to rely on law to achieve purposes for which it may not have been designed. In so doing, they are able to both respect and violate the law simultaneously:

> So I am a law abiding citizen myself, and I understand the Constitution and what it was crafted for, and I have no intention to violate the Constitution. But at the same time the drug dealers, the gangbangers, they are violating. *They know the constitutional rights. They know the law as well as anybody*.[161]

This possibility of disorder being caused by knowledge of law (and knowledge of its limits), is further reflected in some views that the legal system is internally fraught with tensions that residents find confusing, and reflect the struggle over the use of law to achieve one's goals (to the detriment of others). One Reverend spoke of the need for community members to know that "the law is on their side." And at times, this understanding of law's complexity leads to philosophical questions regarding the nature of law and its relationship to their community and its problems:

> ... if you have got the freedom to assemble and you are committing crimes with – through that assemblage, *then I think we are defeating our own purpose by defending the Constitution* ... Their [the police's] hands are tied by the laws. There is only so much people can do with the laws as they are now, and in that respect they are a little helpless (William Sibert, May 18, 1992).[162]

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[159]*Ibid.* at 119 [emphasis added].

[160]*Ibid.* at 140 [emphasis added].

[161]*Ibid.* at 22.

[162]*Committee on Police and Fire Testimonies (18 May 1992), supra* note 108 at 10-20 [emphasis added].

> We are sending the wrong message [through the media] ... [The media] is another avenue to look at [to solve our problems] ... But, then, again, we are jeopardizing freedom of the press. We are jeopardizing freedom of expression. Where does it end. But, again, where does it begin (Alderman Bialczak, May 18, 1992).[163]

Any harm of law, then, is not limited to the absence of legislation, though there is no doubt that this remains a prevalent theme throughout the two days of testimony. Rather, this expands to include both a failure of State authorities to adequately protect neighbourhood residents, and a harm that is caused when others learn how to work the legal system, and are able to harness this "legal capital" in a way that changes the neighbourhood in ways these residents find harmful.

In response to this perceived failure of law, residents testified to the informal organization they engage in as a result, either by having neighbours walk with them, having neighbours watch their home while they are out, changing their habits, creating telephone trees, and so on; as Ms. Pegues recounts, "if I go somewhere, either some of the people in the neighborhood, I call them and they call me, and you keep watching they house ... And then in the evening you have got to make sure you take the garbage out early."[164] Some residents engage in highly coordinated activities – as Candace Howell relates, "I have stood on corners. I have had activities on corners. We have walked. We have done midnight vigils. We have positively loitered ... I know that we have had a phone tree and block watch in place ... We also do court watching ... We have got photographs of these people. We have video tape of these people not only selling their wares but victimizing each other ...."[165] Others learn the informal social norms that help defuse situations – as Leroy Lloyd recounts, "I could say that I hardly ever have any loitering in front of my businesses because I go talk to the gentlemen, and I ease up and talk to them. I don't talk to them. I just pick the one with the funny hat, and they roll up and talk to him directly."[166] These extra-legal responses are not unlike what Ewick and Silbey describe in analysing people's

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[163]*Ibid.* at 76.

[164]*Committee on Police and Fire Testimonies (15 May 1992), supra* note 126 at 123.

[165]*Ibid.* at 115-120.

[166]*Ibid.* at 81-82.

responses to being "up against the law," and focus on what residents do to improve their own situations, without necessarily invoking the power of the state and its public police.[167]

Yet, rather than focusing on what residents do everyday in dealing with these concerns, the City's Aldermen focus on providing residents with the *legal technology* – rather than the common sense efforts that citizens described being engaged in – to solve their problems. Specialized legal knowledge is, then, said to be required in order to respond to this harm, suggesting that the Aldermen share the residents' vision of a competition over law in which greater expertise is the dominant factor in determining a legal result. This emphasis on how to develop the expertise needed to succeed at the competition over state law, it appears, ignores the testimony of residents regarding the extra-legal measures they are already undertaking to address their problems, while also ignoring the administrative failures of the state police, thereby ensuring that this is defined as a problem to be addressed through an emphasis on more law:

> So I would hope that over the weekend that all of you, that your great lawyers, legal minds could work together to come up with something that would provide a legal remedy for the problems that we face in the various neighborhoods (Alderman Shaw, May 15, 1992).[168]
>
> So we want the people that have got the legal minds to team up with whomever you have got to team up to make sure things is legal because things have to be done and things have to be done post-haste (Alderman Smith, May 15, 1992).[169]
>
> [Telling an Alderman that he ought to ask legal questions of the lawyers, and not of others] ... But he doesn't have a legal mind. You can ask him all the questions. That don't mean nothing. We have got legal minds. We have got a number of legal minds here that you need to ask these questions (Chairman Beavers, May 18, 1992).[170]
>
> Alderman, excuse me, and I don't mean to interrupt you, but we brought the legal minds from Corporation Counsel that I am sure will answer your legal questions. I can give you testimony as to what happens in my neighborhood and why I feel .... (Ms. Manshrek, May 18, 1992).[171]

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[167]"Common Knowledge and Ideological Critique", *supra* note 119 at 1034-1035.

[168]*Committee on Police and Fire Testimonies (15 May 1992)*, *supra* note 126 at 18.

[169]*Ibid.* at 27.

[170]*Committee on Police and Fire Testimonies (18 May 1992)*, *supra* note 108 at 30.

[171]*Ibid.* at 50.

> The police have those tools right now, and if you sit here, you will see the police admit. You will see the legal minds of this city admit that. It's in here [and as such the ordinance does not add anything new].[172]

This focus on "legal minds" is imagined as necessary to resolve law's internal conflicts, and the competition that must take place given the ways in which law can be called upon to protect both order and disorder. The legal knowledge that is invoked here is one that allows the State to provide an expertise for dealing with law – how to use it to solve problems – rather than a knowledge of law that focuses on knowing the limits of what law can solve, or one that treats law as an immutable body of principles. As one Alderman suggests, "maybe we have to tighten it up or do a little glitch on it or whatever,"[173] or as others argue, it is precisely law's grandeur (often referred to by reference to constitutional norms and restrictions) that needs to be displaced in favour of a more malleable understanding of legality, achieved by the State's legal expertise:

> If this legislation is not constitutional, then we have got to find a way to make it constitutional because the people have got to have the streets back, and they have got to have it quick because life is becoming as cheap as it can be. Killings are just common in the streets now (Alderman Smith, May 15, 1992).[174]

> ... I understand that everyone is concerned about the constitutional rights, but also think about the constitutional rights of our good, decent, law abiding, hardworking citizens who aren't even allowed to take their children to a park or even let their children go themselves freely to a park (Alderman Evans, May 15, 1992).[175]

> ... I hope ... that you consider that we have constitutional rights, too, and that there are people here from our community that own restaurants and businesses (Alderman Troutman, May 15, 1992).[176]

> Now, I know that my people don't want anyone abused, but we are going to have to find a way to deal with these gangs and these drug dealers and pushers ... at some point in time the good people have got to be given back the opportunity to move freely in the

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[172]*Ibid.* at 51.

[173]*Committee on Police and Fire Testimonies (15 May 1992)*, *supra* note 126 at 30.

[174]*Ibid.* at 27.

[175]*Ibid.* at 21-22.

[176]*Ibid.* at 25.

community .... (Alderman Smith, May 15, 1992).[177]

> Sure we have our freedom. Sure we have our rights, but there are certain laws that we have to abide by. We have got, first of all, the law of God. I don't see that anymore. The law of God; that is missing. The law of man; your manmade laws here. They are made for a reason, for a reason. And we are losing sight of all this, and this is why we have chaos going on, and virtually people, people are afraid, and this is wrong. Again, as one of the Aldermen said, what about our freedoms, what about our rights ... Let's think about everybody's freedom (Alderman Bialczak, May 15, 1992).[178]

> I don't believe in any way, shape or form that it's the intent of the Constitution to allow criminal gang members to congregate, and I am want [sic] to make that eminently clear to you. I am getting a little tired of people defending criminals and defending gang members. Now, the Constitution was interpreted over the years by many, many fine individuals, and I remember – I recall reading the Federalist Papers going back a number of years ... what impressed me most about the Federalist Papers were the concept and diatribe that went on talking abut the facts that when factions arose in society that the issue that we were supposed to protect was the good of the many and not the private interests of the few. I am not real interested in the interests of gang members. I am really not. Now, I certainly adhere to the concepts that their rights are guaranteed under the Constitution. But I think we are missing the point here. There is a greater right involved here and that is the greater right of the many as opposed to the few (Alderman Banks, May 18, 1992).[179]

> But everybody sitting here knows that we can negotiate. We can discuss the constitutional issues from now until 100 years from now, and we are not all going to be on the same wave length ... we shouldn't be afraid to move forward and to hit these issues head on because there may be some questions as to how we track ... the more legislation we pass, the more laws on the books gives us additional tools, and how those tools are used I guess that seems to be the main issue here (Alderman Banks, May 18, 1992).[180]

> If that is doable, then maybe we can go back to the drawing board so that – because we will be here from now until doom's day discussing the constitutional questions, and we want – progress will be impeded (Alderman Evans, May 18, 1992).[181]

These three narratives of law, then, lead to a very particular logic. The evidence presented at the hearings implicate law – at different times, both its manipulability by others and its

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[177]*Ibid.* at 26.

[178]*Ibid.* at 30-31.

[179]*Committee on Police and Fire Testimonies (18 May 1992), supra* note 108 at 11-12.

[180]*Ibid.* at 65-66.

[181]*Ibid.* at 72-73.

abstraction from the everyday – as implicated in the harm residents face. In so doing, the harm being suffered is often not expressed as one that is solely related to gang loitering; rather, the harm is more general, and speaks to a broader concern that residents appear to express regarding the role that legality plays in their lives, whether law is 'on their side,' and whether the police are sufficiently empowered to protect them. This harm pervades the community as a whole; as such, this harm is not limited to circumstances identified by any particular community member, nor to circumstances caused by any particular offender (or group of loiterers). However, despite evidence that residents have the capacity to resort to extra-legal techniques, it is legal knowledge and legal expertise that are conceived of as the central remedy, with residents and aldermen invoking law as a resource that can be harnessed – and shaped to meet one's needs – with the requisite amount of work and skill.

This competition over law, of course, has a productive effect; in defining and shaping the issues in these terms, it privileges and reconstitutes the professional legal field (dominated in this case by the State), thereby promoting the harm to be solved as one that can be responded to through legalistic measures, measures designed to promote community order rather than to deal with any one offence. From the perspective of the sociology of law, it becomes apparent that the attraction of these narratives does not lie in understanding the ways in which disembodied "law" is experienced or instantiated, but in the relations of authority and forms of power they open up when invoked. The often conflicting forms of law that are invoked in everyday experience not only serve to generate an uncontestable authority for "law" that is the basis of Ewick and Silbey's argument, but also serve to have particular effects *beyond* law, when deployed by particular actors in particular social relations.

And yet, to be able to invoke law as a mechanism for solving this community problem in Chicago, the harm needs to be sufficiently specified, a position that has been clearly articulated by courts finding statutes that seek to promote community order with insufficient precision to be unconstitutional.[182] As I demonstrate in the next section, a large part of this result is achieved by deprivileging harms that are 'too broad' and articulated at the hearings – so that, despite a

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[182]It is clear throughout the testimonies that the aldermen are well aware of these cases and the constitutional questions they raise, having also been briefed on these in detail: cite here. For a review of loitering statutes and their constitutionality, see "Validity, Construction, and Application of Loitering Statutes and Ordinances", *supra* note 19.

range of residents' concerns being voiced at the hearings, the result is a focus on a narrow legal question, elevated to the level of the 'community' yet which remains sufficiently definable and concrete to be dealt with through State legislation. An important corollary of this move, of course, is that this problem remains within the expertise of the State's police force – and does not expand to broader 'social work,' perhaps the most central concern that police forces had expressed regarding community policing as a whole, and does not result in a general critique of the State and its relationship with its residents (which might generate calls for broader social and economic reform, a concern running through City Hall at that time[183]). This state-community partnership, then, enacts the community as evidence of the *locus* of the harm to be addressed, generating a call for innovative reforms that will seek to enhance the welfare of the community as a whole, in particular through a reorienting of the police role and a redefinition of harm, both of which expand the powers of the Chicago police. As we have seen, part of this move includes a deprivileging of non-State measures designed to respond to this harm, and a focus on state (legal) expertise. Yet, in order to keep this a police problem, *narrowing* the community harm into a more concrete concern is a critical step in the eventual enactment of the loitering Ordinance.

b) Specifying Community Harm

Rather than presenting a unified front regarding the extent to which gang violence had wreaked havoc in their lives, a close reading of the testimonies demonstrates a focus on general disorder. Residents that specifically discuss the problems of gangs are generally limited to representatives of organized community groups, which have often built political platforms around fear of crime, and which had worked with the City to establish the Ordinance. The interaction of these different witnesses, along with the questions and commentary provided by the city's aldermen, leads to a negotiation of state-community expertise that serves to maintain a role for the state in policing, invoke community expertise as the basis of those efforts, and deflect more radical community concerns and approaches that do not fit with the policing paradigm that had been developed politically.

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[183]W. Raspberry, "Jesse Jackson's 25 Percent Solution for Some Urban Ills" *The Chicago Tribune* (3 February 1992) 10.

For instance Gerald Ross, president of the United Business Association of 63rd Street, was particularly concerned with the effects of "the dope pushers and the prostitutes" on business people,[184] and not with gang members per se. George Kyros, who owns his own restaurant and whose neighbourhood is enjoying a "renaissance," including an $84 million capital improvements program, is "embarrassed by the sights we see" when showing the area to private developers and financial institutions. As Kyros' testimony demonstrates, the problem is not simply with street gangs, but with urban blight more generally:

> Corners loaded with either gangs, professional groups or to a lesser extent and probably to a more pitiful extent the bottle gangs, which create just as bad a sight, just as bad on destroying our community as sophisticated street gangs.[185]

This concern with a lack of social productivity is echoed by the concerns of D'Ivory Gordon, whose concern over loiterers is that they are not *doing* anything – since "[a]ny person who has any type of business is not going to congregate in a group on a corner and hang out all day."[186] Similarly, Percy Jackson, a community organization founder and an insurance representative, focusses on what he perceives to be a lack of supervision, and suggests that the problem lies in having "over three million kids in the street with the average age of 13 years old unsupervised," and that "[w]e need to come strong" as a result.[187] And though Mr. Mitcham, who owns a store in the 7th Ward, is concerned with gang members, he is particularly concerned with the business harms he experiences as a result of *any* form of loitering, and not just by gangs:

> I did notice the ordinance deals very much with gang language or language related to gangs, but I think that any time anyone, whether they are a gang or non-gang or just groups of people, loiter at the entrance of a business that – where I pay rent and do business, that they are doing harm to me, and that if they restrict passage to customers, they are violating those customer's [sic] constitutional rights, too.
>
> So, you know, maybe a little stronger language about activity on the street associated

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[184] *Committee on Police and Fire Testimonies (15 May 1992), supra* note 126 at 58-60.

[185] *Ibid.* at 65.

[186] *Ibid.* at 67.

[187] *Ibid.* at 70.

with loitering that affects other's constitutional rights.[188]

A similar focus on general disorder is articulated by Ms. Pegues, who only goes out when her neighbours accompany her. Her concerns are with nearly everyone who makes her uncomfortable on the public streets: "[Y]ou can't cut through the alley because it's so many women with they babies out there";[189] you can't go through the front because "[t]hey begging and saying everything to you";[190] in the early morning, "[a]ll those girls is walking out there, and they comes all between the buildings, and that only mean crime because they bring those guys in there, and they know how to break in your house";[191] "they drinking everywhere";[192] gangbangers "drive up there in they car," and then pretend like they are working on the car by putting up the hood.[193] In the evening, she needs to take out the garbage early, since later "they all out there in the alley coming from McDonald's," and are hanging out there "all night."[194] She is particularly concerned since she has seen the neighbourhood "go," having lived there since 1941.[195]

The testimony of other residents, however, serves to shape the way in which this disorder will be framed and dealt with. Perhaps the most obvious example of this is the testimony of Leroy Lloyd, who grew up with Chairman Beavers, lived near him for approximately 20 years, and is now a business person in his Ward. Lloyd explicitly came to testify "in conjunction with the Alderperson in [his] ward"[196] As with many of the others, Lloyd does not discuss gang loitering

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[188]*Ibid.* at 76. Interestingly, he also notes that, in the 34th Ward where he lives, a heavily loitered area had been experiencing a lot of "exchanges, but that "has kind of quieted down": *ibid.* at 77.

[189]*Ibid.* at 122.

[190]*Ibid.*

[191]*Ibid.*

[192]*Ibid.*

[193]*Ibid.*

[194]*Ibid.* at 123.

[195]*Ibid.*

[196]*Ibid.* at 81.

specifically, though he immediately asserts that he is "for this gang loitering ordinance."[197] One wonders why, since he in fact suggests that he hardly ever has a problem with loitering, because he has learned how to speak with any such individuals loitering near his business, and as a result does not experience loitering as a problem.[198] Yet, having made it clear that he does not have trouble with gang loitering specifically, Lloyd still directs the remainder of his testimony to what can be done to stem crime more generally, providing over four pages of testimony on the value of police foot patrol, and the ways in which paramilitary-type organizations, such as the police, ought to be organized. And, as we learn at the end of his testimony, a meeting on community policing – in which foot patrol is part of the package – had just recently been held by Chairman Beavers, with Lloyd's testimony seemingly designed to provide support for community policing as a solution to problems of crime and disorder, rather than to express his personal need for a loitering ordinance.[199]

This centrality of community policing as the solution to problems of crime and disorder is specifically articulated by representatives of community groups that had themselves been instrumental in the drafting of the loitering ordinance. The testimony of Laura Cella, who represents the Northwest Neighborhood Federation, reveals that the Federation has petitions of over 10,000 residents of the northwest side of the City, "in favor of something to be done to curb gang activity" in that area. Ms. Cella provides examples of endeavours that have been undertaken, particularly a coalition of neighbours that succeeded in evicting five gangs from five different communities. In describing why neighbourhood coalitions were central, Cella argued that the difficulty lay with a lack of police power, and that fearful residents end up "hiding behind locked doors," and the police then "lose their eyes and ears in the neighborhood." Senior citizens' "rights are gone," families find it impossible to enjoy parks, and entire communities are 'given up.'[200] This process leads to a freedom for gangs to "turn the community into open

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[197] *Ibid.*

[198] *Ibid.* at 81-82.

[199] *Ibid.* at 86.

[200] *Ibid.* at 49-58.

air drugstores," and "eventually a war zone,"[201] a problem that will be compounded with the summer heat, when kids are out on the streets.[202] Cella's comments reflect a distinct familiarity with recent terms in criminal justice policy: "open air drugstores," "hot spots," "eyes and ears of the police," and "cycle of violence," and a distinct familiarity with the broken windows theory of crime that had been driving police reform. Often relied upon throughout the history of the ordinance, Laura Cella's testimony helped provide the necessary grounding for the problems that gang loitering is said to generate for the community as a whole.

A similar role was taken by Candice Howell, a task force member for community policing (she had been in to testify in support of community policing the month before), and an officer with her neighbourhood block club association came to support the ordinance. These activities allow Howell to claim a particular expertise that transcends those witnesses who focus on more general forms of disorder:

> I personally am involved in crime prevention activities in my neighborhood and in the community as a whole, and I know for a fact that this ordinance would give some strength to policing strategies and would curb some of the loitering and gang activity that is a result of the loitering.[203]

Despite chronicling the range of community activities that residents are engaged in to deal with the problem, Howell expresses the view that the ordinance will give people "ammunition," since at present "[t]hese people know that they cannot be arrested for standing on the corner."[204]

For some others, especially those who face particular obstacles because of age and disability, the aldermen's questions ensure that, although they are expressing a range of concerns regarding disorder, these testimonies continue to lend support for the gang loitering ordinance (often through sets of leading questions or sets of questions which are guaranteed to induce particular answers). This is the case for Edward Whitelow, who, after expressing concerns regarding gang members, had also expressed concerns regarding the amount of time police took to respond to

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[201] *Ibid.* at 54.

[202] *Ibid.* at 53.

[203] *Ibid.* at 111.

[204] *Ibid.* at 119.

calls for service. The following exchange then took place, serving to deflect attention away from the poor response times of the police department, and toward the specific harms caused by gang loitering :

Chairman Beavers:	So you are for this loitering ordinance?
Mr. Whitelow:	Yes.
...	
Alderman Wojcik:	Mr. Whitelow, just for the record, we are trying to establish a pattern on, you know, how these gangs intimidate, some of these loitering, these people, what they do. How would you say your lifestyle has changed since these guys are on the corners and their loitering have caused this problem? And what I am getting at, does it force you to stay in more? You are not able to go shopping and so on and so forth?
Mr. Whitelow:	Yes, it does. I have to walk my mother everywhere. She is scared to go places by herself everyday.
Alderman Wojcik:	That's a real terrible experience?
Mr. Whitelow:	Yes, it is.[205]

These types of questions are all the more striking with the testimony of Susan Mary Jackson, 87 years old. According to Jackson, while her neighbourhood used to be "nice," it no longer is – she is afraid to go out by herself, and would like to have more policemen, particularly foot patrol. She does not complain about loitering, but about the garage in back of her house, the language one can hear (even on Sunday), and the pulling up of coal by someone who is trying to park in a vacant lot (she called the police and they never came). Though she never mentions gang loitering, Alderman Troutman notes that Ms. Jackson has seen the changes in the neighbourhood over time,[206] and asks whether she can identify "any of these gang members or people that hang around." Ms. Jackson, responding that all she knows about "is the color," says that there are a bunch of them, who live across the street, who wear "red and white and green and purple all the time," and that she is afraid to pass by them – also noting that, "At my age if they look at me real hard, I be ready to holler."[207] Without noting the irony of the question given Ms. Jackson's age, Alderman Troutman asks whether her "lifestyle has really changed" over

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[205] *Ibid.* at 61-62.

[206] *Ibid.* at 95.

[207] *Ibid.*

time, to which she responds that it is no longer a nice neighbourhood, and she wishes she could move.[208]

Similarly, Mildred Frazier, also a resident of the 20th Ward, worked for 24 years with the City of Chicago, and walked to work without ever being afraid. However, now that she is handicapped, she is afraid to go to the store, just two blocks away. When asked if she can identify any of the gang members that hang around, Frazier replies that she can't – but that this is precisely because she doesn't get out like she used to, and waits for someone to drive her, or asks her neighbours to walk with her to the store. She is concerned, though, that individuals are "hanging on the corner," and that there are "just gobs of them."[209] Alderman Wojcik, in response, seeks to identify the particular harms that Frazier experiences – he asks whether this is at all times of the day and night, to which a resident[210] responds that it is through the day; at night, these individuals "jump over the fences," so she burns a light all night. As the Alderman notes, this 'costs her money,' though she is disabled and doesn't have the money to afford this.[211] He also wants to know the ages of the kids at night – who, according to the witness, don't seem all that young (20, 30), though she sometimes can only hear them – she doesn't "dare open the door to look out."[212] At which point, the Alderman engages in a set of leading questions that seek to elicit a response regarding the effect that this has had on her life:

Alderman Wojcik:	Before this – before this problem really came to a head, would you say that you were able to go to the store and go to church, go back and forth? I mean your life was a lot better; wasn't it?
Ms. Frazier:	Oh, yes.
Alderman Wojcik:	So it's changed your life drastically? It's made you a prisoner?
Ms. Frazier:	Drastically. As I said you might – sometimes I just don't bother

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[208] *Ibid.* at 95-96.

[209] *Ibid.* at 105.

[210] There is some confusion as to who is speaking at this point (see introduction of Ms. Clay and responses by Ms/ Frazier, *ibid.* at 107-109)

[211] *Ibid.* at 109.

[212] *Ibid.*

to go to church, you know.

Alderman Wojcik: And you are generally afraid. You are afraid.

Ms. Frazier: Yes.[213]

The Aldermens' questions also have the effect of slanting the testimony of residents who came out *against* the Ordinance. Velma Jetton , who also lives in the 20th ward, is concerned with the reach of the ordinance – while she wants some corners cleared, she worries that the ordinance is too broad. According to her, "we just can't say loitering"; she, as she says, is "in the area," as are young people going to school who she 'would hate to see caught up in a situation' because of the loitering ordinance.[214] In response, Alderman Troutman asks if she can identify any of the gang members that hang around; Jetton replied that she can't, and that her concern is for the broad range of people that are loitering in the area, including her young children. Troutman then continues – asking whether her lifestyle has changed, such as when she shops. Jetton replies that, while it has, this is likely because of her age, since she is now an early riser. With Troutman's questions falling flat, Chairman Beavers steps in, asking whether Jetton is more cautious than she was in the past; Jetton replies that she has always walked very cautiously. Alderman Moore then steps in, asking whether Jetton could identify an individual as a gang member if she saw them; Jetton replies that no, since there is so much change in gang activity, it would be difficult to know.[215] Alderman Giles then intervened, and asked a different range of questions. His questions to Jetton were whether a community policing approach – one that had officers getting to know the community members, knowing who the drug dealers are, and so on – would be preferable to a more reactive strategy that relies on 911 calls. Though responding that the problem will not simply disappear, and that the police have a broad range of strategies available to them already, she sees that that could curtail some of the activity in the area, and expresses that opinion by the end of the questioning.

Finally, when residents offered testimony that did not please the Aldermen – particularly

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[213] *Ibid.* at 109-110.

[214] *Ibid.* at 97.

[215] *Ibid.* at 99.

when the testimony suggested that the Gang Congregation Ordinance may be problematic – aldermanic questioning took a very different slant. Rick Goode represents an organization called "African American Citizens Against Drugs."[216] Goode – also having lived in the 20th Ward since 1945 – is concerned that the neighbourhood has deteriorated over time; where once your neighbour could police you, the police now "can't do anything with anyone." Having fought in the Vietnam War, having been a fireman, and having been an auxiliary policeman, Goode maintains that "I have never had the terror that I feel everyday when I walk down the streets of Chicago."[217] He says he knows all the drug dealers and the gangbangers, and knows where their stashes are – but when he phones the police, and they come to his door, this identifies him publicly. He has had his windows broken out, guns pulled on him, and is intimidated on a daily basis; he wonders whether to take an ax in his briefcase; he wonders whether he should walk around poorly dressed, so that he does not look rich. He supports the ordinance because things have reached a point where "guys my age are going to go out and take matters in their own hands and put these punks back in their place where they belong."[218] It wasn't this way, he says, when he was a child.[219] In response to Alderman Troutman's questions – seeking to determine whether Goode could identify particular individuals as gang members, and could provide that kind of information to the police – Goode provides an analysis of the situation that makes the Alderman quite upset, since it implicates a broader failure on the part of the City that a simple loitering ordinance could not address:

> Mr. Goode: [...]
>
> > Some of [these kids] come from good families and go to good schools, but they are hooked up with this underground economy where they can make more money just being a lookout or just intimidating people and looking out for the police than they can any other way.
> > When I was a kid, we had activities. You can't go in that school yard and play anymore. They had little leagues, boy scouts, boys clubs, Junior Achievement. Now all we have in this neighborhood is a lot of

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[216] *Ibid.* at 124.

[217] *Ibid.*

[218] *Ibid.* at 125.

[219] *Ibid.* at 126.

> intimidation and a lot of fear.[220]

This elicits a response from Alderman Troutman, who refers to that statement as "not exactly true," stating that he has been "surprised ... that there is so much available in the community," suggesting that this "negative element" just needs to be reduced.[221] Goode, however, does not give up:

> Mr. Goode: Well, I would like to ask you a question. When is the last time you saw a cub scout or a boy scout walking the streets in uniform?[222]

The Alderman replies that, while he has not seen scouts, there are several programs available – and decries the lack of parental participation in these activities. He is sceptical that kids who live in high rises have nothing to do but hang out; he suggests, instead, that they go to the parks, where there are various activities they can participate in. Goode responds that, although he knows the opportunities are there, they are under-publicized – and that parents are too scared to let their kids out of the house. Troutman takes offense to this as well, saying that, if parents wanted to find programs, they would just do so – that, for instance, the YMCA has fliers regarding their programs. Parents, he says, "are not looking for the outlets."[223] The Alderman had become so defensive that Chairman Beavers, at one point, needed to intervene – saying that "he is giving you a complement, okay. He was giving you a complement, all right."[224] It is at this point that Goode's testimony is picked up on by Alderman Bialczak, who turns the issue away from the problem of gangs per se, and toward broader neighbourhood and economic questions. The problem, Bialczak suggests, may be whether there is a parent available to take the child to the activity, since both parents now work. Kids are intimidated by gang members, and can't get to the activities without being accosted (his own son had been accosted and beaten up by gang

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[220] *Ibid.* at 127.

[221] *Ibid.* at 128.

[222] *Ibid.*

[223] *Ibid.* at 131.

[224] *Ibid.*

members on his way home from a boy scout meeting). According to him, programs are being under-used because, if children "don't have parental guidance to walk them hand in hand, 13 to 16 years old with their mommy or daddy in hand, that this type of person can't get to an activity."[225] This focus on parents is also evident elsewhere – even the State Attorney, Jack O'Malley, argued that "I wish their parents would step in and prevent them from sometimes wearing those kind of clothes," which are identifiable with gang activity.[226]

Alternative proposals were also ignored by the Aldermen. Acasi Abey, president of the Brothers West Association, came to speak at the Committee, stating that his organization has been dealing with gang violence since 1960. When he stated that his organization is made up of over 80 former gang members, and that they have been noted in Time magazine and have been the subject of documentaries, Abey was interrupted mid-sentence by Chairman Beavers, who announced that "Well, we are not here to glorify gangs."[227] Abey replied that he was simply describing the membership of his association, and went on to state that "people don't really understand the intricate nature of a gang."[228] According to Abey, a gang is not simply "a bunch of guys" who break windows, crack heads, or sell drugs. Rather it is "from the intrical [sic] part of any community where there is a need for young people to have a family association where they feel they have been getting either wealth, strength or status."[229] He explains that in many of these areas, socioeconomic conditions are such that the families are not as unified, and that this is occurring despite strong church attendance in the black community. He believes that the problem is a "community" one, and is the result of approaching the gang problem "as if these kids were from outerspace." Some youth, furthermore, may *look* like gangbangers, but are not – "[j]ust because they wear their hat funny don't make them a gangbanger." Police, he argues, are not the solution, since gangs have existed in Chicago since 1898, and policing has not eradicated them. Incarceration doesn't solve the problem, since they can continue to interact

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[225]*Ibid.* at 132-133.

[226]*Ibid.* at 36.

[227]*Ibid.* at 141.

[228]*Ibid.* at 142.

[229]*Ibid.*

from prison, and are eventually released. And it does little to say that something will lead to "street safety" for little old ladies, since there is "no such thing." According to Abey, community members have to get together to deal with gangs – schools have to disallow students from walking around with their hats sideways, there can be universal dress codes (thereby eliminating the question of colours), and other non-repressive strategies. He concludes that:

> Gangs are highly socialized, economic institutions in this country, and if you don't approach it like that, you are approaching it totally backwards.[230]

Yet, no questions or comments were made, other than a "thank you" from Chairman Beavers.[231]

And finally, aldermanic questions that had the potential to undercut the ordinance were also dismissed. In one of the only instances of aldermanic skepticism regarding the ordinance, Alderman O'Connor questioned the State Attorney (O'Malley) as to why his office, which has the authority to prosecute gang members for recruiting new gang members, has never done so, but he is instead focusing his attention on what the *city* can do to police gang members. Waiting for O'Malley to respond "Certainly" to whether he believes in a proactive approach to gangs at the city and county level, O'Connor then asks:

> That being the case, why hasn't your office taken these regularly, identifiable gang members and brought them before a grand jury to discuss the recruitment under the state statutes which allows you to indict for felony gang members who are recruiting other individuals from being involved in gang activity?.[232]

In light of this questioning, Chairman Beavers rules Alderman O'Connor out of order, twice, with no explanation offered.[233] The tension between Chairman Beavers, the State Attorney, and the Alderman is palpable:

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[230]*Ibid.* at 146.

[231]*Ibid.*

[232]*Ibid.* at 10.

[233]The tension is palpable from the written record. Before being ruled out of order for the second time, Alderman O'Connor states that "City government has its hands full trying to deal with the problem of gangs. The State's Attorney of Cook County to come over and slap us on the back and say you are doing a great job because, basically, we are doing their job ... I think that is very much in order. Now, if you choose to rule me out of order, that is fine. If you tell me he doesn't have to answer, that is fine, too. But it is a legitimate question ....": *ibid.* at 10-11.

> Excuse me, Mr. Chairman. What I am suggesting is simply this. City government has its hands full trying to deal with the problems of gangs. The State's Attorney of Cook County to come over and slap us on the back and say you are doing a great job because, basically, we are doing their job ... I think that is very much in order. Now, if you choose to rule me out of order, that is fine. If you tell me he doesn't have to answer, that is fine, too. But it is a legitimate question .... (Alderman O'Connor, May 15, 1992).[234]

Following Alderman O'Connor, Alderman Shaw raised his concerns regarding the scope of the Ordinance. According to the terms of the Ordinance, if a police officer finds an apparent gang member loitering on the public way – whether the particular place is publicly or privately owned – that individual can be arrested. Noting that police officers don't always "use such a good judgement,"[235] Alderman Shaw objected to giving "cart blanc [sic] to police officers without any constraints," and voiced his hope that "over the weekend ... that your great lawyers, legal minds could work together to come up with something."[236] Again, O'Malley raised the same trope, deprivileging legal expertise in favour of viewing law as a resource that can be negotiated – that "if we work hard enough at it," and "we try to get more people involved in positive attempts rather than just critical attempts," the problem of unfettered police discretion can be avoided.[237]

This structuring of the hearings, then, ensures that the solution to the problems voiced by residents will be solved through a loitering ordinance, part and parcel of a larger move to community policing, and will thereby remain a problem for State expertise, and one dealt with through policing rather than through economic or social reform – even if the problems voiced by residents are broader and more radical than an Ordinance could hope to address. This invocation of the "community," documented through snippets of selective testimony, provides a basis for the Ordinance, while masking the broader concerns raised during these two days, and while ensuring that the local, grassroots activity and organizing that residents engage in are

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[234]*Ibid.*

[235]*Ibid.* at 12.

[236]*Ibid.* at 18.

[237]*Ibid.* at 14. Alderman Moore, himself a former attorney for the City of Chicago, is particularly concerned that an ordinance, even if "passed with good intentions."

simply an adjunct to the legal measures adopted by the State. As Alderman Ed Smith summarizes, this allows the State to rely on "law" as the problem and the solution, framing it not with legal demands but with the need to invoke law in order to help everyday people who are seeking to engage in everyday activities:

> There's a war going on, and we have to protect the good people who can't take the gangs anymore and shouldn't have to abide by the terror and drug dealing that goes on ... *The ACLU has a place, but so do the people in my neighborhood* ... This doesn't allow the police to go hog wild. *But we're tired of seeing the rights of gangbangers get protected when a senior citizen can't go to the store or the park because they're afraid, or a mother can't send her children outside for fear of them getting shot to death in a drive-by shooting.*[238]

V. Governing Community Harm Through Police Science

"Based on the evidence presented at the Council hearings,"[239] Chicago City Council approved the Gang Congregation Ordinance, 31-11.[240] With some aldermen comparing the ordinance to South African Pass Laws,[241] the debate was so acrimonious, and the Mayor so in support of the Ordinance (though he himself was not in attendance during the City Council debate), that Aldermen were treated quite heavy-handedly, with Mayor Daley having "threatened to have police distribute cards in the appropriate wards, telling constituents that their alderman was opposed to the anti-loitering law,"[242] and suggesting that "the Police Department might not enforce the new law in the wards of those aldermen who voted against it."[243] Incredulously, one prominent academic commentator appears to have relied – in the Supreme Court Law Review

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[238]"Old Tactic Sought in Crime War", *supra* note 91 [emphasis added].

[239]"Gang Loitering, The Court, and Some Realism about Police Patrol", *supra* note 2.

[240]The Chicago Tribune reported that City Council was "sharply divided," with "a vote that centered more on race than on crime". One Alderman, arguing that the Ordinance was aimed at Blacks and Hispanics, warned that it "may be the fuse that starts a riot in Chicago"; another argued that the Ordinance was the "Willie Horton of the City Council," designed to crack down on minorities through crime control, and yet another asked "What did Hitler do to the Jews? The same thing." See Loitering Ban Passes", *supra* note 102; "New Police Arrest Power Lights City Council Fuse", *supra* note 93.

[241]"Loitering Ban Passes", *ibid.*

[242]"New Police Arrest Power Lights City Council Fuse", *supra* note 93.

[243]R. Davis, "Special Units to Police Loiterers: City Wants to Make New Anti-Gang Law Hold Up in Court" *The Chicago Tribune* (19 June 1992) 3.

– on the fact that "[n]o City Council member attempted to take the mayor up" on this proposal to selectively enforce the Ordinance as evidence that there was little opposition to it, rather than concluding that this is evidence of an aggressive campaign to push through the Ordinance within the Council, at any cost.[244]

And so, despite the broad range of concerns outlined by residents at the hearings of the Committee on Police and Fire, according to City Council the 1992 Gang Congregation Ordinance was a response to findings made by the Committee that "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens," and that, since gang members tend to establish control through such implicit intimidation, which is not, in and of itself, a criminal offence, "aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear." As Livingston states, "City Council issued findings *based on the evidence presented at the Council hearings* that were included in the text of the ordinance to explain the reasons for its enactment."[245] The (purported) close connection between the testimony before the Committee on Police and Fire and the drafting of the Ordinance is most clearly articulated by the City of Chicago, in its Brief before the US Supreme Court. As the following passages state, these testimonies took on such political importance that they were also introduced into evidence *at every trial case* heard regarding the Ordinance:[246]

> Enactment of Chicago's gang loitering ordinance followed hearings before the Chicago City Council's Committee on Police and Fire exploring the problems that criminal street gangs present for the people of Chicago – in particular the problems created by public loitering by gang members. At the hearings, witnesses described how criminal street gang members loiter as part of a strategy to organize as a group, recruit new members, claim territory, and antagonize rival gangs and others. Further testimony explained the inadequacy of existing laws to address this problem. Residents may complain to police of illegal gang activity in progress, but once the police arrive, gang members and their cohorts will not commit any overt criminal act; instead, they will appear to be simply loitering. The testimony also showed that community residents are often afraid to file formal complaints, serve as witnesses, or take other steps necessary to prosecute criminal activity because of concerns for their own safety or the safety of their family members

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[244]"Gang Loitering, The Court, and Some Realism about Police Patrol", *supra* note 2.

[245]*Ibid.* at 151 [emphasis added].

[246]The majority of arrests did not result in a trial. For more, see "Gang Loitering (Justice Talking)", *supra* note 5.

> or property.
>
> Perhaps most important, the testimony before the City Council disclosed that criminal street gangs are menacing and destructive regardless of whether their members are, at a particular moment, violating other laws. The intimidating presence of gangs itself has a palpable detrimental effect on a family's sense of well being, on the willingness of parents to allow their children outside, and on the willingness of Chicago residents to remain in the City.
>
> *Based on this testimony*, the City Council, in the preamble to the ordinance, made the following findings ....[247]

This focus on the testimonies as evidence of the problem – an apparent displacement of expertise to the community to define its 'own' harms, a core tenet of community policing programs – finds its way into several of the intervener briefs before the US Supreme Court. Mobilizing these testimonies appears to have been able to unite otherwise disparate politicians, satisfying both a "tough on crime" populist message and a progressive neighborhood development perspective.[248] Such defences of the ordinance often invoked the testimonies at the Committee on Police and Fire as evidence of a gang loitering problem:

> The Ordinance was adopted following hearings on May 15 and 18, 1992, before the Committee on Police and Fire of the City Council of Chicago. Numerous Chicago citizens testified at those hearings that the quality of life in their neighborhoods had deteriorated significantly as a result of increased street gang activity. In particular, citizens testified that gang members, in an effort to claim neighborhoods as their turf, loiter on the streets in those neighborhoods at all hours of the day and night while conducting their illegal gang activities. The record before the City Council showed that results of such loitering are the intimidation of law-abiding passers-by, the solicitation of local children to enlist as gang members, the sale of drugs, the confinement of frightened residents to their homes, the disruption of local businesses, and frequent instances of violence ... The Ordinance was adopted in response to these citizen concerns ... The Council determined that adoption of the Ordinance was 'necessary to preserve the City's streets and other public places so that the public may use such places without fear.'[249]

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[247]*Petition for a Writ of Certiorari to the Supreme Court of Illinois, supra* note 6 at 3-4 [internal citations and footnotes omitted; emphasis added]. It should also be noted that the transcripts of the hearings were lodged with the trial court in each case, and were then added as a supplemental record on appeal (at 3 *n*2).

[248]These were Illinois Republican Henry Hyde, and Illinois Democrat Luis Gutierrez.

[249]Brief of Washington Legal Foundation, U.S. Representatives Henry Hyde and Luis V. Gutterrez, Allied Educational Foundation, Northwest Neighborhood Federation, and West Avalon Civic Group, Inc. as Amici Curiae in Support of Petitioner in *Chicago* v. *Morales*, No. 97-1121 (filed 19 June 1998), [1997] U.S. Briefs 1121, online:

As a response to this state of affairs, the preamble to the Ordinance reads:

> WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and
> WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
> WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
> WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and
> WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear; and
> WHEREAS, The City Council has also determined that it is necessary to amend the Municipal Code of Chicago to provide for a stronger curfew ordinance and a more effective means of enforcement; now therefore;

And, after outlining these general City Council findings:

> BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:
>
> SECTION 1. Chapter 8-4 of the Municipal Code of Chicago is hereby amended by adding a new Section 8-4-015 as follows:

LEXIS (BRIEFS) at 4-6. Similarly, a brief filed on behalf of the US Conference of Mayors and several other groups stated that "Chicago City Council held extensive hearings on the vexing public-safety problems posed for that city's residents by criminal street gangs. After extensive testimony from law enforcement officers and from community residents who lived under the terror created by those gangs, the City Council found that 'the continuing increase in criminal street gang activity in the City [was] largely responsible' for an 'increasing murder rate as well as an increase in violent and drug related crimes,' and that 'the burgeoning presence of street gang members in public places has intimidated many law abiding citizens'." See Brief of the U.S. Conference of Mayors, National League of Cities, National Association of Counties, National Governors' Association, Council of State Governments, International City/County Management Association, and International Municipal Lawyers Association as Amici Curiae in Support of Petitioner, in *Chicago* v. *Morales*, No. 97-1121 (filed 19 June 1998), [1997] 1997 U.S. Briefs 1121, online: LEXIS (BRIEFS) at 3-4.

> 8-4-015. (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> (b) It shall be an affirmative defence to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
>
> (c) As used in this Section:
>
> (1) "Loiter" means to remain in any one place with no apparent purpose.
> (2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
> (3) "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members:
> [A list of over 30 offenses follows]
> (4) "Pattern of criminal activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this Section.
> (5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.[250]

The ordinance, then, does not render loitering into an offense per se. Rather, it is when a police officer's order to disperse is disobeyed that the offense is created, potentially punishable by a fine, imprisonment, and community service:

> (d) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.
>
> In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service ....[251]

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[250]Substitute Ordinance (17 June 1992), *supra* note 3.

[251]*Ibid.*

How, then, does the Ordinance govern the "doing of nothing"? How have the testimonies been translated into law – what knowledges does the ordinance rely upon, what forms of authority and discretion does it provide to police officers, and how does it seek to make public disorder governable? In this section, I focus on the legal construction of harm – and, correlatively, of how to maintain community order – that is reflected in the Chicago ordinance. As I demonstrate, the Gang Congregation Ordinance reflects a 19th century form of governance, generally referred to as "police science" or the "police power of the state," and in so doing is placed partway between administrative law and criminal law rationales for governing crime.

As specified in the preamble, the 1992 Ordinance contemplates at least five different rationales, not all of which are actually based on evidence presented before the Committee on Police and Fire. First, there is said to be an increase in crime – namely murder, violent crime, and drug related offences – which are attributed by City Council to an increase in criminal street gang activity. Although there may be some debate with regard to drug related crimes, there is no doubt that murder and violent crime are a "harm" to be governed, but neither murder nor violent crime are discussed in much detail at the hearings, if at all. Furthermore, murder, violent crime, and drug related crimes do not occur by loitering – in committing these crimes, one is engaging in explicitly criminal activity. The first two elements of the preamble, then, simply serve to set the stage to justify the increased policing of gang members, by chronicling the tangible harms occurring in Chicago.

The focus on loitering is detailed in the remainder of the preamble, which presents a chronology that runs from intimidation of law-abiding residents, to control of the public streets, to an ability to maintain that control by knowing the legal limits of their conduct, leading to a fear of crime that hampers the ability of "the public" to use public spaces without fear. This chronology, mirroring the potential for a spiral of decline that is often attributed to Wes Skogan,[252] presumes that, when left unchecked, disorderly activities that do not initially appear sufficiently serious to warrant criminal punishment lead to the exit of other residents and the development of criminogenic spaces.[253] This is the basis of the harm being regulated by the

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[252]W.G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (New York: Free Press, 1990).

[253]See also J.Q. Wilson & G. L. Kelling. "Broken Windows" (1982) 249 The Atlantic Monthly 29. But see B.E.

Ordinance:[254] because control over the public streets is said to be gained by loitering, and because violence, drug-dealing, and vandalism are often associated with loitering, there is a justifiable fear for property and personal safety, which affects use of the public way by residents.[255]

This harm reflects a very different paradigm than attempts to regulate loitering earlier in the 20th century.[256] Earlier attempts to regulate loitering – generally struck down as "status offences," and found to be unconstitutional – were often based on the character of the individual loiterer: whether, for instance, he was an "habitual loafer," or she was a "common nightwalker." There was little harmful effect implied by these statuses. Rather, earlier legislation often targeted the individual, policing the person of the loiterer, and was more concerned with the immorality or distastefulness of that individual than any concrete harm they posed. In loitering statutes where the morality of the loiterer was not at play, the focus would tend to be on the ability of residents to move about – and loitering would be regulated in a similar manner to vehicular traffic, and would be based on the ability to move about freely. Recent loitering statutes which

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Harcourt, "Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style" (1998) 97 Michigan Law Review 291.

[254]There is also what seems to be an unexplained harm, caused when persons loiter in public places with criminal gang members. With the City claiming to have "an interest in discouraging" such behaviour (Substitute Ordinance (17 June 1992), *supra* note 3), it is unclear whether the harm being regulated is harm to the non-gang member, or further harm to the public at large that is caused when individuals loiter with criminal street gang members. It is not, in fact, entirely clear that this is a harm-based rationale at all, or simply a moral assertion on the part of the City to discourage any such relationships. There are other possibilities as well. It may be a harm that is caused to gang members, who are approached by non-gang members (though this is highly unlikely). It may also be a harm that is caused to law enforcement, who then have difficulty isolating who is/is not a criminal street gang member.

[255]Although the broadness of the Chicago Gang Congregation Ordinance has been dealt with, at length, by other commentators, one issue has escaped notice. A "public place," according to the Ordinance, means the public way and any other location open to the public, whether publicly or privately owned: see Substitute Ordinance (17 June 1992), *ibid.*

[256]Non-moralistic rationales for policing loitering are not new. Past attempts to regulate loafers, vagabonds, and others have at times focused on the labour economy and the need for workers, and were originally designed for that very purpose. See, for example, the edited collection of essays in D.M. Anderson & D. Killingray, eds., *Policing the Empire: Government, Authority and Control, 1830-1940* (New York: Manchester University Press, 1991). For a more legalistic history, see also the summary provided in G. Stewart, "Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions" (1998) 107 Yale Law Journal 2249 [hereinafter "Black Codes and Broken Windows"]. Yet, throughout these attempts, the loiterer has been viewed as something beyond simply an economic threat, and "the chrysalis of every species of criminal." See M.D. Dubber, "Policing Possession: The War on Crime and the End of Criminal Law" (2001) 91 Journal of Criminal Law & Criminology 829 at 919 (citing authority).

have been found to be constitutional have, in contrast, focused on loitering while engaging in particular activities, such as drug dealing – these forms of loitering do not police the doing of nothing, nor do they police a status, but rather police particular activities, and are not therefore not "loitering" in the classic sense.

As a result, I argue that loitering statutes have conventionally focused on four possible harms: either loitering was defined as *morally harmful*, as *harmful to municipal order* (impeding the flow of individuals or vehicles),[257] as *harmful to economic order*, or as posing potentially *future harms* (with these specific individuals said to pose a high risk of offending in the future).[258] The present Ordinance, in contrast, relies on a different perspective, and presents the harm as a risk to the community's ability to maintain social order, with the whereas clauses specifying the concern over gang members being able to control public space, and intimidate residents as a result. This maintenance of social order does not solely relate to the ability of individuals to move around the streets: instead, drawing on the potential for neighbourhood decline, what the

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[257]The different emphasis of the Chicago Ordinance is perhaps most apparent when comparing it with a loitering Ordinance to which it is consistently compared, and which is referred to as having been "nearly identical." This ordinance, Section 1142 of the General City Code of Birmingham, entitled "Street and Sidewalks to Be Kept Open For Free Passage," was struck down by the US Supreme Court as unconstitutional in 1965, and read:

> Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the city with any animal or vehicle, or with boxes or barrels, glass, trash, rubbish or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such streets or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.
>
> It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.

See *Shuttlesworth* v. *Birmingham*, 42 Ala. App. 296 at 296-297 (1963). The Alabama courts quickly made clear that, however the ordinance was written, its application was only intended when it impinged on free passage, a finding that remained undisturbed (and relied upon) by the US Supreme Court ruling: see Shuttlesworth v. Birmingham, 382 U.S. 87 (1965). In contrast, the Chicago Ordinance explicitly polices loitering without any reference to a harmful effect, the argument being that the harmful effect is not visible at any given moment, but occurs at a different level of analysis.

[258]Some of these are, of course, a "risk to the community": see "Black Codes and Broken Windows", *supra* note 256 at 2258, describing how "vagrancy laws evolved into methods of control and banishment of unwanted people who threatened 'financial burden, nuisance and potential criminality'." The important difference, though, is that the risk of harm these individuals were thought to present was more akin to those registered under Megan's Law: it was not that these individuals posed a risk to the surrounding community's behaviour, or to the community's "order," but rather that they presented a risk of that they would offend.

Ordinance suggests is the danger that the public streets will collapse into a criminogenic space, with law-abiding citizens either leaving the neighbourhood or being unable to promote a form of stewardship needed to maintain informal order. Within the framework of advanced liberal governance, this echoes the new penology's move from morality – and its attendant focus on the individual (or on the individual's actions) as the object of analysis – to risk, with its focus on spaces and activities rather than governing individual acts.[259] The more people use public spaces, the less "control" offenders (or other undesirables) will have over the same space. As Adam Crawford skeptically summarizes, these perspectives on the link between 'disorder' and crime boil down to a simplistic correlation of "more community, less crime"[260] – or more precisely, as Bernard Harcourt argues, "order," "disorder," "law-abiding," and "disorderly people," are categories that are intrinsically meaningless, but are instead themselves constitutive of the types of communities in which we seek to imagine ourselves.[261]

This emphasis on regaining control over public space is apparent from the text of the Ordinance, which as I describe here provides a great deal of flexibility for police officers engaged in street-based, proactive, community policing efforts. The emphasis on regaining control over public space is suggested by the offence created in the ordinance. There is no offence committed when an individual gang member – even if he openly professes to be a member of a violent street gang – stands, alone, on the street, and loiters for hours on end. Rather, the Ordinance is limited to those situations where an apparent gang member is loitering *with one or more persons*. The Ordinance does not, as a result, criminalize gang membership, as some commentators have asserted in interpreting the Ordinance.[262] The focus is, rather, on the

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[259]M. Feeley & J. Simon, "The New Penology: Notes On The Emerging Strategy For Corrections And Its Implications" (1992) 30 Criminology 449; D. Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society" (1996) 36 British Journal of Criminology 445 [hereinafter "The Limits of the Sovereign State"]. As Nikolas Rose summarizes, these risk-based strategies "target offenders as an aggregate; they do not aim to rehabilitate, reintegrate, retrain, provide employment for particular individuals ... [t]hey seek only to reduce rates of crime and risks posed by groups – such as the urban poor or underclass – by whatever means are appropriate to the risk they present. See *Powers of Freedom*, *supra* note 115 at 236.

[260]A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (New York: Oxford University Press, 1999).

[261]B.E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge, MA: Harvard University Press, 2001).

[262]See eg. J.L. Santo, "Down on the Corner: an Analysis of Gang-related Antiloitering Laws" (2000) 22 Cardozo

ability to clear the public way of certain groups of individuals;[263] as the Ordinance states, this can be effected *even if the specific individual that the police officer believes to be a gang member turns out not to be*:

> It shall be an affirmative defense to an alleged violation of this section that *no person who was observed loitering* was in fact a member of a criminal street gang.[264]

This turns out to cast an exceptionally broad net. Since an individual can be considered a member of a criminal street gang even if he has not, himself, ever committed a criminal offence,[265] since a criminal street gang can refer to as small a group as three persons, whether that grouping is 'formal' or 'informal,'[266] and since there is evidence to suggest that, in many minority neighbourhoods in urban US cities, a very large percentage of youth are affiliated – at times, for protection, so they can themselves not be the target of crime – with a street gang,[267] the Ordinance will be applicable in a wide array of circumstances. It is true that the "gang" must be engaged in a "pattern of criminal activity," which does limit the Ordinance's applicability. Yet, although the list of offences that constitute criminal gang activity is limited to quite serious offences (it does not, for instance, include possession of controlled substances, nor simple assaults), these do not need to have even been committed by someone in the suspected gang. Rather, if someone in *association* with the gang commits any of these offences in order to assist *any* criminal conduct by gang members, then the gang is said to have been engaged in "criminal gang activity," thereby being a "criminal street gang" and anyone reasonably believed to be a member falls within the purview of the Ordinance. Not only does the Ordinance, then, import

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Law Review 269 at 310-311.

[263]It is possible to read the Ordinance differently, so that as long as *one* person is loitering and is *with* others, the Ordinance applies. In this case, the Ordinance would be canvassing an even broader scope of possible situations than the following discussion presumes.

[264]Substitute Ordinance (17 June 1992), *supra* note 3, s.1(b) [emphasis added]

[265]*Ibid.*, s.1(c)(2).

[266]*Ibid.*

[267]S.H. Decker & B. Van Winkle, *Life in the Gang: Family, Friends, and Violence* (New York: Cambridge University Press, 1996) at 65.

very loose conceptions of what constitutes a "gang," loose conceptions of what constitutes "membership" in that gang (in fact, the Ordinance does not define the concept of "membership" at all, itself indicative of the highly organized structure that the Ordinance incorrectly attributes to "gangs"), and a very low threshold for what constitutes a "pattern" of activity, but it also allows for the policing of gang members who commit more minor crimes than the Ordinance specifically lists, so long as any individual *in association* with that gang commits the specified offences. In addition to these loose requirements, two additional definitions serve to remarkably expand the potential for policing: first, loitering is defined as not having "an apparent purpose," which relies entirely on the perception of the police officer rather than on any objective measures of inactivity; and second, the requirement that the loitering be in a "public place" is undermined by the very definition of "public place," which includes any location *open to the public*, whether publicly or privately owned, thereby including any commercial enterprise in addition to the city streets, and would also, as a result, includes any municipally managed housing development.

This configuration expands the potential for policing remarkably. Someone who is part of a group of three friends who, for instance, smoke marijuana regularly (so long as it was a substantial activity, it would not need to be a daily – or perhaps even weekly – occurrence), would be subject to the Ordinance, *even if they themselves have never smoked.* Since that group of friends would have had to associate with someone who sold them a controlled substance, and so long as they did so twice, they would have now engaged in a pattern of criminal gang activity, they would be defined as a criminal street gang, and it would be irrelevant that the individual who is said to be loitering participated or did not participate in the illegal activity. Furthermore, even if the police officer is flat-out wrong, and the individual in question is not even part of an informal group that may be defined as a gang, the violation is still made out if any of the individual(s) with whom s/he is "loitering" is part of a group of friends who do fall within the net – the only defence provided by the Ordinance is that "*no person who was observed loitering was in fact a member of a criminal street gang.*" Finally, since the argument that "I was doing something" (whatever that something may be) is not a defence to the violation under the Ordinance – the police officer must rely on his/her own perception, since it targets individuals who are "apparently" doing nothing – all this turns entirely on police discretion. And, of course,

this applies not only on the public streets, but in parks, coffee shops, shopping malls, stores, movie theatres, public transit stops, municipally owned locations, and so on – any location that is open to the public.

Although providing authority for police officers to police individuals informally, the Ordinance does appear to be more strict regarding when a penalty can actually be imposed. Simply because an individual is loitering does not mean that they have violated the Ordinance. Rather, to constitute a violation, the individual must "not promptly obey" the police order to disperse and remove himself from the area. This aspect of the Ordinance also appears to provide a wide range of latitude to police officers. How far must an individual go to be said to have dispersed and 'removed themselves from the area'? For how long must they be absent – can they return an hour later? Must they remain dispersed from each other throughout the day? Or can these individuals congregate together, or with others configurations of people, in a different area? Although these issues raise important questions regarding the limits to which individual conduct can be regulated, for present purposes the effect is the same whether the police order is heeded or not – either the individuals will leave, or they will be fined and/or forcibly removed from the area.

Given the massive number of individuals, then, who can be subject to policing under the Ordinance, and given that the "harm" principle has conventionally been conceived of as *limiting*, rather than *expanding*, police enforcement, where does the City of Chicago derive its legal authority to create such an Ordinance? How does the focus on community harm, as specified in the preamble, serve to expand the province of police officers? And similarly, how is it that the testimony of local residents before a City Council committee is invoked as the authorized knowledge for how to respond to these harms, rather than the testimony of experts regarding how violence in Chicago ought to be handled or managed?

In fact, this theory of governing loitering under the Gang Congregation Ordinance is not an entirely new invention. Rather, this authority would appear to derive from what is known as the "police power of the State."[268] Although municipalities in the US do not, strictly speaking, have

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[268]This is a power that appears to have no real corollary in Canadian law, but which is perhaps often paralleled by the ability of provinces to legislate for "all matters of a merely local or private nature." See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s.92(16).

the authority to create criminal offences, "these local governmental units have the police power to regulate for the protection of the lives, health and property of their inhabitants and the preservation of good order and morals."[269] This police power is extremely broad, and inheres in the very essence of local government, and its need to ensure the welfare of local residents. Through this police power, which is by no means limited to the notion of police forces designed to deal with crime,[270] individual states and local governments may "secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws."[271] As Foucault has asserted, "police includes everything"[272] – or, as stated by one court, police power can be defined as "[t]he domestic order of the state, whereby the individuals thereof, like members of a well-governed family, *are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their daily lives.*"[273]

Historically, this conception of "police" – more akin to what we would now refer to as "policy" than what we now refer to as "the police" – was counterposed to rule by "law." In chronicling these tensions, Chris Tomlins argues that the "discourse of police" was entangled in a discursive struggle with legalistic conceptions of the state. "Police" would allow for the formation of policy by democratically elected officials, based on a civic republicanism and a "democratized ideology of communal good order or collective happiness."[274] On the other hand,

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[269]W.R. LaFave & A.W. Scott, Jr., *Substantive Criminal Law*, updated by the 2003 pocket part (St. Paul, MN: West, 1986), 1 Subst. Crim. L. §1.7, online: WL (SUBCRL) [emphasis added] [hereinafter *Substantive Criminal Law*].

[270]This is a mistake that is sometimes made by researchers who reference work on "police": see eg. *The Politics of Community Policing*, *supra* note 103 at 35.

[271]H.C. Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th ed. (St. Paul, MN: West, 1990) at 1156.

[272]M. Foucault, "Omnes et Singulatim: Towards a Criticism of 'Political Reason'" in S. McMurrin, ed., *The Tanner Lectures on Human Values*, no. 2 (Salt Lake City: University of Utah Press, 1981) 225 at 248.

[273]*Hunter* v. *Green*, 142 Fla 104 (Sup. Ct. 1940) [emphasis added].

[274]C.L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993) at 94 [hereinafter *Law, Labor, and Ideology*].

law as a "modality of rule"[275] would instead control this power by subjecting administration to the courts, and to the common law, a governmentality that he argues became dominant through a process of historical contingency in the US, much of which relates to the development of commerce and master-servant relationships.

Tomlins, of course, is quick to note that "law" did not displace the practice or science of "police," but rather that the paradigm of "law" became the context in which "police" would have to function,[276] with law becoming the "paradigmatic discourse."[277] The science of police "became drawn into a complementary relationship with *law*," and its scope became increasingly limited to "a matter of security rather than happiness."[278] As one 19th century lawyer, concerned with ensuring that the city of Boston be able to respond to threats to social order resulting from commercial growth, wrote: "Under a well-connected and energetic police, we may repose without fear of the incendiary or ruffian ... [leading to] a well-regulated city, where the citizens are happy in the enjoyment of their lives ... where each knows and preserves his own place; and where the whole harmoniously unite to promote the general good."[279]

Yet, although Tomlins works through the discursive struggles between "law" and "police," Bill Novak provides a detailed study that demonstrates that – despite a rhetorical move away from a reliance on the police power of the State – traces of it have remained throughout. In his study of regulatory law in nineteenth-century America, Novak's study of *The People's Welfare* focusses on what he refers to as "public regulation," "the power of the state to restrict individual liberty and property for the common welfare,"[280] standing in contrast to myths of American statelessness, liberal individualism, and American exceptionalism. Novak demonstrates a 19th century focus on developing a well-ordered society, primarily though the micro-regulation of urban space and business activities. Through the "state police power," the public welfare of the

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[275] *Ibid.* at 19-97.

[276] *Ibid.* at 39.

[277] *Ibid.* at 59.

[278] *Ibid.* at 39 [emphasis in original].

[279] See *ibid.* at 96.

[280] *The People's Welfare*, *supra* note 13 at 2.

community was ensured, rather than the promotion of individual rights; this police power was described as "restraining and regulating the use of liberty and property,"[281] allowing the State to "prescribe regulations to preserve and promote the public safety, health, and morals, and to prohibit all things hurtful to the comfort and welfare of society."[282]

Novak covers the gamut, from the micro-regulation of combustible items, buildings and behaviour to prevent fire (including tearing down private buildings, by the fire marshal, without compensation to the owner), the prohibition on certain market goods considered to offend public safety, health, and morality, the expansion of public jurisdiction over roads (originally conceived of as private property) and the correlative policing of public morality and health on these spaces, and the expansion of public health and morality as bases for regulation across private activities (including requirements that private owners undertake changes to their property in light of the public good). As he puts it, "the effect of police was a vast proliferation of regulatory intrusions into the remotest corners of public and private activity."[283] Despite a rhetoric of laissez-faire that dominates analyses of 19th century America, Novak's work evidences a central emphasis on protecting "the people's welfare," and a correlative scepticism of free market dominance and American individualism. This police power of the State, he concludes, "[p]olice power was the ability of a state or locality to enact and enforce public laws regulating or even destroying private right, interest, liberty, or property for the common good (i.e., for the public safety, comfort, welfare, morals, or health). Such broad compass has led some to conclude that state police power was "the essence of governance, the hallmark of sovereignty and statecraft."[284]

However, Novak emphasizes that this 19th century focus on the people's welfare was quite different than how we might understand such a philosophy today. In the 19th century analyses that Novak provides, a centerpiece of the state police power is its *local* nature – ensuring the people's welfare was a task for local government, and individual rights were subordinated to the power of the locality to regulate for the public good. Both the centralized state and the emphasis

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[281]See *ibid.* at 13.

[282]*Ibid.*

[283]*Ibid.* at 14.

[284]*Ibid.* at 13.

on individual rights were to come later in the nineteenth century, in a symbiotic fashion that entailed a move away from local definitions of the public good, and from local regulations designed to enhance the people's welfare.[285]

This peculiarly American form of 19th century police science, then, appears to be precisely what is driving the 1992 Chicago Ordinance.[286] The emphasis of the Ordinance is on maintaining order through local control, and in so doing, it emphasizes the general ability of residents to move about freely. The Ordinance does not seek to deal with the drug-dealing, or the violence, that are attributed to gang activity; rather, the Ordinance seeks to police the effects of that activity (and the effects of any such perceived activity) on the well-being of the surrounding community. It is here that a further attribute of Novak's "police power" is particularly relevant. Most evident in German police science, or cameralism, police science is not aimed at producing normalized knowledges about individuals, but focuses instead on governing activities and spaces. This is the focus, for instance, of Patrick Colquhoun's *Treatise on the Police of the Metropolis*, in which he focuses on policing 19th century London docks – Colquhoun does not seek to regulate individual thieves themselves, but on controlling theft by regulating the criminogenic *space* in which it occurs, and licensing the *activities* which are central to daily life on the docks.[287] This "police state," as Neocleous points out, was an early welfare state, connoting order, welfare, and security.[288]

The very object of the Chicago Ordinance – the struggle for control over the public way – was equally a central element in 19th century struggles to ensure that the community's interest would take priority over individual (private) rights. This is further highlighted by the Ordinance's scope: the logic of public/private is blurred in the Ordinance, with the policing of "public places" including privately owned places that are open to the public. As Novak

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[285]*Ibid.* at 235-248.

[286]See "Knowledge on Tap", *supra* note 13 for a comparison of police science in the US, UK, and Canada.

[287]P. Colquhoun, *A Treatise on the Police of the Metropolis* (Montclair, NJ: Patterson Smith, 1969). On cameralism, see also M. Foucault, "Governmentality" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 87.

[288]"Social Police and the Mechanisms of Prevention", *supra* note 13 at 721-722.

concludes, the extension of a public interest onto roads, and the defeat of private property interests that would stand in the way of a regulation of the public interest, was central to the police power of the state that he describes – "[t]he public power to remove and abate nuisances and encroachments on highways was a crucial instrument of sovereignty ... A private individual could not expropriate the public (and, therefore, preeminent) domain."[289] I will return to this struggle over the private usurpation of the public ways by gang members in discussing the briefs filed before the US Supreme Court, later in this chapter; for now, however, it is important to note this tension as a central element of the Ordinance, and to locate its historical roots in 19th century forms of American governance and common law. As Novak demonstrates, although governance has been increasingly replaced by centralized bureaucracies and a focus on individual rights, traces of older emphases on the well-ordered society remain; the Gang Congregation Ordinance follows in this tradition, focusing on the establishment of local order. Of course, it is not simply local order that is being policed – but, as with the early US cases dealing with the policing of public roads, these are "effective mechanisms of broader social and cultural regulation."[290]

Of course, it would be facile to conceive of any legislation which does not adhere to strict conceptions of individual rights as being, in effect, the police power of the State – rendering it, as a form of governance, both meaningless and continually subject to being displaced by State law. Foucault, in proclaiming that "police includes everything," seems to have made precisely this mistake – though for his purposes, it mattered little to conceive of police science as an active form of governance, being interested instead in the techniques that would be deployed in this form of rule. Some of the other difficulties stem from the view expressed by legal scholars that the police power is, in fact, a residual category – so that legislation that does not derive from other powers of the State are said to derive from the police power.[291] Yet, if there is one theme that animates the myriad definitions that focus on the State's police power, it is their insistence that it is deployed in an effort to govern *populations* (and, particularly in the American context, local populations), and as such do not focus on knowledges of individuals (such as individual

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[289] *The People's Welfare*, *supra* note 13 at 123-124.

[290] *Ibid.* at 125.

[291] *Ibid.*

tolerances, tastes, motivations, and so on), nor on macro-level knowledges of states and economies, but instead on knowledges of local order, welfare, and community happiness. The following passage from the *Slaughterhouse Cases* demonstrates the types of concerns most central to this police power:

> 'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.' This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.
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> This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'[292]

The essence of the police power under the common law – different, in many ways, than the police power that flourished on the Continent, and different than the police power that existed prior to it having been transformed into a *complementary* mode of governance to law – is that it provides a corrective to unbridled individualism, focused on ensuring that rights are not taken so far as to detract from community order. It can be conceived of, then, as the common law's response to the tragedy of the commons, extending far beyond the civilian conception of *abus de droit* and instead providing a forum for proactive state action designed to regulate in the name of the community.[293]

But it is the operationalizing of the police power of the State that is perhaps most unique abut

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[292]*Slaughter-House Cases*, 83 U.S. 36 (1873).

[293]See J.L. Baudouin, *La Responsabilité Civile*, 4th ed. (Cowansville: Yvon Blais, 1994) at 111-114.

the Chicago ordinance. Whereas the focus on *community order* has been common throughout recent North American efforts to deal with a range of conduct, generally by youth, the Chicago ordinance claims not to rely on broad police discretion to achieve its aims, in particular because internal police department regulations provide strict guidance regarding how the Ordinance will be enforced (thereby differentiating this Ordinance from earlier, unconstitutional, loitering statutes). This too seems to take its bases from older forms of police science; as theorized in 18th century Europe, "police science" has historically been identified as an odd assortment of knowledges, including political economy, theories of education, and the administrative expertise involved in regulating urban nuisances. Although it has generally been conceived of as an official form of knowledge, deployed by public or quasi-public officials, it has not historically consisted of scientific or technical information; rather police science has deployed knowledges that have been partly 'commonsense,' and partly based on 'experience,' or trade knowledges, learned on the job.

This centrality of administrative/trade knowledge is what comes through in the Chicago Police Department's General Order 92-4, in which it seeks to structure the discretion that police will exercise under the Ordinance.[294] Although the Chicago Police Department has maintained that the Order cannot be made available to the general public,[295] it has been reproduced in the City of Chicago's petition for a writ of certiorari, and I rely on that version, provided to me by the City's Corporation Counsel, here.[296]

As written, the General Order provides some important practical limits on the Ordinance, though each of these is also somewhat vague. Most interesting, though, is that the General Order addresses which forms of knowledge are to be relied upon in assessing this form of "general harm" – with harm having been defined by the Ordinance as a non-specific harm to a particular

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[294]Chicago Police Department, General Order No. 92-4, *Anti-Gang Loitering Ordinance* (7 August 1992), Appendix G of Petition for a Writ of Certiorari to the Supreme Court of Illinois in *Chicago* v. *Morales* (filed 2 January 1998) [hereinafter *General Order No. 92-4*]. As Section II states, "[i]n order to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way, this directive establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way."

[295]E-mail from R. Glasser, Program Analyst, Chicago Police Department to R. Levi (11 July 2000).

[296]*General Order No. 92-4*, *supra* note 294.

community member, it occupies a peculiar ontological status: how can police officers enforce an Ordinance which is designed to police the doing of nothing, in an effort to curtail harms which are not easily definable on any given day? This documentary effort provides us with some insight into the forms of knowledge that are instrumental to the police power of the state, but which are almost never asked – *how do state authorities determine how to go about securing the people's welfare, and what knowledges do they rely upon to 'prohibit all things hurtful to the comfort and welfare of society'*?

First, only certain officers are authorized to make an arrest under the Ordinance, namely district tactical units and sworn members of the police department's gang crime section. This may, though, be broader than it initially appears since the Order also extends the authority to make arrests to "other personnel designated by an exempt member of the Department,"[297] and provides no restriction on any police officers relying on the Ordinance to order people to move along, so long as they do not then follow up with an arrest.[298] As a result, any police officer can, according to the General Order, order the dispersal of loiterers under the Ordinance, with an unclear restriction on which police officers can follow that up with an arrest.

Second, the General Order follows up on the Ordinance's definition of "criminal street gang" by focusing on what forms of knowledge can be relied on in determining whether a criminal street gang exists. Referring to "specific, documented and reliable information," the General Order lists the following as potential, though not exclusive, forms of knowledge that can be relied on:

1. Analysis of crime pattern information;
2. Observations of Department members;
3. Witness interviews;
4. Interviews of admitted criminal street gang members;
5. Information received from informants who have proven to be reliable.

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[297]Ibid., s. III(c). In "Antiquated Procedures or Bedrock Rights?", *supra* note 20 at *n*108, the authors note that: "Lee Carson, a public defender who represented many gang loitering defendants, reports that by at least 1995 every Chicago patrol officer in the districts in which the ordinance was enforced considered herself authorized to make gang loitering arrests. Telephone interview, July 29, 1998."

[298]See generally, J.H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: Wiley, 1966).

There is, then, no attempt to exclusively scientize or formalize the police knowledge here, with a focus instead on the common knowledge of individuals who are not police officers (witnesses, admitted street gang members, and informants), on the trade knowledges of police officers (based on their "observations"), and on the myriad informal and formal knowledges that may inform analyses of crime pattern information. This informal basis carries through to the criteria for defining membership in a criminal street gang, in which the General Order relies heavily on police officers' on-the-job knowledge – their discretionary insights – finding that establishing membership in a criminal street gang "must be substantiated by the arresting officer's experience and knowledge of the alleged offenders." This focus on what police officers already *know*, rather than on their witnessing of any particular event, carries through to a list of criteria which must corroborate the officer's "experience and knowledge." The list includes criteria such as the individual's admission of membership (there appears to be no temporal limit on this admission, such that admissions made years ago may still constitute sufficient corroboration), distinctive emblems, tattoos, or similar markings indicative of a specific criminal street gang, or the use of distinctive signals or symbols. Corroboration, though, can also be provided by a third party's allegation that the individual is a member of a specific gang, so long as that this party has provided reliable information to the Department in the past, or so long as that information can be independently corroborated – opening the door to a wide range of people who may have provided reliable information in the past (even if, as a whole, their information has not been generally reliable), or even to an unreliable source, so long as there is independent confirmation, which may be similarly unreliable (this fourth party need not have provided reliable information in the past at all). Finally, a police officer's "experience and knowledge" can be corroborated even without any of these factors, so long as the corroboration is "specific, documented and reliable." The only stringent restriction, it would seem, is that a police officer cannot establish membership in a gang solely based on an individual's "wearing clothing available for sale to the general public," though a literal reading may even suggest that wearing such clothing in a particular style, or wearing certain combinations of clothing, could fall outside that limitation.

Third, enforcement of the Ordinance is limited, according to the General Order, to areas designated by District Commanders – relying on a range of information including crime patterns,

citizen complaints, police observations, and the views of community members and local officials – which are "frequented by members of criminal street gangs" and which "because of their location, significantly affect the activities of law-abiding persons in the surrounding community."[299] These locations, however, are not released to the general public, so as to avoid a cat-and-mouse game of strategic loitering by gang members. This enforcement relies on a combination of police knowledges, ranging from the views of ordinary citizens, to the trade-type knowledges of police officers, and reliance on statistical information regarding crime patterns. Police expertise, then, is not contemplated as a free-standing expertise reminiscent of a Keynesian welfare state – rather, police expertise is contemplated as an ability to synthesize different forms of knowledge, without privileging one form over another. Crime pattern information, citizen complaints, police observation, and the views of local officials, community organizations, and "other persons within the community" are all included in a hodgepodge of expert and non-expert rationalities.

Fourth, those officers authorized to enforce the Ordinance are to "familiarize themselves" with police information regarding criminal street gang members.[300] This information, though, is not limited to individuals who have been arrested for gang activities, but includes "individuals the Department has concluded that it has probable cause to believe are members of criminal street gangs operating within the City." No additional information regarding what is required for probable cause is available – and, although this is a discretionary decision that is made by law enforcement, it is nearly impossible to contemplate a judicial review of such a decision, since these Gang Information files are not readily available for public consultation. One may, in short, be on the Gang Information File without having been arrested for gang activity, and one may never know that to be the case. Finally, although the Gang Information File must be revised on a semi-annual basis – to delete from the file, for instance, individuals who have left the City or who have died – it seems much more difficult to be removed from the list than to be placed on the list. Other than dying or leaving the City, an individual is to be removed from he file when they are "no longer members of criminal street gangs operating within the City" – this is

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[299] *General Order No. 92-4*, *supra* note 294, s. VI(A)(1).

[300] *Ibid.*, s. VI(c)(1).

a discretionary decision, and the only example the Order provides of an individual that has quit the Gang is one where the individual has not been arrested for a period of time. No detail is provided regarding what constitutes "a period of time," nor is any detail provided as to what would happen if the individual continues to be arrested, but for non-gang related activities. Again, this review is not open to the public.

Fifth, if an arrest is made under the Ordinance, the officer must complete a Report which relates all essential facts and supports the officer's decision that there is probable cause for an arrest; this Report "must contain articulable, specific reasons which indicate that the arrestee is in fact subject to arrest" under the Ordinance, and must "include the articulable, specific reasons why the member concluded that he had probable cause to believe that the arrestee was a member of a criminal street gang or was loitering in a group with a member of a criminal street gang."[301] What is most interesting is that this last provision undercuts, entirely, the restrictions placed in the earlier parts of the Order. Whereas the Order implies that officers will be relying heavily on the police department's Gang Information Files to determine who is a criminal street gang member, the Order then goes on to say that police officers shall enforce the Ordinance *either* when they witness two or more persons who appear in the File are loitering, *or* "when there is probable cause to believe that criminal street gang members are loitering in a designated area." What appears to be going on in the Order is that, although there is a great deal of talk about "designated areas," the Order does not limit the enforcement to those areas – rather, police officers are simply to "pay attention" to those areas. Furthermore, if an individual appears in the Gang Information File, s/he can be policed under the Ordinance in any area – it is only for individuals that do not appear in the File, but who nonetheless are believed to be criminal street gang members, that the designated area matters. The "designated area" provision, then, expands the police power, rather than restricting it (as is commonly asserted).

Finally, it would appear that, following an arrest, any individual arrested will now be part of the Gang Information File – with the police officer's probable cause now providing cause to arrest this individual in any location (designated or non-designated), with the individual now being listed in the Gang Information File.

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[301] *Ibid.*, s. VI(C)(3)(c).

Relying on the logic and knowledges of what is historically known as the state's police power is, then, what allows the City of Chicago to devise an Ordinance that is extremely different from the unconstitutionally broad loitering laws of years past. The City relies on the blurring of public and private space (referring instead to "the public way," and including in its scope privately owned areas to which the public has access, which is extremely broad in US law),[302] on administrative and trade knowledges of police officers rather than on a broad grant of discretion (though these specific trade knowledges may, in fact, do little to curtail that very discretion), on themes of a well-ordered society rather than of individual harms, and on governing spaces rather than on governing individual actions. Since the types of knowledges relied upon in police science are just as diverse as the types of spaces and activities to be governed, this allows the Chicago Ordinance to place itself apart from the boundaries of criminal and administrative law. The Ordinance relied on what appears to be the coercive power of the criminal law to enact sanctions, and to demonstrate that the City is acting on the problem through the use of the public police.[303] Yet, by arguing that the Ordinance does not, in fact, increase the scope of police discretion – the reader will similarly recall O'Malley's testimony which remarkably expands police officers' power while claiming to be narrowing and structuring their discretion – the Ordinance deploys administrative law as a defence to claims that the Ordinance overreaches, all the while using a range of everyday, expert (particularly quantitative), and trade knowledges of police officers to increase the range of activity they can police, and open up a host of ways in which these police can seek to enhance "the public welfare." And by providing this host of knowledges that can be relied upon, the Gang Loitering Ordinance and the corresponding General Order allow them to be played off each other, invoking everyday knowledges that can be elevated to expert conclusions, authorizing the use of trade knowledges through a process that seeks to scientize it, and relying on this synthesis of different forms of knowledge in order to

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[302]See eg. the cases discussed in J.N. Coffin, "The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property" (2000) 33 University of Michigan Journal of Law Reform 615.

[303]Yet, "although resembling crimes," such an ordinance is not strictly criminal, being instead enacted under the police power, and "the violation of a municipal ordinance constitutes a civil wrong against the municipality, even though the ordinance authorizes imprisonment as a penalty for violation ...." However, it would appear that despite this jurisdictional point, "The modern trend is away from the notion that municipal violations are civil offenses and in the direction of calling them criminal, especially when violation is punishable by imprisonment as an end in itself, and not simply as a method of collecting a fine." See *Substantive Criminal Law*, *supra* note 269 at §1.7(c).

deflect criticism regarding its scope.

VI. The Gang Congregation Ordinance in the Illinois Courts

From its initial adoption on June 17, 1992, to having been declared unconstitutional by the Illinois Supreme Court on December 18, 1995 – a total of 3½ years – approximately 42,000 individuals were arrested under the Gang Congregation Ordinance,[304] with numbers of arrests increasing sharply each year (from 5251 arrests in 1993 to 22056 arrests in 1995[305]). In addition to these 42000 arrests, another 43000 people were simply ordered to disperse, bringing the number of individuals directly policed by the ordinance to well over 80000 people.[306] As Professors Alschuler and Schulhofer sceptically argue, "[i]f the ordinance was indeed enforced by only a 'small group of officers,'"as asserted by the City of Chicago, "these officers did keep busy."[307]

In its adjudication in the Illinois courts following this massive number of arrests, thirteen different trial judges ruled on the 1992 Chicago Ordinance. Eleven of these judges found the Ordinance to be unconstitutional, while two judges upheld its constitutionality.[308] However, only one of these decisions, that of Cook County Circuit Court Judge Kowalski in *Chicago* v. *Youkhana*,[309] had an important doctrinal impact on the adjudication that would eventually lead to the US Supreme Court's decision in *Morales*. *Youkhana* dealt with fourteen defendants, all of whom were arrested for violating the Gang Congregation Ordinance. The defendants

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[304]As Alschuler and Schulhofer point out, there appears to be some discrepancy here. The Chicago Police Department has put the figure at 42967, while the Sun-Times reported 41740 (see "Antiquated Procedures or Bedrock Rights?", *supra* note 20 at 233). A City of Chicago press release puts the figure at over 42000: see Chicago Police Department, "Mayor Daley Hails Passage of Gang Loitering Ordinance" (16 February 2000), online: Chicago Police Department <http://w4.ci.chi.il.us./cp/AboutCPD/PressReleases/PressReleases00/PR000222.html> (last accessed: 19 November 2002).

[305]See figures cited in *Morales (U.S. Supreme Court)*, *supra* note 9 at 50 *n*7.

[306]"Antiquated Procedures or Bedrock Rights?", *supra* note 20 at 233.

[307]*Ibid.* at 234 [internal footnotes omitted].

[308]P.W. Poulos, "Chicago's Ban on Gang Loitering: Making Sense of Overbreadth in Loitering Laws" (1995) 83 California Law Review 379 at 384 *n*26.

[309]*Chicago* v. *Youkhana*, No. 93-MC1-293363 (Illinois Cir. Ct., 29 September 1993), Appendix E of Petition for a Writ of Certiorari to the Supreme Court of Illinois in *Chicago* v. *Morales* (filed 2 January 1998) [hereinafter *Youkhana (1993)*].

challenged the Ordinance as being unconstitutional on its face – such that *any* application of the Ordinance would be unconstitutional – and not simply that, in their particular case, the Ordinance was applied in an unconstitutional manner. Successful both at trial[310] and in the Appellate Court of Illinois,[311] the decision in *Youkhana* resulted in a reversal of the conviction of six other individuals originally convicted in *Chicago* v. *Morales*,[312] and a reversal of the conviction of fifty other individuals in *Chicago* v. *Ramsey*.[313] All the defendants in *Youkhana*, *Morales*, and *Ramsey* were then consolidated, 70 defendants in all, before the Supreme Court of Illinois in *Chicago* v. *Morales*.[314] The Supreme Court of Illinois found that the Ordinance was impermissibly vague and an arbitrary restriction on personal liberties, and therefore an unconstitutional violation of due process.[315] It is this decision that was later appealed to the US Supreme Court in *Chicago* v. *Morales*.

Since most of the doctrinal questions raised in the Illinois courts are later picked up by the US Supreme Court in its decision, this chapter does not engage with the specific analyses that the lower courts provided regarding the constitutionality of the ordinance. Questions of vagueness and overbreadth are dealt with in the next section, analysing the decision of the US Supreme Court. It is worth, however, highlighting one aspect of the lower court decisions at this time. In addition to constitutional questions of overbreadth and vagueness, both the trial and Court of Appeal judgments in *Youkhana* examined whether the Gang Congregation Ordinance is unconstitutional because it creates a *status offense*. These two earliest decisions in *Youkhana* find the Ordinance unconstitutional on this ground, independently of their other

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[310]See *ibid.*

[311]*Chicago* v. *Youkhana*, 277 Ill. App. 3d 101 (1995) [hereinafter *Youkhana (1995)*].

[312]*Chicago* v. *Morales*, No. 1-93-4039 (Illinois Ct. App., 29 December 1995), Appendix C of Petition for a Writ of Certiorari to the Supreme Court of Illinois in *Chicago* v. *Morales* (filed 2 January 1998) [hereinafter *Morales (1995)*].

[313]*Chicago* v. *Ramsey*, No. 1-93-4125 (Illinois Ct. App., 29 December 1995), Appendix D of Petition for a Writ of Certiorari to the Supreme Court of Illinois in *Chicago* v. *Morales* (filed 2 January 1998) [hereinafter *Ramsey (1995)*].

[314]*Chicago* v. *Morales*, 177 Ill. 2d 440 (Sup. Ct. 1997) [hereinafter *Morales (1997)*].

[315]Ibid. at 5a. In so doing, the Illinois Supreme Court did not reach the issues that the Ordinance creates a status offence, permits arrests without probably cause, or is overbroad.

findings that the Ordinance is unconstitutionally vague and overbroad. Yet, neither court engages in very much analysis of this question – both the Circuit and Appellate courts simply assert that the Gang Congregation Ordinance creates a status offense, with a cursory review of case law to support this proposition.[316] It is this very *lack* of analysis, I suggest, that is worth paying some attention to, since it provides some insight into the difficulties these courts faced in coming to terms with the Ordinance's reliance on the police power of the state, rather than a more individual-focused object of governance.

What analysis do the courts provide? Having determined that the Gang Congregation Ordinance is unconstitutionally vague, Judge Kowalski of the Cook County Circuit Court turns to whether the Ordinance also punishes one's *status*, and is thereby unconstitutional on that ground. According to Judge Kowalski, "the Gang Congregation Ordinance creates an irrebutable presumption that a person believed to be a gang member, if standing in a public place, will commit illegal activities, and therefore, his mere presence in a public place is a crime,"[317] and the fact that non-gang members can also be arrested "advocates guilt by mere association."[318] No opportunity is provided for an individual to explain his presence on the public street, "no matter how innocent" his presence may be, and it does not matter whether the individual is even aware of his status as an apparent gang member.[319] The same analysis is provided by the Court of Appeal. Since loitering remains legal in other instances,[320] "the Chicago ordinance prohibits gang members from loitering because they are gang members, not because they are loitering,"[321] and makes it "a crime to be a gang member in a public place."[322] Finally, whereas the Illinois

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[316]A similar concern motivates a recent law review article: M.D. Brookstein, "Why Should Gang Membership Be a "Status" Symbol? Status Crimes and City of Chicago v. Youkhana" (2000) 76 Chicago-Kent Law Review 703.

[317]*Youkhana (1993), supra* note 309 at 54a.

[318]*Ibid.* at 54a *n*6.

[319]Judge Kowalski places his analysis within a discussion of the 14th Amendment of the US Constitution. This is correct, though it should be noted that a finding of a status offense is initially predicated on a violation of the ban on cruel and unusual punishment. See *Robinson* v. *California*, 370 U.S. 660 (1962) [hereinafter *Robinson*].

[320]Individuals who are not in the presence of apparent gang members, and are not apparent gang members themselves, remain entitled to loiter.

[321]*Youkhana (1995), supra* note 311 at 113.

[322]*Ibid.* at 114.

Supreme Court does not determine whether the Gang Congregation Ordinance constitutes a status offense, it does appear to have some sympathy for this point – quoting from a trial judge that, under the Ordinance "[the police] will lock you up just for being who you are."[323]

What the courts do not engage in, however, is what *harm* the Ordinance is designed to address, and as such the *Youkhana* courts provide no real analysis of whether the Ordinance actually constitutes a status offense. Although classic status offenses of being a 'vagrant' were once found in every state in the US, and although it is suggested that their use was curtailed based on constitutional concerns,[324] relatively few courts have found actual vagrancy legislation to be unconstitutional.[325] And in fact, although there appears to be a contemporary move toward finding such statutes unconstitutional, courts have been split on a number of issues, particularly on whether the policing of vagrancy falls within the state's police power, and whether due process concerns are violated in the process.[326] Most interestingly, though, these statutes often appear to have given way to loitering statutes,[327] which have generally been challenged on overbreadth and vagueness.[328] The basic tenor of the findings of unconstitutionality on the basis of status, though – either with regard to vagrancy or loitering offenses – is that the underlying status or behaviour is harmless, or that the individual subject to policing has no choice but to conduct themselves in this manner.[329] Similarly, the US Supreme Court has focused on the volitional element when harmless status is being policed, and has not ruled on whether policing

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[323]*Morales (1997)*, *supra* note 314 at 461.

[324]P.H. Robinson, "Imputed Criminal Liability" (1984) 93 Yale Law Journal 609 at 627 *n*58 [hereinafter "Imputed Criminal Liability"].

[325]I.J. Schiffres, "Annotation: Validity of Vagrancy Statutes and Ordinances" (2001) 25 American Law Reports (3d) 792 at §2a [hereinafter "Validity of Vagrancy Statutes and Ordinances"].

[326]*Ibid.*

[327]*Ibid.*; "Imputed Criminal Liability", *supra* note 324 at 627-628; "Validity, Construction, and Application of Loitering Statutes and Ordinances", *supra* note 19 at §2a.

[328]"Validity, Construction, and Application of Loitering Statutes and Ordinances", *ibid.*

[329]See eg. *Pottinger* v. *Miami*, 810 F. Supp. 1551 at 1564 (S.D. Fla. 1992), dealing with the arrest of homeless individuals in Miami: "The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless ... This effect is no different from the vagrancy ordinances which courts struck because they punished "innocent victims of misfortune" and made a crime of being "unemployed, without funds, and in a public place"."

status as such is a violation of the US Constitution.[330]

Furthermore, despite being cited as support for the Ordinance's unconstitutionality, the decisions cited by the Cook County Circuit Court and the Appellate Court of Illinois do not lend clear support for asserting that the Ordinance creates a status offence. The decision in *Aptheker* v. *Secretary of State*, criminalizing passport applications by members of a Communist party, is a case about overbreadth and vagueness, not status.[331] It is true that *Robinson* v. *California*, a 1962 decision of the US Supreme Court,[332] struck down a California statute that criminalized drug addiction for criminalizing status. Yet, the *Robinson* decision turned on the Court's view that narcotics addiction is an *illness*, likening the California statute to a criminalization of other diseases, such as leprosy and mental illness, and going so far as to note that narcotics addiction can even, at times, be developed involuntarily.[333] The Supreme Court decision in *Powell* v. *Texas* is similarly inapposite, not only because it turns at essential points not only on whether alcoholism is a disease, but also because it does not deal with a status offense at all – the offense at issue was public drunkenness by anyone, and was not restricted to a class such as 'habitual inebriates.'[334]

The decision that is most apposite is that in *Farber* v. *Rochford*, a 1975 case which found an earlier Chicago loitering ordinance to be unconstitutional.[335] In *Farber*, the ordinance focused on habitual drunkards, known narcotic addicts, known prostitutes, or felons. The District Court found that the ordinance criminalized status, and was thereby unconstitutional – and was not persuaded that the ordinance was not a status offence because it only applied when these individuals were "congregating" or "loitering." As the appellate court in *Youkhana* asserts, this makes the decision in *Farber* particularly relevant to the Gang Congregation Ordinance, where

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[330]"Validity of Vagrancy Statutes and Ordinances", *supra* note 325 at §3a.

[331]*Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). The same is true of *Ricks* v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968). The Cook County Circuit Court seems to conflate this question of "status offences" with overbreadth and vagueness throughout the decision.

[332]*Robinson*, *supra* note 319.

[333]The Court also explicitly stated that its holding ought to be construed narrowly: *ibid.* at 667-668.

[334]*Powell* v. *Texas*, 392 U.S. 514 (1968).

[335]*Farber* v. *Rochford*, 407 F. Supp. 529 (N.D. Ill. 1975) [hereinafter *Farber*].

the offence is triggered by the status of being an apparent gang member.[336] Yet in *Farber*, the District Court is clear why it reaches its decision – it finds that "crime cannot be short-circuited by the arrest of those with a 'propensity' to crime," and that as such it was an unconstitutional attempt at a "shortcut."[337] The Gang Congregation Ordinance, in contrast, states that loitering by gang members effects a *present harm* – not that these individuals may commit crimes in the future, but that their present activity constitutes a disruption that the City seeks to regulate. To rely on *Farber*, then, would require the courts to develop some inquiry into the question of *harm* – an inquiry that neither the trial court nor the appellate court undertake.

In deciding that the gang congregation ordinance unconstitutionally creates a status offence, then, neither the trial nor appellate decisions in *Youkhana* provide sufficient analysis to back up their conclusion. There is, in particular, no discussion of "harm," and no attempt to determine how the question of harm fits within the prohibition on status offenses and the scope of the state's police power. But ignoring the possibility of a harm that exists, at the community level, through the loitering of apparent gang members, suggests an "acoustic separation"[338] that prevents the Illinois courts from imagining community harm as being beyond the individuality of its members,[339] thereby authorizing some knowledges of harm while de-authorizing others. Noting that the Ordinance does not target any particular conduct, the lower courts immediately determine that it must, then, be criminalizing status – as if *conduct* and *status* are the only two possible objects of governance, and not "harm" itself.

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[336]In so doing, however, the Court does not engage with the City's argument that the Gang Congregation Ordinance adds an additional "act" to the loitering, since an individual must choose to disobey a police order to move along: see *Youkhana (1995), supra* note 311 at 113.

[337]*Farber*, *supra* note 335 at 534.

[338]Although Dan-Cohen focuses on the acoustic separation between officials and the public, his article is particularly helpful when considering the normative wall separating legal and social scientific approaches: "Partial acoustic separation obtains whenever certain normative messages are more likely to register with one of the two groups than with the other": M. Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97 Harvard Law Review 625 at 634.

[339]It may be, as I suggest in this section, that the case-based premises of legal inquiry in fact preclude its ability to conceive of the social world in this way. For a general discussion that informs my suggestion, see J. Forrester, "If *p*, then what? Thinking in Cases" (1996) 9 History of the Human Sciences 1.

VII. Chicago v. Morales in the US Supreme Court

It is precisely this police power of the state that becomes the focus of the US Supreme Court in *Chicago* v. *Morales*.[340] This is never explicitly stated. The term "police power" only appears twice throughout the six separate opinions that were written, both times simply as references in Justice Thomas' dissenting judgment. This is perhaps because, as I argue in this discussion, the decision of the US Supreme Court in *Morales* does not so much turn on the discretion of state officials (though analyses of the decision have focused on precisely that question), but rather on constituting the *subject* of police science in the context of advanced liberal forms of governance. As such, I suggest that the Supreme Court decision in *Morales*, though finding the Chicago Ordinance unconstitutional, does not seek to limit the scope of the state's police power, but rather seeks to negotiate a line for the police power of the state that is in keeping with neoliberal forms of crime prevention, rationalities of prudentialism, individualized risk assessment, and the ability of individuals to make informed choices.

There are six separate written opinions in *Morales* that need to be parcelled out in order to fully demonstrate the tensions in this updating of police science within a neoliberal framework. The majority opinion consists of six judges agreeing that the Ordinance is void for vagueness, since it provides police with unlimited discretion in determining its enforcement, and finding the ordinance unconstitutional as a result.[341] In addition, three of these six judges also find that the Ordinance is void for vagueness because it provides inadequate notice to citizens regarding how they ought to conform their conduct to legal requirements, these three judges also finding that the freedom to loiter is a constitutionally protected liberty. The other three judges who joined the majority judgement – Justices O'Connor, Kennedy, and Breyer – each wrote an additional set of reasons focusing on the questions of vagueness and adequate notice. Finally, Justices Scalia, Thomas, and Rehnquist dissented from the majority decision, with opinions written by Scalia and Thomas JJ. both finding that loitering is not a constitutionally protected right and that the Ordinance is not void for vagueness.[342] In this analysis, I demonstrate that the

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[340]*Morales (U.S. Supreme Court)*, *supra* note 9.

[341]For a discussion, see "Leading Cases" (1999) 113 Harvard Law Review 276 [hereinafter "Leading Cases"].

[342]Justice Rehnquist joined with Justice Thomas. Justice Scalia's opinion also dissents from the majority's willingness to rely on facial challenges.

decisions of the majority and the plurality each work to fracture the terrain of the social, by calling for differential treatment of different groups and areas, and by distancing individuals from the state. The dissenting judgments, although carrying with them a broader notion of the polity, constitute the polity as enterprising and 'active,' engaging in calculated trade-offs, and focusing on the ability to participate in the public sphere as being the marker of good citizenship.

From this perspective, it becomes apparent that the notion of "community" and the community's welfare that is at the heart of police science is radically refigured in *Morales*. In its place, the Court broadly devolves the logic of police onto ordinary citizens, rather than being exercised by the state or more limited groups within civil society,[343] and updates that devolution to fit with a conception in which individuals, and not the state, are said to manage their own risks and to be responsible for their own individual safety.

The Majority

Although the majority decision argues that the Ordinance is unconstitutional because it provides "minimal guidelines to govern law enforcement,"[344] and although law review commentary has focused on whether this was the correct decision to reach,[345] unbridled police discretion does not actually appear to be its concern. Rather, Justice Stevens' opinion, instead of confronting the issue of police discretion, is concerned with how the City has implicitly imagined the polity in its exercise of the police power. As I develop in this section, the majority concern is that the police power as exercised in the ordinance applies to everyone across the city of Chicago – but it would appear to have no trouble with the police discretion the ordinance contemplates, so long as it would focus on particular groups, in particular spaces, at particular times. In sharp contrast to the constitutional decisions of the US Supreme Court in the 1960s focusing primarily on the enhancement of personal liberty and the restriction of state power – *particularly* where the individuals in question might be assumed to present a higher risk, or are

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[343]See "The Limits of the Sovereign State", *supra* note 259 at 465.

[344]See *Kolender* v. *Lawson*, 461 U.S. 352 at 358 (1983).

[345]See eg. "Leading Cases", *supra* note 341 at 281.

otherwise marginalised[346] – the decision in *Morales* is instead premised upon cleavages in the "social," fragmenting policing into a range of strategies dictated by risk factor and individual circumstance, and in so doing concentrates state power onto some individuals while diffusing state power as against others.

The majority decision begins by arguing that the ordinance does not provide minimal guidelines to govern law enforcement because police officers are to rely on people's "apparent purpose," without having to inquire into what their purpose may be. As a result, the ordinance reaches "a substantial amount of innocent conduct." Determining that this provides "absolute discretion to police officers," the Court determines that the ordinance runs afoul of the Constitution because it "entrusts lawmaking to the moment-to-moment judgement of the policeman on his beat."[347] The majority finds that the ordinance's limiting elements – that it does not apply to people who are moving along, to people who have an apparent purpose, or to those individuals who obey an officer's order to disperse – are insufficient to render the ordinance constitutional. That the ordinance does not apply to individuals who are moving along or who have an apparent purpose is found not to speak to "how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance," nor does it guide an officer's "inherently subjective" decision regarding whether an individual's purpose is "apparent." Similarly, that the ordinance only allows for an arrest once an order to disperse is disobeyed "does not provide any guidance to the officer deciding whether such an order should issue." Finally, the majority decision dismisses the limits that the police department's general order places on the ordinance's enforcement, since these administrative regulations could not constitute a defence for someone arrested for loitering in violation of their terms.

The Court's decision, however, becomes more complicated when responding to the ordinance's limit that an order to disperse can only be issued when an officer reasonably believes someone in the group is a criminal street gang member. This is where cracks also

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[346]See M.J. Horwitz, "The Warren Court and the Pursuit of Justice" (1993) 50 Washington & Lee Law Review. 5; D. Luban, "The Warren Court and the Concept of a Right" (1999) 34 Harvard Civil Rights-Civil Liberties Law Review 7; R. Weisberg, "Foreword: Criminal Procedure Doctrine: Some Versions Of The Skeptical" (1985) 76 Journal of Criminal Law & Criminology 832; P. Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" (1983) 72 Georgetown Law Journal 185.

[347]The majority's reliance on the Illinois Supreme Court appears, however, to be in *obiter*, since the US Supreme Court majority independently decides that the ordinance's subjective standard renders it void for vagueness.

appear in the majority's earlier conclusions regarding the insufficient limits on police discretion presented in the ordinance:

> It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. *That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members.* But this ordinance ... applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent ....[348]

There are, then, two possibilities expressed for when this ordinance might be constitutional: when combined with the ordinance's present limitation that one of the individuals in the group must reasonably be believed to be a gang member, either the ordinance would only apply to those with "an apparently harmful purpose or effect," or it would only apply to those individuals in the group who are "reasonably believed to be gang members."

It is not clear how, by being limited to those situations of an "apparently harmful purpose or effect," the ordinance would reduce police discretion. By continuing to rely on whether that purpose/effect is "apparently harmful," rather than even a slightly higher standard of "reasonably harmful" (which no member of the Court mentions as a possibility, despite the prevalence of this standard throughout criminal procedure), a police officer would continue to enjoy the same scope of discretion over which the majority expresses concern. The Court does not provide any guidelines as to how an "apparently harmful" standard should be interpreted, nor does it suggest that any such guidelines would be required. And it is not only that such a construction *might* be constitutional, which may explain the lack of guidelines the Court provides. Instead, with this added language, the Court determines that the ordinance would be constitutional, stating that such a limitation "would no doubt be sufficient."[349]

It is important to note that, in determining that the Ordinance as written runs afoul of this constitutional standard, the US Supreme Court implicitly rejects the City's claim that individuals who are apparently doing nothing have a harmful effect, regardless of their purpose. By stating

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[348] *Morales, supra* note 9 at 62-63 [emphasis added].

[349] *Ibid.* at 62.

that the ordinance would "no doubt be" constitutional if it included an explicit reference to an apparently harmful effect,[350] one can only infer that the Court does not agree with the City's argument regarding the innately harmful effects of loitering in these circumstances. Similarly, the Court makes no mention of the social science evidence before it documenting the possibility of meso-level, community harms. On this basis, one can begin to infer that what the US Supreme Court seems to be requiring are *individually discernible* harms, which must be *visible to an individual police officer* (the majority's perspective would not seem to allow for an attitudinal harm, nor for a harm that is based on how residents or those within the interpretive community *interpret* the doing of nothing), and which must also be both *geographically and temporally proximate* to the loitering that is taking place.

Aside from including an "apparently harmful" standard, however, the majority further suggests that the ordinance might possibly be rendered constitutional if it was limited to persons reasonably believed to be gang members, and not those associated with them. This should well limit the number of individuals who may be subject to policing under the ordinance. However, why this might render the ordinance constitutional is never stated. At one level, this finding is surprising, since limiting the ordinance to those reasonably believed to be gang members would not limit the ordinance from reaching "a substantial amount of innocent conduct" (unless one believes that individuals who can be reasonably believed to be gang members rarely engage in innocent conduct). Nor would this construction limit the vesting of "absolute discretion to police officers" when faced with these individuals, since it would continue to "[entrust] lawmaking to the moment-to-moment judgement of the policeman on his beat." What it would do, of course, is limit the scope of the ordinance to a targeted set of individuals[351] – but continuing to police them with the same vast grant of discretion that the majority believes to be otherwise unconstitutional.

Having dismissed the police department's general order as irrelevant to the constitutional analysis, the majority provides no guidance as to what factors might be relied upon by a police

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[350] *Ibid.*

[351] This assumes that there are reasonable bases for discerning apparent gang members from non-members. Part of the problem turns on the definition of "criminal street gang." The Court does not touch on this question – leaving open the question of whether, if an expansive definition of gangs is relied on, the limitations the Court proposes would remain sufficient.

officer in these encounters. It may be that the Court is simply refraining from indicating what precise guidelines would be required here. This is even more likely since the majority is only indicating that a more targeted ordinance would only *possibly* be constitutional. Yet in so doing, the Court has set a bright-line rule indicating that the acquaintances of apparent gang members cannot be included – and has refrained from positing a bright-line rule regarding the policing of apparent gang members themselves. Its stated concern is that "[f]riends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member,"[352] and not about the same fate occurring to apparent gang members.

This concern over the breadth of individuals that is subject to the ordinance indicates the Court's concern with an ordinance that is applicable against the whole polity – and suggests that there is less concern being expressed over the ambit of state power over unpopular groups. This stance is evident throughout the majority's decision. Although it makes no explicit suggestion that restricting the ordinance's scope geographically would preserve its constitutionality, the ordinance's general applicability seems foremost in the minds of the majority judges:

> *In any public place in the city of Chicago*, persons who stand or sit in the company of a gang member may be ordered to disperse ....[353]
>
> It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or *just to get a glimpse of Sammy Sosa leaving the ballpark* ....[354]
>
> *It applies to everyone in the city* who may remain in one place with one suspected gang member ....[355]
>
> That the police have adopted internal rules limiting their enforcement to *certain designated areas of the city* would not provide a defense to a loiterer who might be arrested elsewhere.[356]

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[352]*Morales*, *supra* note 9 at 63.

[353]*Ibid.* at 60 [emphasis added]

[354]*Ibid.* [emphasis added].

[355]*Ibid.* at 62-63 [emphasis added].

[356]*Ibid.* at 63 [emphasis added].

> [A] person who knowingly loitered with a well-known gang member *anywhere in the city* [could not] safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.[357]

While there is no doubt that restricting the ordinance geographically would limit the number of individuals potentially caught within its scope, the decision to limit the ordinance's scope in this way is telling. Rather than focusing on the content of policing involved, and the police officer's discretion in ay one encounter, the majority is most concerned with the possibility that the whole city could be subject to the ordinance.[358] This position effects some reversal of the assumptions of constitutional protection in the area of criminal procedure, which focus precisely on those who are being "targeted" and policed unequally. Instead, as Valverde states "there seems to be a sense that the city or the nation as a whole can't or shouldn't be policed: instead, there should be a rational selection of high risk spaces, high-risk people, or risk factors."[359] Nikolas Rose describes how this type of differentiation represents a strategy that permeates neoliberal practices of how to govern populations, focusing control practices on a set of marginal individuals who are deemed to be economically and socially unproductive, and criminalizing their daily practices:

> [T]he reverse of the responsibilizing moral imperatives of welfare reform is the construction and exclusion of a semi-permanent quasi-criminal population, seen as impervious to the demands of the new morality ... Exclusion itself is effectively criminalized, as crime control agencies hone in on those very violations that enable survival in the circuits of exclusion: petty theft, drinking alcohol in public, loitering, drugs and so forth ... Whilst the welfare budgets are cut, the penal budgets expand, and police, magistrates, parole officers and a host of others have become integral to the

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[357] *Ibid.* at 63-64 [emphasis added].

[358] The majority's concern with geography is further reflected in its analysis of the police department's general order. In determining that it does not sufficiently limit the ordinance's broad grant of discretion, the majority focuses exclusively on the geographic limitations it imposes. The general order, however, purports to limit police discretion in a wide range of areas relating to the ordinance's enforcement. While the majority could have clearly taken issue with whether those limitations are effective, its exclusive focus on geography is indicative of a broader concern the Court appears to have regarding the applicability of the ordinance across the city. Others have noted that Justice Stevens, who wrote the majority opinion, is from Chicago himself. See "Constitutional Principles at Loggerheads with Community Action", *supra* note 21 at 392.

[359] M. Valverde, "Targeted Governance and the Problem of Desire" (Risk and Morality Conference, Green College, University of British Columbia, May 2001) [unpublished].

management of exclusion, playing a key role in the government of insecurity.[360]

What emerges from the *Morales* Court is a configuration of state-community relations that fractures the social into separate segments to be policed differentially, while not authorizing any segments as constituting individual communities with the cohesion or ability required to determine the scope of governable harm. With respect to the "harm principle," the US Supreme Court states that either an apparently harmful effect, or an apparently harmful intent, would – when combined with the ordinance's existing requirement that one individual in the group be reasonably believed to be a gang member – be sufficient to render the ordinance constitutional. In allowing for an "apparently" harmful effect or intent, the Court grants wide discretion to police officers to enforce a similar ordinance. Yet, by finding this ordinance unconstitutional, the Court makes it apparent that the harms as expressed by residents, and as detailed in the social science evidence presented in the briefs canvassed above, are insufficient harms. These complaints, which may be difficult to detect without taking into account the social meaning that loitering may have in a particular community, do not give rise to legal "harms." This stems from the majority decision's purported focus on civil liberties, which leads it to neglect the possibility of a community harm by focusing solely on a temporally defined police-citizen encounter (which makes the majority's willingness to allow for this policing against certain individuals that much more surprising). Local communities, then, are not authorized to make decisions regarding harm, nor is harm a matter of scientific expertise. And yet, arming the police officers with relatively wide discretion to look for apparently harmful effects or intents, the Court then goes on to state its preference for an ordinance that would target certain people while excluding others, focusing solely on individuals who are reasonably believed to be gang members. The net effect is apparent: the local community is de-authorized from determining the harm to be policed, either through its own knowledge or through the invocation of social science evidence; police officers maintain wide discretion to enforce the ordinance; but the ordinance ought not to be enforced city-wide, but solely against individuals exhibiting certain profiles, likely conceived of as risk factors (or perhaps, given the Court's other statements, certain localities, but this is never explicitly stated). This, then, fractures the social sufficiently to target individual

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[360] *Powers of Freedom*, *supra* note 115 at 271-272.

groups instead of others, while not authorizing local knowledges of sub-state "communities."[361]

Of course, particularly in its later incarnation as a strategy to promote security (rather than the people's welfare more generally), the police power of the state often focused on one particular geographic area, or on licensing a particular trade, rather than relying on coercive state power against the polity as a whole. In that sense, the majority decision is not different from pre-liberal uses of the police power. An important shift, however, seems to occur in the Court's view regarding local determinations of harm, and its seemingly dismissive attitude toward the possibility of a "community harm." In its more classic incarnations, the police power of the state focusses precisely on local determinations and needs – although said to reside in the competence of individual states, it is delegated to local governments to ensure the welfare of their residents. Of course, in so doing the police power was often used in order to focus on particular area of the city, or on licensing one particular trade – but at other times this was often not the case, with the police power being relied on to govern the whole city, such as ordinances designed to prevent fires, to control vehicular traffic, or to restrict the movement of vagrants. Yet, the majority decision in *Morales* seems to elevate this targeted aspect of the police power into *a constitutional requirement* in this case, finding that this police power can only be used against particular individuals, or in those cases where a harmful effect or intent are apparent. And, as discussed above, this does little to reduce police discretion or restrict the power of the state; it simply requires that this exercise of authority be deployed against some rather than others.

This fracturing of the social beyond that which already existed in pre-liberal incarnations of the police power, going some ways toward *constitutionalizing* a practice of targeted governance, does some work toward updating the police power of the state within a neoliberal approach to crime and its prevention. This cleavage in the social, however, does not serve to authorize sub-state (or "community") groups to determine what constitutes harm, and similarly does not seek to integrate local knowledges or problems into this determination.

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[361] As Rose suggests, "[t]he excluded have no unity amongst themselves – like Marx's peasants, individualized like potatoes in a sack, incapable of forming themselves into a single class on the basis of a consciousness of their shared expropriation, they cannot represent themselves ....": *ibid.* at 258-259.

The Plurality

A clue to the rationale motivating the majority's reasoning may be found in the decision of three of these six judges (Justices Stevens, Souter and Ginsburg), who constitute the plurality judgement of the Court, in which tensions between the pre-liberal police power of the state and neoliberal logics of personal security comes to the fore even more strenuously. In addition to taking part in the majority decision, the plurality decision independently finds that the Ordinance is unconstitutional because loitering is a constitutionally protected liberty, and that the ordinance's vagueness, infringing upon that liberty through a criminal statute that contains no mens rea requirement,[362] is thereby unconstitutional.[363] Incorporating the views of the broader majority, this vagueness finding is based on both the concern of potentially arbitrary enforcement (as discussed in the majority judgement), as well as an independent finding[364] that the ordinance's vagueness stems from its inadequate notice to citizens regarding how they ought to conform their conduct to legal requirements.[365] Setting to one side the question of whether loitering is a constitutionally protected right and whether the ordinance requires *mens rea* – neither of which were the subject of very much analysis by the plurality – it is to this notice

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[362]This is not, in fact, a criminal statute, its violation being, at least technically, a civil wrong as against the municipality.

[363]Commentary on precisely what was central to the plurality opinion's determination that the ordinance is facially invalid is highly divergent. Though no commentators have explicitly noticed these differences, some state that the plurality opinion, while finding loitering to be a constitutionally protected liberty, is based on a freestanding vagueness analysis of the ordinance. Others state that, while the plurality finds that loitering is a constitutionally protected liberty, the plurality opinion is based on a finding that the ordinance is vague, and is unconstitutional because it is applied to a criminal statute with no mens rea, which itself constitutes a constitutional violation. And still others state that the plurality opinion's finding that loitering is a constitutionally protected liberty is central to its decision, asserting that the plurality opinion is based on a finding that the ordinance is unconstitutional because it is a vague ordinance, applied to a criminal statute with no mens rea requirement, *and* infringes on a constitutionally protected right (ie. loitering). Although my analysis in this chapter does not turn on which of these formulations most closely reflects the opinion of the plurality, I find that this last formulation is most in keeping with the text of the plurality decision in *Morales*, *supra* note 9 at 55. This last formulation is also the formulation that Justice Scalia believes reflects the plurality opinion's analysis, which he then sharply critiques in his dissenting opinion, stating that this formulation "is set forth with such assurance that one might suppose that it repeats some well-accepted formula in our jurisprudence: (Criminal law without *mens rea* requirement) + (infringement of constitutionally protected right) + (vagueness) = (entitlement to facial validation). There is no such formula; the plurality has made it up for this case, as the absence of any citation demonstrates." See *Morales*, *supra* note 9 at 83.

[364]The plurality is clear that this is an either-or test, and that both prongs do not need to be met: *ibid.* at 56.

[365]These three judges also find that the freedom to loiter is constitutionally protected as an attribute of personal liberty, but do not turn their decision on this point.

requirement that the plurality articulates that I now turn.[366]

I argue that the plurality decision's focus on "notice" highlights a central tension in applying the police power of the state in a neoliberal context, evidencing a conflict between the neoliberal resurrection of *homo prudens* with the police power's vision that social organization be run on principles of a "well-governed family."[367] In order to fully appreciate this distinction, the following two quotes – the first of Blackstone articulating the assumptions of the police power of the state, and the second an academic articulation of the assumptions of neoliberalism – are instructive:

> The last species of offenses which especially affect the Commonwealth are those against the public police or economy. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby *the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.*[368]

> [Within neo-liberal governance] individuals should take responsibility for the management of risks, as part of their rational and responsible existence ... Those risks that will receive their attention will be the ones they identify as significant problems ... And we can be sure of the efficiency of this process, because the success of the measures taken will be assessed in terms of the cost-benefit calculus of individuals who put their own resources and their own security on the line. *Prudentialism thus embodies a key technique for dealing with one of the central problems of liberal governmentalities – defining the minimal parameters of State activity consistent with an ordered, prosperous and peaceful nation.*[369]

These two quotes highlight radically different perspectives as to how individual subjects ought to manage their behaviour, the first based on being "decent, industrious and inoffensive"

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[366]On whether vagueness is in fact a two-prong test as the plurality states, see M.C. Steel, "Constitutional Law – The Vagueness Doctrine: Two-Part Test, or Two Conflicting Tests?" (2000) 35 Land & Water Law Review 255.

[367]On the role of governmentality in pre-liberal forms of governance, see A. Hunt, "Governing the City: Liberalism and Early Modern Modes of Governance" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 167.

[368]W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 2002) at 162 [emphasis added].

[369]P. O'Malley, "Risk and Responsibility" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 189 at 204 [internal footnotes omitted, emphasis added].

(a publicly established standard) and the second based instead on determining for oneself what course of action to take, and to manage one's behaviour not by taking as central the needs of others in the collectivity, but based on one's own needs and interests. In choosing to examine the constitutionality of this ordinance from the vantage point of "notice" – a choice that the plurality did not need to make, since it, along with the other majority judges, found the ordinance unconstitutional based on an independent prong of the vagueness doctrine – this brings to the fore this tension between the subject of police science, the neoliberal subject, and the community that each of these contemplates.

According to the plurality, the fair notice requirement is designed to enable "the ordinary citizen to conform his or her conduct to the law." Yet, with loitering defined in the ordinance as "to remain in any one place with no apparent purpose," the plurality's concern is that individuals could have no way of knowing whether they are demonstrating an "apparent purpose" or not, and as a result the plurality determines that fair notice is not provided to citizens, since "no standard of conduct is specified at all" in the ordinance.[370] That police officers must order the individuals to disperse before making an arrest under the ordinance is insufficient to constitute fair notice: since the order to disperse is only issued once the underlying conduct (ie. loitering) occurs, it does not constitute advance notice to citizens, and the order to disperse itself constitutes an impairment of the individual's liberty. That there are no sanctions attached at that point – an individual must then disobey the order to disperse before facing any sanction – does not change the analysis.[371] As articulated, then, there appear to be two elements to its "fair notice" analysis: a substantive question of whether the ordinance is sufficiently clear, and a temporal question of whether the police order to disperse, provided at the time of the impugned

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[370]*Morales*, *supra* note 9 at 60, quoting from *Coates* v. *Cincinnati*, 402 U.S. 611 (1971).

[371]In addition, the plurality suggests that the required dispersal order may itself be substantively vague, by not providing sufficient detail regarding how far the individuals must go and for how long they must leave the area. The plurality does not reach a conclusive determination in this regard: *Morales*, *ibid.* at 59-60. Yet the plurality goes on to suggest that, whether or not this part of the ordinance is unconstitutionally vague, its substantive vagueness "buttresses our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice ...." (at 60). Justice Scalia, finding that the question of substantive vagueness "scarcely requires a response" (at 90) since it would render a host of proclamations unconstitutional, is particularly critical of the plurality's attempt to invoke the ordinance's substantive vagueness without determining the potential unconstitutionality of this concern, finding that it "is full of mystery" and suspends "the metaphysical principle that nothing can confer what it does not possess" (at 91 n9).

conduct but without any sanction imposed, can serve as that notice.

On the substantive question of whether the ordinance is sufficiently clear, the plurality's main concern is that, by being based not on actual conduct but on "apparent" conduct (ie. whether a police officer determines that you have an "apparent purpose"), citizens are not provided with a standard of conduct to which they can conform. This position, however, makes no allowance that there may be local shared norms or meanings (or intersubjectivity) from which individuals can determine whether others will believe they have an apparent purpose.[372] In this sense, the plurality treats individuals as existing outside of a local interpretive community, positing instead a radically individualistic encounter between citizens and police officers, in which individuals do not know whether their conduct is "apparent" to others,[373] and thereby have insufficient notice as to what constitutes acceptable conduct. I do not here suggest that such shared norms always exist; instead, I more simply seek to highlight that this judgement works with a vision of social relations in which such norms are presumed to be absent. This sheds light on the plurality's background assumptions regarding individuals and communities, assumptions that are in keeping with the majority decision's fracturing of the social.[374]

However, it is the temporal aspect of the plurality's "fair notice" analysis – that a sanctionless police order to disperse does not satisfy a requirement of fair notice to citizens – that I want to pick up on in more detail. The net effect is that a dispersal order provided by a police officer comes too late in the process to constitute fair notice: "Such an order [to disperse] cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law."[375] Although the plurality tends to confound the analysis

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[372]This is likely what Justice Thomas has in mind when he states in his dissenting opinion that "[t]he plurality underestimates the intellectual capacity of the citizens of Chicago" and that "[p]ersons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct": *ibid.* at 114.

[373]This is most clearly articulated in Justice Kennedy's concurring judgement, in which he states that he shares similar concerns as the plurality on this question: *ibid.* at 69-70.

[374]This is not unexpected, stemming not only from the plurality's civil libertarianism but perhaps more directly from the rhetorical style in which the decision is framed, privileging hypothetical examples over an assessment of likely scenarios. Although also engaging in this hypothetical style, Justice Scalia's argument perhaps most vividly demonstrates the futility of deciding these cases based on hypotheticals, taking license with a scene from West Side Story: *ibid.* at 81-82.

[375]*Ibid.* at 59.

of fair notice with questions regarding the scope of police discretion,[376] the thrust of its analysis is that individual citizens must know, *before* coming into contact with police officers, whether they might be infringing the municipal ordinance. This analysis, then, does not envisage "fair notice" as simply providing individuals with the opportunity to conform to legal requirements before facing criminal sanctions, but also envisages the "fair notice" requirement as allowing an individual to avoid such contact with state officials altogether. It is the order to disperse, and not the criminal sanction, that the plurality is concerned with: "Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of *advance notice that will protect the putative loiterer from being ordered to disperse.*"[377] Although Justice Scalia's dissenting opinion later suggests that this is an incorrect statement of the law – what matters, he states, is "what [the ordinance] actually subjects to criminal penalty,"[378] and whether citizens are provided with fair notice of what conduct they must refrain from before being subject to that penalty – the plurality's decision works to attenuate a monitoring relationship between individuals and the state that was classically central to the exercise of the police power.

Recall that at issue here is not whether the ordinance is justifiable, whether it provides police officers with undue discretionary powers, or even whether the ordinance is clear as written. Rather, what is at issue in this aspect of the plurality decision is solely whether being told by police officers, on the street, to refrain from engaging in proscribed conduct (with no sanction yet attached) is sufficient to meet the constitutional fair notice requirement. It would seem that, by implicitly deciding that individuals must enjoy this notice before being told by police officers to move along, the plurality is here deciding that individuals must be provided with the capacity and knowledge to be able to *plan* their activities, rather than relying on an individual state official to guide them. In so doing, this judgement would constitutionalize a requirement that individuals must not only be provided with fair notice by the state of what is legal or illegal conduct (what I refer to as the substantive element of the plurality test), but that this notice must also be provided outside of any interaction with a state official at the time of the event.

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[376] *Ibid.* at 58.

[377] *Ibid.* at 59 [emphasis added].

[378] *Ibid.* at 90.

The plurality's concern over an individual's ability to plan – there appears to be no other plausible way to read this temporal element of its decision – reflects the neoliberal constitution of governable subjects as prudential, rational, and calculative. As others have studied in the context of accounting practices, governing the neoliberal subject, though initially achieved through external mechanisms, is maintained by encouraging the subject to actively consider the limits of their conduct, thereby governing at a distance through individual freedom.[379] The active subject of neoliberalism is encouraged to act prudentially, and is thereby "enjoined to bring the future into the present"[380] – having the state inform citizens, on the street, that their conduct is unacceptable is simply at loggerheads with an expectation that citizens will be able to *plan ahead*, and discourages the promotion of active citizenship. This ability to plan ahead is, of course, incommensurate with the classic police power – and what is most interesting about the plurality decision is not the negotiation of constitutional law and police powers, but the extension of the tensions between these two strategies that is evident in its concerns.

The Dissenting Opinions

The other concurring opinions reveal similar tensions to those of the majority and the plurality: Justices O'Connor and Breyer add that there are alternative means for the City of Chicago to reach its goal (even providing a sample definition of loitering that would be acceptable),[381] Justice Kennedy indicates his sympathy with the plurality's concerns over notice,[382] and Justice Breyer further adds that the grant of discretion to the police in this ordinance is unconstitutionally vague in every case, even if at times the officer would be

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[379]P. Miller & T. O'Leary, "Accounting and the Construction of the Governable Person" (1987) 12 Accounting, Organisations and Society 235.

[380]N. Rose, "Governing "Advanced" Liberal Democracies" in A. Barry, T. Osborne & N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 37 at 58.

[381]See *Morales*, *supra* note 9 at 67-68.

[382]Although Justice Kennedy indicates that, in some situations, a citizen might be prosecuted for disobeying a police order even if s/he does not know *why* the order was given, he is particularly concerned of the lack of notice in the context of the present ordinance. He is not clear, however, as to why this is the case: *ibid.* at 69-70.

applying the ordinance in a way that might be perfectly reasonable.[383] Yet in contrast to the majority and concurring judgements, it is the dissenting judges – Justices Scalia, Thomas, and Chief Justice Rehnquist, representing the most conservative members of the Court – who most explicitly take up the capacity of Chicago to rely on the police power of the state to deal with loitering. In so doing, the dissenting judgements shift the debate away from focusing on individual police encounters with citizens, instead focusing on the regulatory aspects of social life that have been prevalent throughout US history – demonstrating that American "freedom" has never been absolute, and has always been subject to State intervention. Yet, the constitution of the polity that the dissenters engage is not evidence of a desire for increased state involvement to enforce morality. Rather, these judges eschew talk of morality altogether, and instead focus on the ability of civil society to be enterprising, and the need for individuals to be active in the public sphere in order to be good citizens.

Justice Scalia's judgement finds the Court's conclusion that the ordinance is unconstitutional on its face to be inherently flawed. He finds that there is no constitutionally protected right to loiter and that the ordinance is not unconstitutionally vague, surviving both the doctrine's requirement of sufficient notice and requirement that police discretion be adequately structured.[384] Permeating Justice Scalia's judgement, however, is a more unified conception of the polity than that expressed by the Court. Whereas the majority judgement expressed concern over the undifferentiated applicability of the ordinance across the city,[385] Justice Scalia instead *relies* on this broader conception of the polity to support the ordinance's constitutionality. He begins his decision by relying on some of the most mundane forms of municipal regulation – traffic laws – and elevates these as evidence for a transcendent social contract:

> The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle. This infringed upon the 'freedom' of all citizens, but was not unconstitutional.

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[383]This is the basis of Justice Breyer's defence of a facial invalidation of the ordinance: *ibid.* at 71.

[384]See "Leading Cases", *supra* note 341.

[385]In so doing, the Court ignored both the general order and the social science data on policing.

> Similarly, the citizens of Chicago were once free to stand around and gawk at the scene of an accident. At some point Chicagoans discovered that this obstructed traffic and caused more accidents. They did not make the practice unlawful, but they did authorize police officers to order the crowd to disperse ... Again, this prophylactic measure infringed upon the 'freedom' of all citizens, but was not unconstitutional.
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> Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose ... Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they once enjoyed ...[386]

The political process theory that Justice Scalia invokes, which treats Chicago citizens as a unified entity for the purposes of legislative enactment, is sharply criticized by the plurality judgement. These three judges retort to Justice Scalia's claims by noting that when the Illinois speed limit was enacted, there were nearly 1.7 million citizens of Chicago, but only between 8000 and 80000 cars, concluding that "[i]t seems quite clear that it was pedestrians, rather than drivers, who were primarily responsible for Illinois' decision to impose a speed limit."[387] Of course, which interpretation is most accurate remains unimportant. It is the fact that the plurality engages this issue, despite it having no place in the judgement, that indicates to me that this premise is more of a dividing issue than other commentators have suggested. For his part, Justice Scalia takes issue with the Court's decision that the ordinance might be constitutional if it applied solely to apparent gang members:

> And if 'remaining in one place with no apparent purpose' is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be vague when applied to gang members *alone*. Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.[388]

This defence of a generalized "social" is, in Justice Scalia's decision, closely linked with a need for classically social forms of legislation, and is presented as otherwise too unwieldy to

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[386]*Morales*, *supra* note 9 at 74.

[387]*Ibid.* at 54. This broader question of governing drivers and pedestrians is given significant treatment in J. Simon, "Driving Governmentality: Automobile Accidents, Insurance and the Challenge to Social Order in the Inter-War Years, 1919-1941" (1998) 4 Connecticut Insurance Law Journal 521.

[388]*Morales*, *ibid.* at 97.

manage (and in need of management to begin with). This is apparent in the presentation of traffic laws that Justice Scalia relies upon in opening his judgement; it is similarly evident in his argument that some of the restrictions on police discretion that some members of the majority offer are simply unrealistic, since "[n]o modern urban society – and probably none since London got big enough to have sewers – could function under such a rule." By shifting the level of the analysis to that of the whole polity, Justice Scalia's judgement functions to counterpose the need for social regulation – as determined by members of society themselves, through some transcendent social contract – to a "free state of nature." Yet it would be mistaken to suggest that Justice Scalia adopts a Durkheimian tone; rather, his invocation of the "social" is not framed in a way that connotes a broad-based moral consensus, or any form of "collective conscience," but rather at a more mundane level of regulation, speaking of sewers, speed limits, and the flow of highway traffic. By rendering loitering into a problem to be regulated, rather than conceiving of it as a criminal offense – a position that, as I suggest above, is most consistent with the classic understandings of municipal ordinances, even when criminal penalties are attached – Justice Scalia is able to posit loitering as an activity to be proscribed despite being, in the present, harmless:

> So long as constitutionally guaranteed rights are not affected, and as long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden ... [Including acts that are] entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged.[389]

Central to Justice Scalia's judgement, then, are two interconnected elements: he posits the loitering ordinance as being reflective of a broader social contract, entered into freely and rationally by all Chicago citizens and applicable to all, while also presenting the policing of loiterers as simply a way to manage pedestrian traffic. And in so doing, Justice Scalia constitutes civil society as an enterprising, active entity that is able to make calculative judgements regarding what is best for itself, shifting the debate from one of morality to one of regulating risk, which he could not as easily suggest without invoking the *whole* polity as having decided to trade this freedom away. Justice Scalia's broader conception of the polity, then, works to

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[389] *Ibid.* at 98.

constitute a rational, calculative, and unified social, which can make rational decisions on its own behalf, and does not impose burdens on some over others (which may call for judicial intervention):

> The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.[390]
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> ... [The ordinance's applicability to a great deal of harmless behavior] would be invalidating if that harmless behavior were constitutionally protected against abridgement, such as speech or the practice of religion. Remaining in one place is *not* so protected, and so (as already discussed) it is up to the citizens of Chicago – not us – to decide whether the trade-off is worth it.[391]
>
> The citizens of Chicago have decided that depriving themselves of the freedom to 'hang out' with a gang member is necessary to eliminate pervasive gang crime and intimidation – and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.[392]

Justice Scalia's invocation of the whole polity is followed by Justice Thomas, whose opinion is also joined by Justices Scalia and Rehnquist. Justice Thomas begins by discussing the "citizens of Chicago," who in enacting the Ordinance "sensibly decided to return to basics,"[393] and criticizes the plurality as underestimating "the intellectual capacity of the citizens of Chicago." Yet, Justice Thomas does not rest his decision on those grounds – he focuses, rather, on the ways in which gangs "fill the daily lives of many of our poorest and most vulnerable citizens with terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes."[394] Relying on social science research and the

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[390] *Ibid.* at 74.

[391] *Ibid.* at 94.

[392] *Ibid.* at 98.

[393] *Ibid.* at 101, 114. This raises an important distinction between Justice Thomas' and Justice Scalia's opinions: whereas Justice Scalia focuses on the ordinance as innovative, Justice Thomas instead focuses on the ordinance as a return to basics, and devotes much of his judgement to historical analyses of loitering laws and the role of police officers in preserving the public peace.

[394] *Ibid.* at 99.

testimonies before Chicago City Council, Justice Thomas focuses his doctrinal analysis on arguments that the ordinance is not vague, that it provides adequate notice to citizens, that loitering is not a constitutionally protected right, and that the function of the police officer has historically been to keep the peace, thereby requiring an important grant of discretion to fulfill this role. But it is his conclusion that is most striking:

> Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so – the people who will have to live with the consequences of today's opinion do not live in our neighborhoods ... They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens.[395]

At first blush, this passage simply turns the majority position on its head. The majority does not determine that there is a constitutional right to loiter: instead, it finds that if the ordinance were targeted at the "two percent," it might well be constitutional. But it is Justice Thomas' other comments in this passage that are my focus here, in which he presents the residents of the inner city as struggling to "remain good citizens." It is relatively clear what Justice Thomas means when he states that loitering may affect other residents' freedom of movement, that it may affect their ability to earn a living, to shop, and so on. But in what sense does this become a question of *citizenship*? And perhaps most importantly, what precisely does Justice Thomas mean when he suggests that it may affect the ability of other residents to *remain* good citizens?

Although other possible explanations remain, the paragraph suggests that inner-city residents, if afraid to use the public streets, will face even greater social alienation, and will thereby not have the ability to fully participate in the broader polity. Good citizenship, for Justice Thomas, then hinges on a reinscription of the logics of public and private,[396] with citizenship closely linked to participation in the public sphere.[397] There is a welfarism to Justice Thomas' analysis, but rather than focus on the role of the state in assisting others in 'overcoming their desperate

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[395]*Ibid.* at 115 [internal citations omitted].

[396]See I.M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" in R. Beiner, ed., *Theorizing Citizenship* (Albany: SUNY Albany Press, 1995) 175.

[397]Justice Thomas seems to link the private sphere of the family with the capacity to fully participate in the public sphere, conceiving of inner-city residents as struggling to "raise their families," "earn a living," and "remain good citizens," thereby juxtaposing public against private: *Morales*, *supra* note 9 at 115.

situations,' this welfarism instead seeks to ensure that individual residents are provided with the conditions under which they can choose to do so themselves. The public sphere, then, with the ability to work and shop,[398] is posited as the solution to good citizenship – and loiterers presented as obstacles to an individual's ability to achieve that success through their own efforts. It is a welfarism that eschews "state dependency," focusing instead on individual effort and achievement, with the state simply providing the conditions to foster self-reliant forms of citizenship to individually transcend the problems facing one's community. Good citizenship, in short, occurs in the public sphere, and is to be fostered through active individuals that seek to transcend the common lot of their shared circumstances.

Taken together, the range of opinions in *Morales* highlight a range of tensions between this regulation of loitering and the subjects of advanced liberalism. The majority decision is concerned with the applicability of the ordinance to all members of the polity (rather than with police discretion), and its decision appears to constitutionalize a penchant for cleavages in the "social"; yet, the majority also refrains from authorizing local communities to determine the scope of harm, through common sense knowledges or the invocation of social science evidence on their behalf. The plurality judgement goes further along this road, and seeks to constitute individuals who enjoy a constitutional right to plan ahead, and act prudentially to stay within legal limits – and to constitutionalize their ability to do so without having to interact with state officials. And the dissenting judgments, one of which focuses on a macro conception of the polity and the other on a more meso-level conception of local neighbourhoods, adopt a similar tack – although staunchly maintaining the ability of the municipality to engage in the promotion of social order, the welfare that these judges find at the heart of the police power is one that focuses on activating individual citizens to ensure their own welfare, through their own resources, decision-making, and entrepreneurship.

VIII. Conclusion: Police Science as a Technology of Community Harm

With arrests having ceased when the Ordinance was declared unconstitutional, Chicago City Council has since amended the Ordinance, with public officials stating that they have now met

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[398] *Ibid.*

concerns regarding its constitutionality.[399] There are significant changes in the amended Ordinance, ranging from the preamble to the definition of loitering.[400] The preamble has increased in length by 50%, focusing on gangs' control over narcotic sales and illegal activity,[401] and invoking concrete acts of aggression, such as "unacceptably high rates of drive-by shootings." The Ordinance is now explicit about why individuals found *with* apparent gang members are precluded from loitering – they are "at risk from drive-by shootings and other gang-related violence," and "at risk to be recruited by gangs." Finally, the text of the Ordinance has been redrafted to specify that it only applies in locations specified by the police department, how far individuals must go when ordered to disperse (out of "sight and hearing" for three hours), and to define gang loitering as occurring when a reasonable person could believe that its purpose or effect is *to establish gang control over an area, to intimidate others from entering, or to conceal illegal activities.*[402]

These changes are direct responses to the constitutional challenges lodged against the original ordinance, and can well be interpreted as a small victory for civil liberties by displacing the ability of police officers to simply police the doing of "nothing." Yet, it would be premature to suggest that what has occurred is a marginalization of police science and its attendant logic. Rather, the new ordinance includes a significant innovation that may entail a reinvigoration of the police power of the state in tackling the question of community harm:

> The superintendent of police shall by written directive designate areas of the City in which the superintendent has determined that enforcement of this section is necessary because gang loitering has enabled criminal street gangs to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities. *Prior to making a determination under this subsection, the superintendent shall consult as he or she deems appropriate with persons who are knowledgeable about*

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[399]See discussion in E. Luna, "Constitutional Road Maps" (2000) 90 Journal of Criminal Law & Criminology 1125.

[400]City of Chicago, Amendment of Title 8, Chapter 4 of Municipal Code of Chicago by Repeal of Section 015 and Creation of New Sections 015 and 017 which Prohibit Loitering in Public Places by Criminal Street Gang Members ((16 February 2000), Journal of Proceedings of the City Council 25705-25711 (16 February 2000) [hereinafter Ordinance (16 February 2000)].

[401]In addition to the general loitering ordinance, there is now also a separate section on "narcotics-related loitering." *Ibid.*, s. 8-4-017.

[402]The revised ordinance also specifies that it does not apply to constitutionally protected "collective advocacy activities": *ibid.*, s.1(c).

> *the effects of gang activity in areas in which the ordinance may be enforced. Such persons may include, but need not be limited to, members of the department of police with special training or experience related to criminal street gangs; other personnel of that department with particular knowledge of gang activities in the proposed designated area; elected and appointed officials of the area; community-based organizations; and participants in the Chicago Alternative Policing Strategy who are familiar with the area.* The superintendent shall develop and implement procedures for the periodic review and update of designations made under this subsection.

Although remaining at the discretion of the police superintendent, this element of the ordinance has been hailed as integrating community participation in a way that extends beyond conventional police-community partnerships. The police superintendent has stated that because of this element of the ordinance, "[t]he community empowers us, the police department, to enforce this law."[403] One alderman has suggested that, because it incorporates community participation in designating which areas have problems that need policing, this is "a much more concrete way of community participation," and that it takes "community policing to a new level."[404] And in justifying the revised ordinance, counsel for the City of Chicago seems to have ignored the discretionary aspect of the consultative process outlined above, and instead argues that this process will broaden the very knowledges on which policing is based, and will shift this from a state-enterprise to a community-based one:

> And that section goes on to say that this will be a consultative, community-driven process. It won't simply be someone in police headquarters looking at statistics, but it will be consultation with community groups, elected officials, community-based police enforcement in order to identify the areas in which the community identifies a problem created by gangs taking over public spaces. Kind of classic "take back the streets" approach *driven by the community itself.*[405]

Since none of the judicial decisions provide any indication that this community partnership would help save the ordinance's constitutionality, this is a curious addition to the ordinance. Of course, this may be pure Chicago politics – the rhetoric of "community" may be an attempt to

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[403] *Committee on Police and Fire Testimonies (2 February 2000)*, *supra* note 19 at 7.

[404] *Ibid.* at 45.

[405] *Ibid.* at 76. Not everyone subscribed to this view. Professor Schulhofer, for instance, argued that the ordinance "is the exact opposite of what community policing advocates and police professionals have been recommending for the past 15 years" (*ibid.* at 187).

mask what amounts to a new tool for the Chicago police force, particularly since the ordinance had been decried as having a disparate impact on minority residents. And it may be that, given the success of Chicago's community policing program, this revision to the ordinance seeks to firmly ground the ordinance within this paradigm. From the perspective of the police powers of the state, though, this invocation of community is particularly interesting. With some displacement of technical expertise in favour of the everyday experience of community members and elected officials,[406] and the experiential on-the-job knowledge of elected officials and police officers, the revised ordinance has become increasingly similar to the conventional police powers of the state that rarely relied on formally taught expertise. And yet, whereas the conventional police power specifically positioned the state as the bearer of the community's welfare – the police power is referred to as the very hallmark of statecraft and inseparable from sovereignty – the revised ordinance seems to effect an erasure of that position by calling upon the *community* as the legitimating source of the ordinance. A policing strategy that could otherwise be framed as a heavy-handed response is instead, through the interposition of the community, conceived of in entirely different terms:

> You mentioned the word sweeps. We do not conduct sweeps, we do not adhere to sweeps, we do not condone sweeps. This is a different police department. We are into community policing, we are into partnerships, and that is what it's about (Police Superintendent Hilliard, February 2, 2000).[407]

Of course, although the ordinance *invokes* the community, defining that community remains a thorny problem. Over two days of hearings in February 2000, a wide range of community members came to speak regarding proposed revisions to the ordinance, representing a much broader set of residents than spoke out at the 1992 hearings. Not surprisingly, there was a significant amount of dissent, making it evident that the question will remain: which individuals will be authorized to speak in the name of "the" community, and be able to define the harms that need to be policed?[408] But what has happened is sure to have palpable effects on the development

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[406]As I discuss here, legally there has been no displacement of expertise, though there is a general perception that this has occurred in the revised ordinance.

[407]*Committee on Police and Fire Testimonies (2 February 2000)*, *supra* note 19 at 18-19.

[408]Some of the testimonies demonstrate an explicit differentiation between community groups. Take, for instance,

of the preventive criminal justice state. With "community" having taken on different roles throughout the sociolegal history of the Chicago ordinance – as the initial locus of the harm to be defined, as both the victim of law's failures and the source of law's grandeur, as the conceptual territory to be policed and the space of neoliberal subjects who can effect their own policing in cooperation with the state, and most lately as the source of expertise on harm and policing – it is clear that governing crime through community is a necessarily unstable technology of government.

The tensions and struggles over social order that are articulated throughout this analysis are evidence of the often circuitous ways in which community is deployed, and the effects its invocation may have on legal analysis and development. Whereas the previous chapter demonstrates the ways in which "community" is deployed in the context of Megan's Law – in which the community is both imagined and constituted in relation to a particular view of risk management and an educative role for the state – the Gang Congregation Ordinance instead imagines community through a conception of "harm" and seeks to retain policing in the hands of the state while relying on the community in various ways.

Through its ambiguity, the concept of "community" provides a lens from which we can detect shifts in conventional governmental strategies, such as those evident in the present analysis of community, harm, and the police powers of the state, and attendant shifts in the expert, professional, and lay knowledges on which the ordinance is based. This may well be its power, since the ambiguity of community, after all, is what allows any particular invocation of it to carry enormous rhetorical force.[409] The question of governable harm in this chapter raises implications for other questions: how we see ourselves as citizens, how the non-regulation of public space is said to be destructive of community, how public space is relied upon to

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Alderman Burnett, who articulates the fear that residents in his ward experience. He then goes on to make sure it is clear just what class of residents he is speaking of: "And these people – and I am talking about – I'm not talking about the Cabrini Green area or the Henry Horner the public housing areas. I am talking about areas where people pay for their homes. I am talking about homeowners. *Decent people are concerned about this issue*, and they are tired of it, and they are fed up" (*ibid.* at 22-23 [emphasis added]).

[409]As Valverde concludes, "Abstractions do their work precisely because they are multivocal, fuzzy, and full of conflicting connotations": see M. Valverde, "Addendum" in M. Valverde, R. Levi, C. Shearing, M. Condon & P. O'Malley, *Democracy in Governance: A Socio-Legal Framework* (Ottawa: Law Commission of Canada, 1999) 56 at 64.

responsibilize individual citizens, and the rhetorical processes of community building. As such, the present history demonstrates the importance of a sociology of legal knowledge – with an attention to detail in the everyday, in an effort to document the tensions, contradictions, nuances and assumptions that lie at the heart of what Carol Steiker calls "the preventive state."[410]

[410]C.S. Steiker, "Foreword: The Limits of the Preventive State" (1998) 88 Journal of Criminal Law & Criminology 771.

Chapter Four

Gated Communities in Law's Gaze: Material Forms and the Production of a Social Body in Legal Adjudication

I. Introduction

Whereas both Megan's Law and the Gang Congregation Ordinance reflect state-sponsored invocations of "community" to manage the risk of crime, this third case study focuses instead on gated communities, which seek to manage crime risks by privately reconfiguring the urban landscape.[1] Prevalent in Africa, South America, and Europe,[2] gated private enclaves are being developed at a rapid rate throughout the US,[3] with Canadian developers now following suit.[4] Yet, while gated communities are often invoked as a cultural trope for urban inequality and lamenting class-based fortifications against crime, there has been surprisingly little academic research on these developments and their implications.

Although gated communities are imbued with specific cultural connotations – invoked by residents, non-residents, property developers and municipalities – there is no body of law said to be unique to gated communities. This is because gated communities are not conceived of as a distinct legal form. Rather, these developments are understood as simply one example of residential community associations, which generally privatize elements of their governance and

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[1]The concept of "landscape" denotes both material geography and a way of representing the world. This emerges as a key concept in the critical geography literature, which focuses on the production of social space. For more on "landscape" in sociolegal studies, see N. Blomley, "Landscapes of Property" (1998) 32 Law & Society Review 567 [hereinafter "Landscapes of Property"].

[2]See the papers presented at *Gated Communities as a Global Phenomenon* (1999), online: Johannes Gutenberg-University, Mainz <http://www.geo.uni-mainz.de/glasze/netz_gc_e.html> (last accessed: 21 March 2002).

[3]E.J. Blakely & M.G. Snyder, *Fortress America: Gated Communities in the United States* (Washington, D.C.: Brookings Institution, 1997) [hereinafter *Fortress America*].

[4]In the Toronto area alone, see eg. "Gated Community Offers Quiet, Privacy" *The Toronto Star* (12 October 2002) P4; P. Kuitenbrouwer, "Do Fence Me In: 'Florida-Style' Gated Community Peddles Peace of Mind Amid Toronto-Style Crime Rate" *The National Post* (23 September 2000) H1; A. Lahey, "Marketing the Leisure Life: Adult Lifestyle Communities are Booming as Seniors Embrace a Promised Life of Ease" *Marketing* 103:32 (24 August 1998) 1; E. Carey, "Metro Joins Trend to Guarded Communities: But Critics Call Gated Enclaves Further Proof of Social Breakdown" *The Toronto Star* (15 June 1997) A1; J. Spears, "Welcome's Guarded at First Gate Community" *The Toronto Star* (7 May 1996) D4; B. Dexter, "York Region Looks for Policy on Luxury Gated Communities" (30 November 1995) NY5; J. Lorinc, "Trespassers will be Prosecuted: Gated Communities Have Arrived in Toronto, and Politicians Aren't Doing Anything About It" *Toronto Life* 30:13 (September 1996) 47.

are run by homeowner associations.[5] The proliferation of these community associations[6] is often linked with a broad-based "secession of the successful,"[7] now widespread in many US states, which is said to include the privatization of city streets, reliance on private police, detailed building codes designed to ensure conformity and protect property values, and membership in local homeowner associations.[8] Except when examining local variations determined by statute,[9] this dominant analytical frame has led legal scholars interested in gated communities to examine homeowners associations more generally, with their analyses consistently extending beyond gated communities to include an analysis of conventional (vertical) condominiums, privately governed subdivisions, housing cooperatives, or even mobile home parks.[10]

Any cultural specificity of gated communities is similarly ignored in the criminological literature, which reduces gated communities to the element of private security they often deploy (or at least are imagined to deploy). As a result, the criminological literature rarely distinguishes between gated communities and shopping malls, condominiums, or even the subtle forms of social control deployed by Disney World.[11] Rather than emphasizing the material form or cultural connotation of each, the criminological literature centers on the logic of policing that is said to be common to all of these – namely, an insurance-driven avoidance of "loss" – that is then contrasted with the conventional organization of public police forces around the

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[5]However, these associations are themselves conceived of as *sui generis* by some commentators: see e.g. S. Siegel, "The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama" (1998) 6 William & Mary Bill of Rights Journal 461 [hereinafter "The Constitution and Private Government"].

[6]These are often referred to as residential private governments or common-interest communities.

[7]R.B. Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (New York: Knopf, 1991).

[8]See E. McKenzie, *Privatopia: Homeowners Associations and the Rise of Residential Private Government* (New Haven: Yale University Press, 1994) at 1-28 [hereinafter *Privatopia*]; G.W. Liebmann, "The New American Local Government" (2002) 34 Urban Lawyer 93 at 118-120.

[9]Many jurisdictions, for instance, have specific statutes to deal with condominiums specifically.

[10]See U. Reichman, "Residential Private Governments: An Introductory Survey" (1976) 43 University of Chicago Law Review 253; *Fortress America*, *supra* note 3 at 20-28; *Privatopia*, *supra* note 8.

[11]See C.D. Shearing & P.C. Stenning, "From the Panopticon to Disney World: The Development of Discipline" in A.N. Doob & E.L. Greenspan, eds., *Perspectives in Criminal Law: Essays in Honour of John LL.J. Edwards* (Aurora, ON: Canada Law Book, 1985) 335.

enforcement of moral codes.[12] Underlying this literature is the suggestion that mass private property,[13] whether it be instantiated as a residential community or as a theme park, is closely linked with a reorientation of policing, and that the forms of social control these deploy need to be understood as an alternative vision of security itself.[14]

In both the legal and criminological literatures, then, the material form of the gated community is not conceived of as an entity to be analyzed as such. This stands in sharp contrast to the anthropological and urban studies literatures, which tend to emphasize the importance of understanding specific material forms, and are concerned with the experiential dimension of gated communities and their cultural effects in the built environment. Later in this chapter, I return to some of this literature in more detail, and thereby provide a foundation for understanding gated communities as both an architectural and cultural form. In foregrounding the approach taken by these literatures, I further highlight recent work on the social production of space, much of which stems from research in critical geography. In so doing, this chapter provides an analytical basis for conceiving of the social production of a specific space in law, namely the urban gated community – which I present here as an "assemblage" of the material elements of the gates and walls themselves, their placement in the urban setting, and their cultural connotations when used to achieve security from outsiders without sacrificing the conveniences, relations, and opportunities offered by life outside the gate.[15]

My point is not that scholars in law or criminology have it wrong. As I have elaborated elsewhere, I begin with the premise that legal authorities (as with all other knowledge practices)

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[12]Of course, this is not a rigid binary. See generally C.D. Shearing, "The Relation Between Public and Private Policing" in M. Tonry & N. Morris, eds., *Modern Policing* (Chicago: University of Chicago Press, 1992) 399.

[13]C.D. Shearing & P.C. Stenning, "Modern Private Security: Its Growth and Implications" (1981) 3 Crime and Justice 193 [hereinafter "Modern Private Security"]; T. Jones & T. Newburn, "Urban Change and Policing: Mass Private Property Re-Considered" (1999) 7 European Journal on Criminal Policy and Research 225; D.A. Sklansky, "The Private Police" (1999) 46 UCLA Law Review 1165 at 1221-1225 [hereinafter "The Private Police"].

[14]See eg. D.H. Bayley & C.D. Shearing, "The Future of Policing" (1996) 30 Law & Society Review 585 [hereinafter "Future of Policing"]; D.H. Bayley & C.D. Shearing, *The New Structure of Policing: Description, Conceptualization and Research Agenda* (Washington, DC: National Institute of Justice, 2001) [hereinafter *New Structure of Policing*].

[15]On the concept of the "assemblage," see K.D. Haggerty & R.V. Ericson, "The Surveillant Assemblage" (2000) 51 British Journal of Sociology 605 [hereinafter "Surveillant Assemblage"].

are engaged in a process of constructing the world,[16] while not following the conventional law and society trope that, as a result, these constructions are somehow unimportant, or less real, than the truth that lies "out there."[17] These representations are themselves, as Paul Rabinow states, "social facts."[18] In determining the rights and responsibilities of gated communities, it makes a great deal of sense for legal scholars to be concerned with their private nature, rather than with the cultural effects they present; similarly, the criminological focus on mass private property has opened up research possibilities into the governance of security that may have been otherwise unthinkable. My point is more modestly that juxtaposing different disciplinary frames can generate insights into the constitutive elements of knowledge production in each discipline.[19] Unlike conventional law and society scholarship, then, I do not seek to demonstrate the 'true' (or positivist) reality to which law *ought* to be attuned. As Annelise Riles argues, "any attempt to transform the material from concrete to abstract would fail to achieve the effect we expect of our analyses in the first place."[20] I similarly suggest that the goal is not to somehow capture the truth of the material/cultural form in the normative universe of adjudication.

What I find in this chapter is that, by conflating gated communities with other private developments, research to date has overlooked a consistent *resistance* to the borders presented

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[16]R. Levi, "Erasure as a Knowledge Practice in Criminal Law" (Law and Society Association Annual Meeting, Vancouver, 30 May 2002). As I argue in this paper, to focus on the *content* of what law forgets, or erases, is an important move; but as marshaled by scholars in the tradition of critical legal studies, these arguments suggest that, if the erasure is remedied, "Justice" would be achieved. As an empirical matter, I argue instead that it is more useful to investigate the *forms* that erasure takes in law, and the different effects that are indicated by each.

[17]This is often an implicit presumption, however, of much law and society research – which often suggests that, if but law relied on sociological/economic/anthropological evidence, it would generate an account that is more "true" (rather than generating an account that would itself be reflective of that discipline's epistemological and normative presumptions). For a critique of this approach in law and anthropology, see A. Riles, "Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity" (1994) University of Illinois Law Review 597 [hereinafter "Representing In-Between"].

[18]P. Rabinow, "Representations are Social Facts: Modernity and Post-Modernity in Anthropology" in P. Rabinow, ed., *Essays on the Anthropology of Reason* (Princeton: Princeton University Press, 1998) 28 [hereinafter "Representations are Social Facts"].

[19]"Representing In-Between", *supra* note 17.

[20]See A. Riles, "Infinity Within the Brackets" (1998) 25 American Ethnologist 378 at 393 [hereinafter "Infinity Within the Brackets"]. Riles is instead interested in the discursive translations that each field marshals in producing knowledges, and the ability to move back and forth between these to produce an account of knowledge productions themselves.

by gated communities and their logic of excluding non-residents while retaining access to the world outside the gate. This finding lies in sharp contrast to the tendency of academic research on gated communities and urban life, much of which presumes that the trend toward privatized, 'contractual communities,'[21] or "privatopias,"[22] marches on unabated – and then laments the death of public space, increased spatial and social fragmentation, hyper-capitalism, and the specter of fortified communities leaving little but wasteland outside their walls.[23] This literature has at times suggested that law is itself complicit in this process, either by ignoring the complex ways in which space is negotiated in everyday life,[24] or by elevating private property rights above other social concerns.[25] Richard Schragger, for instance, draws on these concerns to conclude that, among other social ills, judicial deference to locally-defined communities of this sort can lead to "a metropolitan region of spatially differentiated individuals, segregated into racial and socioeconomic enclaves that are justified as the product of individual choice and community self-determination."[26]

As a result, my emphasis in this chapter is in demonstrating the manner in which courts, faced with a new, material form in the social environment – one which, as the anthropological literature suggests, is itself imbued with important cultural effects – are in fact resisting the cultural logic that gated communities (re)present. By relying on literature that highlights the

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[21]N. Rose, *Powers of Freedom: Reframing Political Thought* (New York: Cambridge University Press, 1999) at 247-250 [hereinafter *Powers of Freedom*]; C.D. Shearing, "Reinventing Policing: Policing as Governance" in O. Marenin, ed., *Policing Change: Changing Police* (New York: Garland, 1995) 285.

[22]*Privatopia*, *supra* note 8 at 97.

[23]See eg. M. Sorkin, ed., *Variations on a Theme Park: Scenes From the New American City and the End of Public Space* (New York: Hill and Wang, 1992) [hereinafter *Variations on a Theme Park*]; S. Zukin, *Landscapes of Power: From Detroit to Disney World* (Berkeley: University of California Press, 1991); M. Davis, *City of Quartz: Excavating the Future in Los Angeles* (London: Verso, 1990) [hereinafter *City of Quartz*]; M. Davis, *Ecology of Fear: Los Angeles and the Imagination of Disaster* (New York: Vintage, 1999); E.W. Soja, *Thirdspace: Journeys to Los Angeles and Other Real-and-Imagined Places* (Cambridge, MA: Blackwell, 1996); M. Dear, "Los Angeles and the Chicago School: Invitation to a Debate" (2002) 1 City and Community 5 [hereinafter "Los Angeles and the Chicago School"].

[24]For a detailed account, see "Boundaries of Race", *infra* note 64.

[25]See eg. R.T. Ford, "Law's Territory (A History of Jurisdiction)" (1999) 97 Michigan Law Review 843 [hereinafter "Law's Territory"]; *City Making*, *infra* note 56.

[26]R.C. Schragger, "The Limits of Localism" (2001) 100 Michigan Law Review 371 at 429 [hereinafter "Limits of Localism"].

social construction of space and the built environment, I have here isolated the case law that deals with the borders of gated communities from other decisions involving private residential forms. Whereas these cases are often overshadowed by decisions involving condominiums, shopping malls, or even company-owned towns, isolating these cases in the present analysis turns out to reveal a very interesting pattern: in contrast to what is suggested by the literature, courts dealing with the boundaries of gated communities do recognize gated communities as distinct spatial forms, and are highly suspicious of the localism that residents or homeowners associations in these developments seek to assert. Unlike the deference courts seem to offer to municipal borders and to the internal rules of homeowners associations, drawn upon at length by commentators to bolster claims of an emerging "privatopia" and the death of public space,[27] courts negotiating the borders of gated communities consistently intervene to articulate a vision of community that is distinct from that instantiated by the gate. As an empirical matter, *in every case* that deals with the borders of gated communities and relations between residents and non-residents, courts have put forward a vision of community that is highly suspicious of localized, neofeudal, choice-based bubbles of sovereignty.[28]

In isolating the cases dealing with gated communities, however, a caveat is in order. I certainly don't suggest that restricting my analysis to these cases yields a law of gated communities that can be gleaned from these decisions. The law regulating gated communities, instead, draws significantly on cases involving other forms, such as condominiums and shopping malls, and is greatly influenced by property law, municipal zoning law, and contract law. Rather, my attention is on the representations of gated communities that courts locate within law's gaze, and I thereby situate law's gaze – rather than gated communities themselves – as my object of study. As a result, while bringing together cases on gated communities may not provide a complete understanding of the black-letter law on point, it does provide sharper insight into *law's vision* of these developments, and the discursive ways in which the borders of these

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[27]See eg. *ibid.*; J. Frug, "Decentering Decentralization" (1993) 60 University of Chicago Law Review 253; "Our Localism (Part I)", *infra* note 64; "Our Localism (Part II)", *infra* note 64; J.C. Williams, "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law" (1986) Wisconsin Law Review 83; "Boundaries of Race", *infra* note 64; S.D. Cashin, "Building Community in the Twenty-First Century: A Post-Integrationist Vision for the American Metropolis" (2000) 98 Michigan Law Review 1704.

[28]G.S. Rigakos & D.R. Greener, "Bubbles of Governance: Private Policing and the Law in Canada" (2000) 15 Canadian Journal of Law and Society 1; "Future of Policing", *supra* note 14.

communities are invoked, contested, and negotiated by courts.[29]

Finally, toward the end of this chapter I contextualize these cases by drawing on Mary Poovey's research on the making of a "social body," and what she calls "the circulation of ideas, images, and collectivizing representations through both institutional and extrainstitutional venues."[30] Although I seek to rely on her term as a heuristic device, Poovey's research on 19th century British cultural formation provides the context for understanding judicial resistance to the neofeudal vision of gated communities. The decentralized vision of sovereignty and bounded relations that gated communities invoke is at odds with the more homogenous, less localized view of relations that the courts present in response. The boundaries to outsiders that gated communities instantiate appear, in Poovey's terms, to be "like undigestible bits of bone" in "the craw of modernity,"[31] with courts working to establish a vision in which "everyone belongs to one 'social body'."[32] Most interestingly, as we will see, the judicial view of community in these cases takes on a further wrinkle here. According to the logics of their decisions, these courts *might* allow gated communities to enforce rigid boundaries against outsiders in a limited set of circumstances – yet a close reading of these cases suggests that these are circumstances which entail an all-or-nothing separation from the social body entirely.

II. Gates and Privatopia

In the past few years, researchers have documented, in significant detail, the proliferation of gated communities in the United States. In their work on *Fortress America*, Blakely and Snyder discuss the trend toward gating in both higher-end as well as middle-class housing communities – and estimate that, by 1997, there were approximately 20,000 gated communities in the U.S.,

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[29]I draw this point from D. Hook & M. Vrdoljak, "Gated Communities, Heterotopia and a 'Rights' of Privilege: A 'Heterotopology' of the South African Security-Park" (2002) 33 Geoforum 195 at 206: "... in a Foucauldian vein, one might speculate that the spaces and practices of a given place like that of the gated community *may be seen as very materialized forms of discourse*" [emphasis in original, internal citations omitted] [hereinafter "Heterotopia"]. For a comparable account on law's visions of community, see R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (New York: Oxford University Press, 1995) at 221-248.

[30]M. Poovey, "For Everything Else, There's ..." (2001) 68 Social Research 397 at 422.

[31]M. Poovey, *Making a Social Body: British Cultural Formation, 1830-1864* (Chicago: University of Chicago Press, 1995) at 53 [hereinafter *Making a Social Body*].

[32]*Ibid.* at 58.

representing over three million dwellings.[33] With over four million individuals thereby living in gated developments in the U.S. alone,[34] sales in gated developments continue to rise[35] – and as Helsley and Strange discuss, gated communities are now being developed in Canada as well, particularly in British Columbia.[36] Of course, these gated communities were not developed out of whole cloth. They can instead be understood as an extension of suburbanization more generally,[37] with gating having historical precedents that are "as old as city-building itself."[38] And gating is itself engaged in for a variety of reasons, none of which are particularly novel: while some may be designed as security measures, others may be markers of social exclusivity, common leisure interests, and social status.[39]

This proliferation of gated communities in recent years has come to be identified as part of an emerging "privatopia," with homeowners moving to master-planned communities that often include private security and recreation facilities – and which also include some form of private government, with association boards enforcing covenants, conditions, and restrictions to which homeowners assent. The term "privatopia" itself was coined in the late 1980s by Evan McKenzie, who described the massive increase of private homeowners associations in the United States as integrating private and utopic elements.[40] Providing a historical analysis of the emergence of this form of property, McKenzie's account of homeowners associations demonstrates that this utopic vision is itself linked with a conception of community as local, and with a conception of space as controllable. For proponents of homeowners associations, the space of the city is seen much in the same way as early sociologists of the city expressed it,

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[33]*Fortress America*, *supra* note 3 at 5-7.

[34]T. Egan, "Many seek security in private communities" *The New York Times* (3 September 1995) A1.

[35]D. Dillon, "Fortress America: More and More of Us are Living Behind Locked Gates" (June 1994) 60 Planning 8.

[36]R.W. Helsley & W.C. Strange, "Gated Communities and the Economic Geography of Crime" (1999) 46 Journal of Urban Economics 80 [hereinafter "Gated Communities and the Economic Geography of Crime"].

[37]*Fortress America*, *supra* note 3 at 11-15.

[38]*Ibid.* at 3.

[39]See *ibid.*, differentiating between "leisure," "prestige," and "security" communities.

[40]E. McKenzie, "Morning in Privatopia" (1989) 36 Dissent 257.

replete with alienation, undesirable heterogeneity, mutual strangeness, and lack of community.[41] The voluntary aspect of common-interest developments is said to be a bulwark against the anomie of city life, since in these associations, "members choose to join and choose to remain."[42]

The logic of municipal planning is central to these common-interest developments. Planning a new development, rather than negotiating existing urban problems, is itself presented as the cure for citizen apathy, and offering a "'return' to village democracy."[43] As the following passage from an organization of community developers suggests, homeowners associations are themselves imagined as offering a necessary counter-balance to the chaos of urban centers, through a vision of community that is closely aligned with spatial features of *small size* and *localism*. Furthermore, the *control* these associations offer is imagined as encouraging civic participation:

> The explosive growth of our cities, their trend to gigantism, and the high mobility of their residents are rapidly destroying a sense of community among individuals in urban America. Constructive forces are needed to counteract these negative aspects and to utilize the opportunity that growth offers to build better communities. The best possible way to bring about – or revive – a grass roots sense of community is for homeowners to control nearby facilities of importance to them and through this to participate actively in the life of their neighborhoods.[44]

With approximately 225,000 homeowners associations in the US (of which under 10% are gated communities),[45] academic concern over the implications of these developments has centered on the death of public space, the loss of urban community it may either reflect or promote, the dangers of residential and racial homogeneity, and the lack of political

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[41]For a review, see J. Frug, "The Geography of Community" (1996) 48 Stanford Law Review 1047 at 1055-1067 [hereinafter "Geography of Community"].

[42]C.J. Silverman & S.E. Barton, "Common Interest Communities and the American Dream" (Working Paper No. 463, Institute of Urban and Regional Development, Berkeley, CA, September 1987) at 16-17, quoted in *Privatopia*, *supra* note 8 at 25.

[43]*Privatopia*, *ibid.* at 97.

[44]Urban Land Institute/Federal Housing Administration, *The Homes Associations Handbook* (Technical Bulletin No. 50, Urban Land Institute, Washington, D.C, 1964 at 4, quoted in *Privatopia*, *ibid.* at 24.

[45]*Privatopia*, *ibid.* at 11.

accountability that homeowners associations will engender.[46] Jeremy Rifkin sees these developments as part of "hypercapitalism";[47] Jane Jacobs understands them as "the end of civilization";[48] and Michael Sorkin as "variations on a theme park."[49] Evan McKenzie suggests that, as a unique form of privatization, common interest developments promote "a kind of segregation different in kind and degree from that produced by simple suburbanization."[50] Mike Davis similarly laments the decline of "urban liberalism," as privatized enclaves provide a material "gloss over the brutalization of inner-city neighborhoods and the stark divisions of class and race represented in [the] built environment."[51]

Although often hyperbolic, the privatopia literature has opened the opportunity for broader debates regarding the role of government, how to encourage sustainable neighbourhoods,[52] and the potential for grassroots forms of governance.[53] Some have argued that communitarians ought to support the development of residential community associations, since they provide a basis for local community development,[54] and that these local communities ought to rely on "openness

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[46]See eg. *ibid.*; *City Making*, *infra* note 56; *City of Quartz*, *supra* note 23; M. Dear & S. Flusty, "The Iron Lotus: Los Angeles and Postmodern Urbanism" (1997) 551 Annals of the American Academy of Political and Social Science 151; M. Lynch, "Security and Segregation Across the Social and Penal Landscape" (2001) 56 University of Miami Law Review 89.

[47]J. Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-For Experience* (New York: J.P. Tarcher/Putnam, 2000).

[48]See D.J. Kennedy, "Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers" (1995) 105 Yale Law Journal 761 at 778 [hereinafter "Residential Associations as State Actors"].

[49]*Variations on a Theme Park*, *supra* note 23.

[50]*Privatopia*, *supra* note 8 at 26.

[51]M. Davis, "Fortress Los Angeles: The Militarization of Urban Space" in *Variations on a Theme Park*, *supra* note 23, 154 at 156.

[52]See eg. *Fortress America*, *supra* note 3 at 161-177.

[53]For a close analysis of the difficulties in applying differing normative legal standards to different forms of "community," see G.O. Robinson, "Communities" (1997) 83 Virginia Law Review 269 [hereinafter "Communities"].

[54]See e.g. *ibid.*; C.P. Gillette, "Courts, Covenants, and Communities" (1994) 61 University of Chicago Law Review 1375.

and dialogue."[55] Some have expressed concern over the negative effects residential associations may have on democratic participation,[56] while others have suggested that the development of residential associations may spur others to "build coalitions based on enlightened self interest," and thereby increase "civic engagement."[57] A publication of the conservative Cato institute demonstrates how progressive and conservative arguments can both be marshalled in support of residential associations – drawing a page from legal pluralism in referring to private communities as offering "polycentric law," with these residents then "acquiring a taste for home-cooked governance."[58]

In the legal literature, there has been a tendency to question whether private residential associations are *really* communities, echoing John Freie's work on "counterfeit community."[59] In adopting this normative focus, the law review articles have themselves come to develop a recognizable pattern: first, the author points to the decline in community caused by these residential developments, usually through newspaper articles regarding frictions between neighbours and homeowners associations, or by highlighting potential tensions between residents and non-residents; second, the author suggests that achieving community is a

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[55]See G.S. Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community" (1989) 75 Cornell Law Review 1 at 60 [hereinafter "Dilemmas of Group Autonomy"].

[56]The most vocal proponent of this view is Jerry Frug. See G.E. Frug, "Cities and Homeowners Associations: A Reply" (1982) 130 University of Pennsylvania Law Review 1589 [hereinafter "Cities and Homeowners Associations: A Reply"] ; G.E. Frug, *City Making: Building Communities without Building Walls* (Princeton: Princeton University Press, 1999) [hereinafter *City Making*].

[57]S.D. Cashin, "Privatized Communities and the 'Secession of the Successful': Democracy and Fairness Beyond the Gate" (2001) 28 Fordham Urban Law Journal 1675 at 1691-1692 [hereinafter "Privatized Communities"]. See also J. Simon, "Guns, Crime, and Governance" (2002) 39 Houston Law Review 133 at 148 (providing an alternative of "a different kind of politics," and suggesting that "one might imagine movements against gated communities, cell phones, or supersized SUVs") [hereinafter "Guns, Crime, and Governance"].

[58]T.W. Bell, "Polycentric Law in a New Century" (1998) 20(6) CATO Policy Report 1 at 10.

[59]J.F. Freie, *Counterfeit Community: The Exploitation of Our Longings for Connectedness* (Lanham, MD: Rowman & Littlefield, 1998). Some of this tends to be a misreading of "the new urbanism," a method of planning that seeks to encourage "community," and on which many planned communities claim to rely. As Hyatt observes, however, "The new architect-planners do not believe that the architectural and land plans alone will create community or a renewed sense of community. What they do believe, with substantial justification, is that these plans produce a place and structured opportunities for community and interpersonal interaction": see W.S. Hyatt, "Common Interest Communities: Evolution and Reinvention" (1998) 31 John Marshall Law Review 303 at 331 [hereinafter "Common Interest Communities: Evolution and Reinvention"]. See also R.C. Ellickson, "New Institutions for Old Neighborhoods" (1998) 48 Duke Law Journal 75.

worthwhile policy goal (sometimes invoking concepts of trust and social capital); and third, the author goes on to provide a solution for the lack of community, usually through applying judicial review to homeowners associations, increasing political opportunities for non-residents, or providing non-residents with enforceable rights against private associations. A recent article by Paula Franzese reflects this common outline, which in the following passages first laments the lack of community in private residential developments, and then seeks to devise a solution. Although lengthy, these are worth quoting given how representative they are of the literature:

> The organizational, structural and social foundations of the typical common interest community do not promote trust, which is an important anchor of community ... The premise of this Article is that the patterns of regimentation that accompany CIC living promote cultures that do more to destroy community than to build it. The increase in litigation, conflict and tension between associations, boards and residents over the far-reaching content, application and enforcement of imposed CC&Rs suggests that "common interest community" has become a misnomer of sorts. Just what are the "common interests" shared by residents? And most essentially, where is the "community"?[60]

> Planners and leaders must actively cultivate the determinants of community, and patiently commit to the premise that a strong social fabric is not only desirable but attainable. Once in place, forced compliance with behavior in the best interests of the community would become the exception rather than the rule, as routine patterns of exchange would come to serve as the principal basis upon which to enforce agreements. Presently, most common interest communities put the cart before the horse, relying on elaborately prepackaged mandates to impose "community," rather than facilitating the development of a genuine social fabric, which in turn would render many of those edicts simply unnecessary. In other words, "we need a change in the way we draft documents and apply them so that the emphasis is not on telling people what they can't do, but helping them to do things that genuinely create communities" ... "Community" as a concept and a work in progress must be featured prominently in the words and constructs chosen to depict initiatives and resolve controversies.[61]

This legal focus on private homeowners associations has resulted in research on the limits of their regulatory regime, deference to their decisions, and the covenants, conditions, and often

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[60]P.A. Franzese, "Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community" (2002) 47 Villanova Law Review 553 at 559-560 [hereinafter "Does it Take a Village?"]. The use of CIC refers to "common interest communities," and the use of CC&R refers to "Covenants, Conditions, and Restrictions."

[61]*Ibid.* at 590 [internal citations omitted].

inane restrictions to which residents assent (and later contest).[62] More conceptual work in the legal literature has maintained this analytic frame, and has sought to link this proliferation of private governance within the context of changing forms of civic participation and alternative conceptions of property rights, thereby maintaining gated developments as one instance (if perhaps its most flagrant) of privatized developments.[63]

As a result of their emphasis on the broad array of private developments, legal researchers have in fact paid little attention to cases involving disputes between gated communities and non-residents. Instead, since cases involving private subdivisions or condominiums overwhelmingly involve internal disputes, the literature has focused on the degree of deference granted by courts to homeowners associations – and has generally concluded that the form of private property instantiated in homeowners associations enjoys broad support in the courts, and that this can result in disastrous social consequences.[64] Deference to homeowners associations, when

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[62]See eg. C.B. Kress, "Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association" (1995) 42 UCLA Law Review 837; "Common Interest Communities: Evolution and Reinvention", *supra* note 59; M. Fenster, "Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community" (1999) 15 Journal of Land Use & Environmental Law 3; A. Arabian, "Condos, Cats, and CC&Rs: Invasion of the Castle Common" (1995) 23 Pepperdine Law Review 1; "The Constitution and Private Government", *supra* note 5; "Privatized Communities", *supra* note 57; J.L. Winokur, "The Financial Role of Community Associations" (1998) 38 Santa Clara Law Review 1135; E. McKenzie, "Reflections on a Policy Role for the Judiciary" (1998) 31 John Marshall Law Review 397; D.C. Drewes, "Putting the 'Community' Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review" (2001) 101 Columbia Law Review 314; Note, "The Rule of Law in Residential Associations" (1985) 99 Harvard Law Review 472; H. Rishikof & A. Wohl, "Private Communities or Public Governments: 'The State Will Make the Call'" (1996) 30 Valparaiso University Law Review 509.

[63]See especially *Privatopia*, *supra* note 8; M.A. Heller, "The Boundaries of Private Property" (1999) 108 Yale Law Journal 1163; R.H. Nelson, "Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods" (1999) 7 George Mason Law Review 827; C.P. Gillette, "Public Service: Opting out of Public Provision" (1996) 73 Denver University Law Review 1185 [hereinafter "Public Service"]; G.S. Alexander, "Freedom, Coercion, and the Law of Servitudes" (1988) 73 Cornell Law Review 883; R.C. Ellickson, "Cities and Homeowners Associations" (1982) 130 University of Pennsylvania Law Review 1518 [hereinafter "Cities and Homeowners Associations"]; "Cities and Homeowners Associations: A Reply", *supra* note 56; "Dilemmas of Group Autonomy", *supra* note 55.

[64]See, for instance, "Cities and Homeowners Associations: A Reply", *ibid.*; "Limits of Localism", *supra* note 26; R. Briffault, "Our Localism: Part I – The Structure of Local Government Law" (1990) 90 Columbia Law Review 1 [hereinafter "Our Localism (Part I)"]; R. Briffault, "Our Localism: Part II – Localism and Legal Theory" (1990) 90 Columbia Law Review 346 [hereinafter "Our Localism (Part II)"]; "Limits of Localism", *supra* note 26; R.T. Ford, "The Boundaries of Race: Political Geography in Legal Analysis" (1994) 107 Harvard Law Review 1843 [hereinafter "Boundaries of Race"]. Others such as Ellickson, have argued otherwise: see eg. "Cities and Homeowners Associations", *ibid.*

combined with deference to existing municipal boundaries,[65] is said to enshrine exclusion by preserving the status quo while further enhancing the ability of private communities to make decisions regarding space and its regulation. Prominent scholars have thereby lamented the deference granted by courts to a contractarian vision of community, often coextensive with a vision of community as a spatially-defined locality, and have suggested instead that the relevant "community" ought to be re-imagined as one which is not limited to residents, but rather to all those whose interests are affected by these seemingly local decisions.[66] Judicial deference to private property, municipal (suburban) boundaries, and homeowners associations are said to render law complicit in this balkanization of America – for instance, this is a central premise of Jerry Frug's work on cities and municipal law,[67] and is the basis for Richard Ford's conclusion that present municipal governance leads to the racial identification of geographic areas and the perpetuation of racial segregation.[68] This perception of law as complicit in the emergence of unchecked private forms of governance is echoed by Evan McKenzie, who argues that there has been a legal resistance to placing public controls on common interest developments, and that this has further enhanced the status of these developments and their ability to expand – [69] which he argues has left them with "a special, unregulated status."[70]

And so, consistent with the concern over "privatopia" more generally, the legal literature has understood gated communities as simply one aspect of this more general phenomenon, and as a result only two judicial decisions regarding gated developments are discussed with any regularity in the legal literature – with even these rarely receiving more than passing attention in a footnote. In fact, the majority of the literature rarely mentions any cases at all, instead

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[65]See eg. "Boundaries of Race", *ibid.*; "Limits of Localism", *ibid.*

[66]See *City Making*, *supra* note 56; "Boundaries of Race", *ibid.*

[67]*City Making*, *ibid.*; G.E. Frug, "The City as a Legal Concept" (1980) 93 Harvard Law Review 1057 [hereinafter "City as a Legal Concept"].

[68]"Boundaries of Race", *supra* note 64.

[69]*Privatopia*, *supra* note 8 at 150-174.

[70]*Ibid.* at 28. See also "Law's Territory", *supra* note 25 at 920: "[t]he creation of autonomous suburbs – suburbs that, thanks to the Court's decision in *Milliken*, are isolated from economic or social responsibility for the inner cities – makes white flight possible and attractive. It is the state that has given "fearful" whites somewhere to fly to."

relying on newspaper accounts of tensions within private homeowners associations, lamenting the death of public space, and providing a normative solution that seeks to enhance democratic participation and city life.

This lack of attention to gated communities in particular – perceiving them instead as simply one aspect of a burgeoning, unchecked, and uncontrolled privatopia – is similarly evident in the criminological literature. Predating the term "privatopia," Clifford Shearing and Phillip Stenning instead invoked the term "mass private property," and sought to illustrate that policing, as a mechanism through which to govern, requires researchers to pay attention to strategies of control that are deployed by agents other than the public police.[71] Gated communities, theme parks, airports, large corporations, and other forms were brought together to demonstrate that non-state policing strategies often invoked a different operating logic than did the public police.[72] In these contexts, crime is not a moral problem but an instrumental one, and private security seeks to prevent rule-breaking in order to promote orderly consumerist consumption and minimize private losses.[73]

With the legal paradigm focusing on the element of private governance that gated communities reflect, and the criminological paradigm focusing on the privatization of policing, scholars have resorted to invoking "gated communities" in the titles of their articles, but rarely discussing any element that is truly particular to gated communities in the text of their analyses. A recent example is an article in the American Criminal Law Review, titled "Gated Communities and the Fourth Amendment," even though none of the case law it analyses deals with, or even mentions, gated communities.[74] The author instead laments the lack of attention

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[71]C.D. Shearing & P.C. Stenning, "Private Security: Implications for Social Control" (1983) 30 Social Problems 493 at 498.

[72]See eg. L. Johnston, *The Rebirth of Private Policing* (New York: Routledge, 1992).

[73]These are well summarized in "Future of Policing", *supra* note 14. Legal scholars have now also adopted this paradigm to provide analyses of the powers of the private police and the challenges these actors pose to our understanding of criminal procedure more generally: see "Modern Private Security", *supra* note 13; C.D. Shearing & P.C. Stenning, "The Quiet Revolution: The Nature, Development, and General Legal Implications of Private Security in Canada" (1979) 22 Criminal Law Quarterly 220; "The Private Police", *supra* note 13; J.B. Owens, "Westec Story: Gated Communities and the Fourth Amendment" (1997) 3 American Criminal Law Review 1127 [hereinafter "Westec Story"].

[74]"Westec Story", *ibid.*

given to gated communities in academic work, but proceeds to analyse the case law dealing with private police officers generally – and concludes his article by simply invoking the possibility that private security guards may adopt "invasive measures" in gated communities, and that his analysis would provide the legal context for responding to such situations.[75] It is the choice of title, however, that is most intriguing. Invoking gated communities in the title suggests an awareness of the cultural specificity of gated communities, while the analysis itself suggests the difficulty scholars have in finding an analytical basis for conceiving of gated developments as distinct from other elements of "privatopia."

Within legal scholarship, the most notable attempt to disentangle gated communities from a broader analysis of residential private government is David Kennedy's article on the impact of gated communities on non-residents.[76] Specifically addressing the lack of attention paid to gated communities in particular, Kennedy's analysis is attuned to the ways in which decisions involving condominiums or private subdivisions, which represent the bulk of cases in this area but which generally address internal strife rather than conflicts with non-residents, have come to dominate legal scholarship. Kennedy seeks to isolate gated communities as presenting a unique set of problems, focusing on the social costs they can impose on non-residents. Kennedy, however, does not provide an analytical justification for conceiving of gated communities in isolation – he simply does so on the basis that these "generate far greater friction with nonmembers," rather than grounding his analysis in any particularity they present in the social environment.[77] Perhaps as a result, by the end of his article Kennedy also reaches beyond gated communities, to incorporate case law dealing with company towns and shopping malls – but his earlier inclination to isolate them does suggest that, whatever their legal classification, gated communities do carry a different cultural valence than vertical condominiums or privately

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[75] *Ibid.* at 1160.

[76] "Residential Associations as State Actors", *supra* note 48.

[77] *Ibid.* at 765. This very lack of analytical distinction is, I suggest, what Wayne Hyatt is responding to, in mistakenly asserting that Kennedy mistakenly "draws conclusions on the assumption that common interest communities and neighborhoods that close public streets are the same or that all common interest communities are 'gated communities'." See "Common Interest Communities: Evolution and Reinvention", *supra* note 59 at 339 *n*164.

controlled subdivisions.[78]

In the following section, I seek to develop an approach to gated communities as a particular social form, one that incorporates cultural and design elements as a single "assemblage." I am not suggesting that gated communities are not part of more general trends toward mass private property or that gated communities do not share many attributes of other private entities.[79] Rather, grounding this approach in research in urban anthropology and critical geography, I seek to emphasize this one particular form, in order to then draw out law's vision of gated communities in particular. As I state above, this is not done in order to develop a more refined understanding of the web of legal mechanisms through which gated communities are regulated, but to isolate the conceptions of community that courts bring to these spatial forms, and the contestations that occur when they are brought within law's gaze.

III. Gated Communities as a Material and Cultural Assemblage

Both the legal and criminological literatures, then, emphasize privatization rather than gating. I argue that in so doing, researchers have glossed over what is perhaps most culturally evident about gated communities, namely the presence of a particular built form in the social environment, one which carries specific connotations for both residents and non-residents alike. This emphasis on the spatial characteristics of gated communities – their very material form, and their placement in urban settings – is bound up with the ways in which those very spaces are understood, experienced, and imagined. As Edward Soja asserts in his analysis of the "socio-spatial dialectic," "[s]pace in itself may be primordially given, but the organization, and meaning of space is a product of social translation, transformation, and experience."[80]

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[78]Most recently, Richard Damstra has argued that the basis for an analytical distinction can rest on the specific legal and social effects that gated communities can cause, though he too seems to conceptualize gated communities as an egregious instance of a broader phenomenon: see R. Damstra, "Don't Fence Us Out: The Municipal Power To Ban Gated Communities and the Federal Takings Clause" (2001) 35 Valparaiso University Law Review 525 [hereinafter "Don't Fence us Out"].

[79]*Fortress America*, *supra* note 3 at 28.

[80]E.W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (New York: Verso, 1989) at 79-80 [hereinafter *Postmodern Geographies*]. Soja is thereby critical of analyses that neglect spatial relations, and which suggest that the social can be conceived of wholly through value relations between individuals and classes.

In conceiving of gated communities as instantiating specific views of social relations (both imagined and aspirational), David Harvey's work is of particular assistance.[81] Harvey emphasizes the contested nature of space, and the close relationship between that contestation and the construction of social identities. He describes, for instance, how the victors of the French revolution not only changed their relation to time by replacing the seven day calendar with a secularised ten-day calendar,[82] but "they also broke open all the old spaces of privilege and constructed a new set of ceremonial spaces consistent with their revolutionary aims."[83] Social and political contestations can rework the content of spatial practices and premises,[84] and space is thereby produced rather than determined.[85] As we will see later in this chapter, Harvey's focus on struggle and contestation is helpful in understanding the resistance of courts to the forms of community and of space that gated developments present, a normative dynamic that has been ignored by the lack of attention to cases dealing with gated communities in the literature to date.[86]

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[81]While Soja weaves his argument through a range of social theory, his highly abstracted approach renders it difficult to determine precisely how an appreciation of space 'from the very beginning' would be useful: *Ibid.* at 7.

[82]See E. Zerubavel, *The Seven Day Circle* (Chicago: Univ. of Chicago Press, 1985) at 27ff.

[83]D. Harvey, *Justice, Nature & the Geography of Difference* (Cambridge, MA: Blackwell, 1996) at 230 [hereinafter *Justice, Nature & The Geography of Difference*]. Harvey extends his thesis on the social construction of space by noting present shifts resulting from economic and technological change, suggesting that the increased flexibility of capital results in a "time-space compression." Yet, this disintegration of spatial barriers ironically leads to a more emphatic geopolitics of place, with localities seeking to distinguish themselves by providing more hospitable business climates, more effective labour forces, and the like (at 242-247). See also D. Harvey, *The Condition of Postmodernity* (Cambridge, MA: Blackwell, 1989) at 240ff [hereinafter *Condition of Postmodernity*].

[84]*Condition of Postmodernity, ibid.* at 226-227.

[85]Working within a generally Marxist paradigm, Harvey's interest is not only in understanding the social processes by which understandings of space are constituted, but in documenting the ways in which these are then deployed in particular ways, with particular inflections and truths attached to them. See *ibid.* at 227. Harvey's analysis of spatial relations, then, is directed toward the social processes that are at play in their construction, and the effects that perceptions of space then have on the distribution of social power. Although criticized by Soja for neglecting the role of spatiality in creating that very conception of the social (see *Postmodern Geographies, supra* note 80 at 58), Harvey is more attuned to the dialectical nature of this interaction than Soja suggests, and in fact stresses the inherent spatiality of the social relations that are his focus (see eg. *Condition of Postmodernity, ibid.* at 227).

[86]What renders Harvey most significant for our purposes is his emphasis on spatiality as part of broader analyses of governance and political power, an emphasis that Soja's paradigm tends to preclude, yet which is commensurate with his project more generally. I would argue that such a project remains possible within Soja's paradigm, though it would be hamstrung by the structure of Soja's approach. My reading of Soja's project is that he seeks to conceive of space as 'always-always there,' and that he further seeks to problematize that givenness at every turn. As a result, Soja appears to simply be replacing historical analyses with spatial ones. This makes Harvey's focus – which I read

Research to date indicates that understanding gated communities in the built environment requires one to pay attention to fear of crime and the exclusion of outsiders. It is in reacting to fear of crime that gated communities, as Nikolas Rose argues, uniquely privilege conceptions of community that center on individual choice, smart risks, privatization, and social exclusivity.[87] The utopias of old are here "transformed into a totally new product, organized and marketed as a solution to contemporary problems rather than as a search for a better communal system."[88] The move to community is here brought, as Rose again argues, "into alliance with the individualized ethos of neo-liberal politics," with community not being what is protected, but rather what will itself be able to protect us from the ravages of urban life.[89] The empirical literature bears this out: despite the broad array of reasons there may be for gating, survey evidence suggests that over 95% of gated community residents consider security to be an important feature in their choice of development,[90] and that residents then interpret lower crime rates in their communities as due to the physical barriers themselves.[91] Typologizing differences in why individuals move to gated communities "often breaks down in practice," with an increased emphasis on the gates as security measures over time,[92] and many new developments built primarily in the context of crime fears.[93] As Helsley and Strange state, "[g]ated communities are at least in part a response to the fear of crime, real or imagined, and to

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as the ways in which spatial relations are implicated and imbricated as part of broader social processes and struggles – more amenable to research from an interdisciplinary perspective.

[87]*Powers of Freedom*, *supra* note 21 at 246-250.

[88]*Fortress America*, *supra* note 3 at 15.

[89]*Powers of Freedom*, *supra* note 21 at 249. Placing the emergence of the gated community within a broader political context (in this case, neoliberalism) parallels the history of the emergence of towns and cities more generally, which were closely aligned with prevailing governmentalities. For an account of this history from a legal perspective, see "City as a Legal Concept", *supra* note 67.

[90]*Fortress America*, *supra* note 3 at 126. See also R.J. Schwartz, "Public Gated Residential Communities: The Rosemont, Illinois, Approach and its Constitutional Implications" (1997) 29 Urban Lawyer 123 at 124-125.

[91]*Fortress America*, *ibid.* at 44-45, 125-129.

[92]"Heterotopia", *supra* note 29 at 196.

[93]*Fortress America*, *supra* note 3.

understand them it is necessary to understand the specifics of the market for security.'"[94]

Further economic and sociological research provides evidence that confirms the link between crime and gated communities in particular. As economic analyses demonstrate, the practice of gating can itself effect variation in the geographic distribution of crime, at least partially due to its "aggressively visible" nature[95] – and in so doing, gating can increase crime in other areas, and effect changes in the market that will lead to a proliferation of gates throughout.[96] The very materiality of gates may affect mobility and pedestrian activity within the city, and may reconfigure patterns of pedestrian and motor traffic.[97] And although a burgeoning literature suggests that the communal bonds experienced by residents in these developments are often thin, residential satisfaction with gating specifically remains high.[98] This satisfaction is reflected in evidence of a price premium that is enjoyed by gated developments, with data suggesting that houses in these developments command higher prices than homes in other areas, even after controlling for other factors – and the statistical evidence suggests that part of this premium is a function of the gate itself, rather than the private nature of the development.[99]

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[94]"Gated Communities and the Economic Geography of Crime", *supra* note 36 at 82.

[95]*Ibid.* at 82, in which Helsley and Strange stress that gating must be understood beyond the question of public versus private provision, and that it is *gating* itself that can effect certain changes. On the effects of public versus private provision in this context, see R.W. Helsley & W.C. Strange, "Private Government" (1998) 69 Journal of Public Economics 281.

[96]"Gated Communities and the Economic Geography of Crime", *ibid.*, arguing that gates may also have an effect on the very level of crime, although the direction of the effect would depend on the effect of gating on legitimate employment opportunities.

[97]M. Burke, "The Pedestrian Behavior of Residents in Gated Communities" (Australia: Walking the 21st Century: An International Walking Conference, Perth, Western Australia, 20-22 February 2001), online: Ministry for Planning and Department of Transport <http://www.transport.wa.gov.au/conferences/walking/pdfs/A14.pdf> (last accessed: 8 April 2002).

[98]See eg. S.J. Bjarnason, *Lawn and Order: Gated Communities and Social Interaction in Dana Point, California* (Ph.D. Dissertation, Department of Geography, University of Oregon 2000) [unpublished]; S.M. Low, "The Edge and the Center: Gated Communities and the Discourse of Urban Fear" (2001) 103 American Anthropologist 45 [hereinafter "Edge and the Center"]; J.O. Aldrich, *An Exploratory and Descriptive Study of Attitudinal and Behavioral Dimensions of Selected Civic Culture Analogues (Including Religiosity) in a Gated Community* (D.P.A. Dissertation, Department of Public Administration, University of La Verne 2000) [unpublished]; G. Wilson-Doenges, "An Exploration of Sense of Community and Fear of Crime in Gated Communities" (2000) 32 Environment and Behavior 597 [hereinafter "An Exploration of Sense of Community]; *Fortress America*, *supra* note 3.

[99]M. LaCour-Little & S. Malpezzi, "Gated Communities and Property Values" (2001), online: University of Wisconsin-Madison School of Business

Not surprisingly, researchers have now begun to chronicle the broader cultural effects that gated communities can have. Mike Davis, in discussing the "militarization of city life so grimly visible at the street level," suggests that there is here an "architectural policing of social boundaries" that "has become a zeitgeist of urban restructuring."[100] For Davis, this securing of habitat has an effect that is often ignored – one that he argues is "just about as subtle as a swaggering white cop," and which is concentrated on excluding visibly identifiable others from one's "hardened residential enclave or restricted suburb."[101] Explicitly linking these exclusive responses to crime and urban life within the context of neoliberal politics, David Garland identifies an emerging "culture of control," and highlights the widespread effects that gated communities may have:

> Over time, a pattern of response and adaptation emerged, in which individuals began to take more routine precautions against crime ... These routine precautions often involved taking evasive action, much of which entailed a level of inconvenience and expense ... Others took more drastic action, 'escaping' to the suburbs, and even, when the suburbs themselves became more crime-prone (or merely too 'diverse'), to 'gated communities' ... [T]hese shifts in daily routines eventually resulted in settled *cultural* effects ... The fear of crime – or rather a *collectively raised consciousness* of crime – has gradually become *institutionalized.* It has been written into common sense and the routines of everyday life: into our expectations, our entertainment and news programmes, our insurance contracts, our urban myths, our real estate categories.[102]

It is the reconfiguration of real estate categories Garland describes that reflects the emphasis of this chapter. Gated communities represent a distinct configuration of territory – not solely because these developments privatize residential space and exclude "others,"[103] but because of the very specific ways in which they represent, deploy, and produce physical and social space,

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<http://www.bus.wisc.edu/realestate/pdf/pdf/Private%20Streets%20Paper%20June%202001.pdf> (last accessed: 8 April 2002). But see *Fortress America*, *ibid.* at 16-18 (finding no such effect, but not relying on multivariate analyses).

[100]*City of Quartz*, *supra* note 23 at 223.

[101]*Ibid.* at 224-226.

[102]D. Garland, "The Culture of High Crime Societies: Some Preconditions of Recent 'Law and Order' Policies" (2000) 40 British Journal of Criminology 347 at 366-367 [emphasis in original].

[103]See e.g. "Geography of Community", *supra* note 41.

which result in both an "architectural reality and cultural metaphor."[104]

This emphasis on spatial construction is central to Setha Low's anthropological research on gated communities. Low argues that gated developments are distinct precisely because of the ways in which they change the landscape of city life. She interprets gated communities as a unique *design form*, embedded within broader discourses and cultural encodings:

> Understanding this spatial form, its historical and cultural context, and why residents choose to live there provides an important perspective on the central city that is often overlooked ... I suggest that adding walls, gates, and guards produces a landscape that encodes class relations and residential (race/class/ethnic/gender) segregation more permanently in the built environment. Understanding how this landscape is legitimated by a discourse of fear of crime and violence helps to uncover how this design form is materially and rhetorically created.[105]

Although individuals often react to fear of crime through spatial strategies designed to avoid certain areas or individuals, Low's anthropological research demonstrates that residents in gated communities appear to draw on the gate beyond its utility in simply avoiding outsiders. The gate, rather, is invoked by residents *as a visual component of a broader social ordering that they favour.*[106] Through interviews and ethnographic research, Low finds that the discourse of residents complements the spatial ordering that the gated community provides, with residents reproducing concerns over class and crime *within* their gated developments as well.[107] As she concludes, the gates encode a range of concerns regarding class, race, ethnic, and gender relations, and residents within these communities engage in a discourse of insecurity which "provides a verbal component that complements, even reinforces, the visual landscape of fear

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[104]"Edge and the Center", *supra* note 98 at 48.

[105]*Ibid.* at 45.

[106]Low's perspective echoes that of other anthropologists studying boundaries. For instance, in a study of the Tswana, Graeme Hardie argues that while boundaries "do exist," understanding physical boundaries makes it "necessary to understand the spiritual beliefs of the Tswana, in which boundaries are deeply embedded": see G.J. Hardie, "Boundaries Real and Imagined" in D. Pellow, ed. *Setting Boundaries: The Anthropology of Spatial and Social Organization* (Westport, CT: Greenwood, 1996) 195 at 213.

[107]This stands in contrast to Jonathan Simon's claim that "[s]hould the gates be breached it is every family for itself," with Low suggesting instead that residents work within a hierarchical normative order that would define external threats differentially, and would continue to define such threats in relation to the social order they favour regardless of the gate: see "Guns, Crime, and Governance", *supra* note 57 at 140.

created by the walls, gates, and guards."[108]

Setha Low's interpretation of gated communities as a particular spatial form is central here. Her emphasis is on the symbolic function of the gate itself, and the corresponding importance of understanding gated communities as a distinct form of development. Theresa Caldeira reaches similar conclusions in her analysis of Sao Paulo, suggesting that the emergence of fortified enclaves *itself transforms public space*, as it is increasingly "abandoned" and "the public is treated as leftover by the design of the enclaves and by the citizens who create the new private order."[109] As one anti-gating activist in California recounts, it is the gates themselves that other residents can find offensive, as much for what they express as for what they do:

> John Jay (Citizens Against Gated Enclaves): It says 'stay out' and it also says, 'We are the wealthy, and you guys are not, and this gate shall establish the difference.' ... [T]hey do technically remain as public streets, and we, as the public, continue to pay for them through our taxes, and we should be able to walk on those streets. They are our streets.[110]

This emphasis by non-residents on the exclusivity that the gates emphasize has begun to receive some attention at the level of municipal government. Some municipalities have sought to ban gated communities specifically, while not mentioning condominium apartments, private subdivisions, and the like. While some of these have resisted gated communities by arguing that emergency service vehicles need easy access to all city areas,[111] others have been concerned with the vision of community life they present in the built environment. In banning gated communities in the City of Flagstaff, Arizona, members of a regional task force were concerned that "gated communities do little to foster a sense of larger citizenship or community, and by

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[108]"Edge and the Center", *supra* note 98 at 56.

[109]T. Caldeira, "Building Up Walls: The New Pattern of Segregation in Sao Paulo" (1996) 48 International Social Science Journal 55 at 64-65.

[110]See R. Siegel, "Gated Communities Controversy in Los Angeles" *National Public Radio ("All Things Considered")* (11 August 1992), online: LEXIS (NPR).

[111]See eg. Town of Cary, North Carolina, Ordinance No. 97-030, *An Ordinance of the Town of Cary, Providing that the Code of Ordinances be Amended by Amending Certain Sections of Chapters 2 and 13 of the Unified Development Ordinance to Clarify that Vehicular Gates are Prohibited in Residential Districts but Allowed, under Certain Conditions, in Nonresidential Districts* (23 July 1997); Town of Cary, North Carolina, *Staff Report, Ordinance Amendment Related to the Use of Gates in Developments (DS97-209)*, Consideration of an Amendment to Address the Use of Gates in Developments (4 June 1997). See also references in "Don't Fence us Out", *supra* note 78 at *n*11.

their nature communicate a separateness which is ultimately harmful to the sense of being part of a greater Flagstaff community."[112] An Australian ward resists gated communities by calling for developments that are "connected to, and part of, the neighbourhood rather than a separate semi-private enclave,"[113] with gated developments being "discouraged."[114] The City of Concord, California, while approving a gated development, listed the following community-based arguments against these developments as: "artificially divide the community"; "undermine neighborhood identity"; "gates 'turn their back' on the community"; "the use of gates creates an 'us' vs. 'them' mentality"; "gated communities destroy a sense of belonging to the larger community"; "the use of gates breeds 'exclusivity'"; "community character is undermined."[115] Others, such as the City of Camas, Washington, held public hearings on a proposed gated community, and although it was since built, no further request for such a development has been proposed.[116] As these local conflicts suggest, struggles over space can form the basis for what later becomes "semiotically encoded and interpreted reality."[117]

This is an important point. While the legal and criminological literature seek to first define gated communities as private, and thereby engage with one set of analytical questions, the more anthropological tone I take here instead conceives of the *difference in design* as itself important. The municipalities above are not banning condominium apartments, private security guards for shopping malls, or private subdivisions. They are, however, banning residential gates, and are

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[112]City of Flagstaff, Arizona, *Flagstaff Area Regional Land Use and Development Plan*, Appendix D, Regional Task Force Addendum (draft, 15 July 1999) at 147.

[113]City of Brisbane, Australia, *Brisbane City Plan 1999*, Codes and Related Provisions (5 February 1999) at 153 (§5.1, P5, A5.1).

[114]*Ibid.* at 201 (§7.1).

[115]City of Concord, California, *Report to Planning Commission*, Montecito Residential Subdivision Use Permit Amendment (UP 02-006) (6 March 2002) at 3.

[116]A. Hart, "Camas Takes Look at Gated Communities" *The Columbian (Vancouver, WA)* (23 January 2000) B1; A. Hart, "Testimony Split on Gated Communities in Camas" *The Columbian (Vancouver, WA)* (25 January 2000) B3; A. Hart, "Gate Ban May Get Locked Out" *The Columbian (Vancouver, WA)* (11 February 2000) B1; A. Hart, "City Backs off Vote to Ban Gated Community" *The Columbian (Vancouver, WA)* (15 February 2000) B1; E-mail from W. Woodruff, Camas City Councilmember to R. Levi (19 April 2002).

[117]S.M. Low, "Spatializing Culture: The Social Production and Social Construction of Public Space in Costa Rica" (1996) 23 American Ethnologist 861 at 861.

expressing concern over the effects that these gates can have on the broader community. This emphasis on the specific urban effects that are produced by gated communities finds echoes in the research of those who conduct qualitative empirical studies of cities. In particular, Laura Ruggeri's work specifically distinguishes gated communities from other private forms, suggesting that the logic of the condominium is explicitly inverted by the horizontal logic of gated communities, with very specific spatial and social effects that are ignored by the legal literature:

> Traditionally, the closer one moved to the top and the centre, the greater one's social power; power and prestige diminished as one moved toward the peripheries. This obsession with the 'centre' lead to a very high concentration of tall residential buildings in what is improperly described as the 'business district'. This vertical, and stratified arrangement of space, where top floors are the most prestigious and desirable, is now challenged by the proliferation of upmarket gated communities in the periphery. Developers can maximize profit by acquiring unattractive lots, whose market price is very low, and then building luxury homes and first class facilities, similar to those found in more prestigious areas. It is only by virtue of their isolation from their dreary surroundings and the security systems that enable it, that these enclaves become suitable for the middle and upper class.[118]

As Ruggeri suggests, as a material symbol or signal of social ordering,[119] the gates themselves are critical elements that cannot be understood solely through reducing these forms to their status as private developments.[120] The "collective imaginary" of cities is here acted upon through the "symbolic role of architecture," with gated communities and their attendant reshuffling of power in the core and the periphery of urban spaces.[121] Distinguishing gated communities by

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[118]L. Ruggeri, "Prisoners of the California Dream; Panic Suburbs in Hong Kong" (n.d.), online: Middlesex University <http://vcm.mdx.ac.uk/spatialculture/ruggeriessay3.html> (last accessed: 24 June 2002).

[119]As Gillette argues, choosing private forms of governance (and in particular, forms such as gated communities that are easily visible) can have a signaling effect regarding satisfaction with public forms: see "Public Service", *supra* note 63. Gillette concludes that "Whether we should invite such signals depends on whether the process of amplification improves on more opaque alternatives or generates intolerable costs to political life. But even focusing on these factors fails to reveal the full complexity of opting out. Our willingness to risk efficient provision, efficient politics, or community, varies from service to service" (at 1219).

[120]I here rely on Michele Lamont's elaboration of symbolic boundaries, in particular her emphasis on the multipolarity these boundaries can take and the ways in which they are deployed by individuals in making sense of the world: see M. Lamont, *The Dignity of Working Men: Morality and the Boundaries of Race, Class, and Immigration* (Cambridge, MA: Harvard University Press, 2000).

[121]See F. Godard, "Cities as Arenas of Accelerated Social Transformations" (Management of Social Transformations

emphasizing the built environment[122] does not ignore the private nature of these developments, but neither does it privilege this lens.[123] Instead, logics of space lead to multiple configurations of power, marginalization, inclusion, and exclusion, configurations which are not always coextensive with divisions of public and private, and which may instead transgress that very divide.[124]

Despite the emphasis of much of the literature on the effects of gates in excluding outsiders, both physically and symbolically, gating also carries important cultural connotations for residents of these communities. Hagan suggests that such barriers "may have as much or more subjective significance for those who are 'fenced in' as for those who are 'fenced out'."[125] This is to be expected. In Foucauldian terms, gated communities are at times conceived of as heterotopias, invoking "community" while at the same time neutralizing, subverting, or inverting that very term, and as such, individuals in these developments are produced as residents in interaction with this particular built and discursive environment.[126]

Programme Seminar, UNESCO, Vienna, 10-12 February 1994), online: United Nations Educational, Scientific and Cultural Organization <http://www.unesco.org/most/wien/godard.htm> (last accessed: 24 June 2002).

[122]Analyses of the built environment have been taken up most impressively in recent anthropological work. In this chapter, I seek to add a sociolegal dimension to this general project, focusing mainly on legal materials themselves. For more on the theoretical import of studying the built environment and spatial forms, see D.L. Lawrence & S.M. Low, "The Built Environment and Spatial Form" (1990) 19 Annual Review of Anthropology 453 [hereinafter "Built Environment and Spatial Form"].

[123]See, for instance, the range of issues covered through Soja's analysis of Los Angeles in *Postmodern Geographies*, *supra* note 80. This emphasis makes the stance in this chapter both similar to and distinct from that taken by Robert Ellickson. Ellickson's early work on homeowners associations similarly sought to conceive of the differences between these and cities on formal grounds, yet in doing so he tended to privilege the private nature of these developments: see "Cities and Homeowners Associations", *supra* note 63.

[124]For a similar reflection on the paradoxes of spatial practices on identity formation, see L. Sanchez, "Spatial Practices and Bodily Maneuvers: Negotiating at the Margins of a Local Sexual Economy" (1997) 20 Political and Legal Anthropology Review 47 [hereinafter "Spatial Practices and Bodily Maneuvers"].

[125]J. Hagan, "Class Fortification Against Crime in Canada" (1992) 29 Canadian Review of Sociology and Anthropology 126 at 128. In contrast, those writing on "spatial governmentality" focus on the spatial mechanisms used to produce outsiders. See S.E. Merry, "Spatial Governmentality and the New Urban Social Order: Controlling Gender Violence Through Law" (2001) 103 American Anthropologist 16 [hereinafter "Spatial Governmentality"].

[126]M. Foucault, "Of Other Spaces" (1986) 16 Diacritics 22. In this essay, Foucault provides five elements of what he calls "heterotopias," locations which he contrasts to utopias in their being both *mythic* and *real* at the same time. I thereby suggest that gated communities, and the residents who live there, are in fact produced in a range of ways, at least partially through a "legal infrastructure" which is glossed over by invoking terms such as participatory regulation, choice, and consent: see generally S. Sassen, "Spatialities and Temporalities of the Global: Elements for a Theorization" (2000) 12 Public Culture 215 at 217-218. The analysis of gated communities as heterotopia is

Through her ethnographic research, Setha Low demonstrates that it is indeed the gate itself that residents focus upon – but not only as a physical barrier, but as an attempt to create a sense of social distance between them and what they perceive to be neighbourhood deterioration occurring in other residential areas. Her interviews reveal that the presence of the gate appears to shield residents from concerns they have when living in other neighborhoods: concerns over ethnic changes, the replacement of Bloomingdale's stores with K-Marts, shopping in "mixed" areas, where they feel more "threatened" because that is "where everybody goes," or fears of staying home alone or having one's child kidnapped.[127] It is the presence of the gate, and not the private nature of the development, that appears to provide residents with this social distance. As one resident describes, despite living in private subdivisions, residents belonging to other homeowners associations experience their form of privatized living very differently from those living in gated communities. For some, the gate itself holds an attraction that renders it distinct from the private neighbourhoods in which they live, even if the gate cannot provide the security protection it seems to instantiate:

> ... First of all, it's a false sense of security if you think about it ... There's a perception of safety that may not be real ... [Those living here are people] who want to raise families in a more protected environment ... There are a lot of families who have, in the last couple of years, after we built, as the crime rate, or the reporting of that crime rate, has become such a prominent part of the news of the community, there's been a lot of "fear flight." I've mentioned that people who were building or going to build [a home in the gated community] based on wanting to get out of the very exclusive subdivisions without a gate, solely for the gate ... shopping [for a house in the gated community] because they had been randomly robbed many times.[128]

Most interestingly, it would appear that the gate has this effect for these residents even when the gate is ineffective in excluding outsiders. As one of Low's respondents states, there is a sense of security within the gated development even when outsiders do in fact enter – the same

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pursued in more detail in "Heterotopia", *supra* note 29. Foucault's argument regarding heterotopias is particularly interesting for legal scholarship in this context: by providing an analytical framework for distinguishing heterotopias from utopias, arguments regarding gated communities can be distinguished from earlier cases involving utopian communities, such as Oneida. For an attempt to distinguish these that could have benefitted from this Foucauldian concept, see "Communities", *supra* note 53 at 286-287.

[127]"Edge and the Center", *supra* note 98.

[128]*Ibid.* at 53-54.

outsiders who, if living in a non-gated neighbourhood, would leave her family concerned for the safety of her children:

> [That sense of security is] what's been most important to my husband, to get the children out here where they can feel safe, and we feel safe if they could go out in the streets and not worry that someone is going to grab them ... We feel so secure and maybe that's wrong too ... You know, we've got workers out here, and we still think "oh, they're safe out here" ...[129]

What the above resident appears to be relying on, then, is not the exclusion of these very outsiders, but the sense of manageability and controllability of the environment around them. Echoing the concerns over urban "gigantism" mentioned earlier in this chapter, this resident elaborates that her concerns over living outside the gate is that "there was so much traffic coming in and out, you never knew who was cruising the street and how fast they can grab a child ... And I don't feel that way in our area at all."[130] Other residents similarly focus on the sense of control that gated living offers them, and their concern over the heterogeneity and diversity of the world outside:

> When I leave the area entirely and go downtown [little laugh], I feel quite threatened, just being out in normal urban areas, unrestricted urban areas ... Please let me explain ... if you go downtown, which is much more mixed, where everybody goes, I feel much more threatened.[131]

This sense of control is further articulated, by residents and developers alike – as I discuss later, even in the litigation surrounding gated communities and their borders – as providing a sense of *home* that is instantiated by the gates themselves:

> When you drive home, you would feel that you were home at one of two places: when you turn onto your street or when you turn into your driveway. *When I put a gate on an entrance, I can extend that feeling of home, which is so strong in you, it feels unbelievable.* I can extend it as far away as your house is from the gate. (National

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[129] *Ibid.* at 54.

[130] *Ibid.*

[131] *Ibid.*

consultant on gated communities, 1994).[132]

> Open up your senses and tour Anthem Las Vegas with us. From the moment you pass through the grand guard-gated entry to the handsome Model Village where 18 diverse home designs are showcased ... More than a collection of distinctive homes and exceptional amenities, *Anthem Country Club will be your own personal world*, a rich lifestyle orchestrated around a private club. Live in this vibrant environment and you'll be welcomed by scenic lakes and waterfalls, mountain vistas and dazzling city views. Plus, you'll have a club that feels like home, and a home that feels like paradise. (Advertisement, 2002).[133]

> If this isn't heaven it's the next best thing. An idyllic life awaits you at The Courts on Mattie's Orchard – *a retreat unto itself, secluded from the cares and bustle of the world.* It's an exclusive neighborhood, designed and laid out around eight turn-of-the-century, craft-style homes, built with special care and attention to detail. Here you'll find a different pace to life, created for active executives and retirees searching for *an escape from the harried activity of the city* ... Realizing that your real estate investment is only as good as the neighborhood itself, we have created every safeguard to insure those who invest in The Courts on Mattie's Orchard of only the highest standards in workmanship, down to the most meticulous detail; and *to provide the community with safeguards against intrusion in any form from the outside world*. (Advertisement, 2002).[134]

> It's an artificial setting here, but you're creating that environment, which *duplicates what Middle America used to be back when you had small towns*. (Resident, n.d.).[135]

The gates, of course, do not provide these residents with isolation. Instead, they provide residents with the opportunity to enjoy all the advantages of the world outside the gates, while offering them a sense of security within the gates by making their residential environment smaller and easier to control. The marketing of gated communities, then, provides residents with what is said to be the best of both worlds. Residents enjoy high speed internet connections from service providers beyond the gate; delivery of their daily newspapers; the continued ability to travel to and from work; calling on local servicemen; dining and entertainment; and so on. As

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[132]See comments from an interview with a national consultant on gated communities, in *Fortress America*, *supra* note 3 at 19 [emphasis added].

[133]"Experience a greater level of luxury and privacy at Anthem Las Vegas" (n.d.), online: Del Webb Corporation <http://www.delwebb.com/countryclub/nevada/anthemcountryclub/amenities/amenities.shtml> (last accessed: 26 July 2002) [emphasis added].

[134]"The Courts on Mattie's Orchard" (n.d.), online: Duncans Cove Incorporated <http://www.duncanscove.com/Brochure.htm> (last accessed: 29 July 2002) [emphasis added].

[135]Quoted in *Fortress America*, *supra* note 3 at 63 [emphasis added].

a Florida real estate development summarizes, "[t]he gated community boasts a private clubhouse, exercise room, pool, outdoor spa and a manned guardhouse with 24-hour security. Within a two-mile radius you will find world-renowned private spas, tennis courts, golf courses, marina facilities, shopping malls, schools and more."[136]

Of course, residents themselves are acutely aware of the limitations of these gates, including the reality of outsiders entering, of security failures, and of having to cross the gates themselves, in order to shop in threatening "unrestricted urban areas," "where everybody goes."[137] Yet they continue to find themselves feeling safer, providing a sense that these developments reflect a certain feudalism, and through it the creation of smaller physical spaces rather than maintaining the city as a whole as the territory of governance. Other researchers have reached similar conclusions, suggesting that the latent premise of gated communities is that "unregulated and uncontrolled space is dangerous space."[138] Setha Low's conclusion is thereby quite compelling – in which she suggests that in addition to excluding outsiders, the walls have a cultural effect that comforts residents by "making visible the systems of exclusion that are already there, now constructed in concrete."[139] Low's emphasis on the *social meaning*, or *cultural valence*, of the gate echoes David Harvey's work, stressing how social relations are produced in and through spatial strategies:

> The internal spatio-temporal organization of the household, of workplaces, of cities, is the outcome of struggles to stabilize or disrupt social meanings by opposed social forces. The fixing of spatiality through material building creates solidly constructed spaces that instanciate negotiated or imposed social values ... The spatialized control of unwanted groups – the homeless, gypsies, "New Age" travelers, the elderly – and spatial stigmatization is as widespread a phenomenon in contemporary society as it was in the medieval world.[140]

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[136]See description of Aventura Bay Townhomes at "Aventura's Prestige Properties" (n.d.), online: www.aventura-homes.com <http://www.aventura-homes.com/aventura_properties.html> (last accessed: 29 July 2002).

[137]"Edge and the Center", *supra* note 98 at 54.

[138]"Heterotopia", *supra* note 29 at 196.

[139]"Edge and the Center", *supra* note 98 at 55.

[140]Harvey's tone is, of course, more Marxian than Low's. See *Justice, Nature & The Geography of Difference*, *supra* note 83 at 230.

It is this combination of material exclusion, perceived privilege, access to the outside and social meaning, often attributed to gated developments, that I here seek to conceptualize as an "assemblage." I invoke this as an instantiation of both the material form of the gate and the cultural valence attached to it in particular settings.[141] I do so in order to avoid suggesting that it is somehow the gate itself that carries its own effectivity, while continuing to argue that the gate is itself implicated in the cultural form of what a gated community represents, thereby reinforcing the integration of material, individual, and cultural elements in understanding the social environment.[142] Gated communities by their nature lend themselves "to the amalgamation of the spatial and the social," given the image of each that the term itself suggests.[143] The physical design is combined with a cultural strategy, perhaps reflecting a broader zeitgeist, that seeks to achieve security by controlling smaller spaces, invoking images of exclusion and exclusivity, and all the while preserving for residents (or even enhancing) the conveniences, relations, and opportunities offered by life outside the gate.[144]

Conceptually, focusing on gated communities as a distinct assemblage closely tracks recent work in anthropology more generally. Rather than presuming that forms are simply the dressing that needs to be unmasked, or penetrated, to arrive at the substance – in this case, to presume that gated communities are to be reduced to their private nature, or their use of private policing[145] – I draw on anthropological work that focuses on the forms as themselves significant. Setha Low's work represents this anthropological sensibility, which is similarly highlighted in Annelise

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[141]I am not here seeking to invoke the wide array of theoretical work on assemblages, but rather to rely on the concept to capture the different elements of gated communities and what they come to instantiate. See "Surveillant Assemblage", *supra* note 15.

[142]In the same way, Brigham and Gordon suggest that legal definitions carry a concrete materiality – so that "[o]wnership is presented in material ways (locks, fences, razor wire) and even more discursively (in language that says "Get out," "Where is the rent," "Come in")." J. Brigham & D.R. Gordon, "Law in Politics: Struggles over Property and Public Space on New York City's Lower East Side" (1996) 21 Law & Social Inquiry 265 at 277-278.

[143]"Heterotopia", *supra* note 29 at 195. For a similar argument regarding jurisdictional borders more generally, see "Law's Territory", *supra* note 25 at 855.

[144]I note here that it is particularly in the context of what gated communities are said to represent – claims of distance from the broader polity and the conception of community in neoliberal terms – that state law can become most central, and later fetishized. See J. Comaroff & J.L. Comaroff, "Millenial Capitalism: First Thoughts on a Second Coming" (2000) 12 Public Culture 291 at 328-330.

[145]See A.P. Morris, "Returning Justice to its Private Roots" (2001) 68 University of Chicago Law Review 551.

Riles' work in law and anthropology.[146]

Yet, analyses of material forms are rarely undertaken in legal scholarship.[147] In this vein, Blomley and Bakan claim that "legal relations and obligations are frequently thought of by the courts and other legal agencies as existing in a purely conceptual space, with little recognition of their spatial heterogeneity or the local material contexts within which law is understood and contested."[148] This echoes a growing recognition that our understandings of knowledge and power are themselves situated in time and space,[149] and that dominant spatial categories can act upon broader political logics and appropriable forms of identity.[150]

This chapter links this insight with the thinking of David Garland and Setha Low, and seeks

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[146]"Representing In-Between", *supra* note 17.

[147]It should be noted that spatial metaphors are used in various ways to explain the reach of law and the diversity of legal governance, by scholars in a variety of theoretical paradigms. Vera Chouinard speaks of geographies of power, Chris Tomlins of legal cartography, William Twining of mapping legal systems, and Boaventura Santos of legal pluralism in the context of "symbolic cartography and postmodern law." See V. Chouinard, "Challenging Law's Empire: Rebellion, Incorporation, and Changing Geographies of Power in Ontario's Legal Clinic System" (1998) 55 Studies in Political Economy 65; C.L. Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century" (2001) 26 Law and Social Inquiry 315; W. Twining, "Mapping Law" in W. Twining, ed., *Globalisation and Legal Theory* (Evanston, IL: Northwestern University Press, 2000) 136; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 472 [hereinafter *Toward a New Common Sense*]. Much of this reliance on spatial metaphors is intended to achieve one of three aims: to decenter a monistic view of "law" and invoke legal orders outside the state or in overlapping jurisdictions, to demonstrate the ways in which law governs differentially, and the ways in which the subjects and objects of legal governance are imagined in each site (see P. Rekacewicz, "Mapping Concepts (Cartographier la Pensée)" (2000) 12 Public Culture 703), or to refer to structural positions in which people find themselves, such as being at the intersection of race, class, and gender positions (these aims are not mutually exclusive, and Santos deploys all three of these nuances interdependently in discussing the relationship between law, knowledge, and mapping: see *Toward a New Common Sense* at 400-401.

[148]N.K. Blomley & J.C. Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30 Osgoode Hall Law Journal 661 at 663-664 [hereinafter "Spacing Out"].

[149]This point is fundamental to Giddens' "time-space distanciation": see eg. A. Giddens, "Agency, Institution, and Time-Space Analysis" in K. Knorr-Cetina, A.V. Cicourel, eds., *Advances in Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies* (London: Routledge, 1981) 161 at 168; A. Giddens, *The Constitution of Society* (Cambridge: Polity, 1984) at 110-144.

[150]See F. Jameson, "The Cultural Logic of Late Capitalism" in F. Jameson, ed., *Postmodernism, or, The Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991). Jameson, in fact, points to the possibility that spatial changes may outpace, at times, our capacity to understand them. He concludes that in its newest mutations, space "has finally succeeded in transcending the capacities of the individual human body to locate itself, to organize its immediate surroundings perceptually, and cognitively to map its position in a mappable external world," and that this disjunction "can itself stand as the symbol and analogon of that even sharper dilemma which is the incapacity of our minds, at least at present, to map the great global multinational and decentered communicational network in which we find ourselves caught as individual subjects."

to draw out the ways in which the case law dealing with gated communities relies on a certain vision of spatial relations – a geography of community – and the effects this has on contemplating neighbourhoods with particular capacities and structures assigned to them, and boundaries that have differing levels of permeability depending on these constructions. This emphasis on the social production of space is one that Denise Lawrence and Setha Low have elsewhere defined as the economic, historical, and political formation of material space, and which I here extend to include law and legal adjudication.[151]

In focusing on the normative contestations that occur when gated communities are placed within law's gaze, my interest here is in those cases that pit gated communities against non-residents. These are precisely the decisions that have been largely ignored by scholars to date, with much of the literature focusing on the internal powers of homeowners associations to regulate residents' lives through community covenants, codes, and restrictions. Struggles over the permeability of the boundaries erected by gated communities, however, are critical to distilling how courts conceive of this spatial form, and the political conceptions of community and of space it instantiates.[152] This is not to say that understanding the law on gated communities would not require an analysis of cases dealing with other forms, ranging from company towns through shopping malls and condominium apartments. It is, however, to suggest that distinct forms may themselves generate different effects and responses, and I here investigate the ways in which knowledges of community and of space are deployed when the borders erected by gated communities are themselves in law's gaze.[153]

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[151]"Built Environment and Spatial Form", *supra* note 122.

[152]P. Bourdieu, "Site Effects" in P. Bourdieu et al., ed., *The Weight of the World: Social Suffering in Contemporary Society* (Cambridge: Polity, 1999) 123 at 129. In a legal context, Schragger suggests that localism "does not just happen," but is instead constructed by background assumptions, private action, and the legitimacy granted to certain relations by state actors: see "Limits of Localism", *supra* note 26 at 374.

[153]I draw on what Merry refers to as "mechanisms of social order based on spatial regulation." See "Spatial Governmentality", *supra* note 125 at 16. See also R.W. Perry, "Governmentalities in City-scapes: Introduction to the Symposium" (2000) 23 Political and Legal Anthropology Review 65 at 66-67. For the reverse emphasis on locating law's power in actual territories, see R.J. Coombe, "Anthropological Approaches to Law and Society in Conditions of Globalization" (1995) 10 American University of International Law and Policy 791.

IV. Borders: Law and Spatial Regulation

With very few articles discussing the case law dealing with gated communities in particular, legal commentators have ignored the analytical questions of boundaries in these enclaves – both the making of boundaries and their transgression – and the legal disputes surrounding the proper borders of gated developments and the permeability of those borders by residents and outsiders alike.[154] When brought together, cases involving gated communities demonstrate that a focus on the private nature of residential associations only engages part of the story, which results in unwarranted generalizations regarding the legal contestations in which gated communities and non-residents are involved.[155]

Although there remains comparatively little work dealing with law and spatial regulation,[156] the work that does exist stresses borders and boundaries.[157] This is particularly the case in

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[154]Although a rich set of materials regarding the relationship between law and gated communities is found at the municipal level – where zoning applications, municipal board decisions, and public consultations are held – I focus in this chapter on cases that have been adjudicated in state and federal courts. Whereas zoning and planning hearings are overtly concerned with space and its social consequences, state and federal decisions instead reveal that contestation over borders takes place in a wider range of forums, and in situations dealing with an array of legal questions. This method is close to that employed by Blomley and Bakan in their study of case law regarding health and safety legislation in the workplace, and thereby seeks to contribute to this literature on space and legal adjudication.

[155]A similar perspective has recently been taken by Frug, who first distills the ways in which law comes to produce certain assumptions and visions of cities, and only then goes on to provide a more utopic frame of urban "community building" that extends beyond conceptions of private property rights. See *City Making*, *supra* note 56.

[156]Wesley Pue seems to attribute this to an "anti-geographical" mentality within law, in which de-contextualized concepts and identities are the units of analysis, in contrast to geography's emphasis on the particular, embedded nature of all relations (W. Pue, "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 Urban Geography 566). Much turns here on what one considers to be "geographical." See generally *Toward a New Common Sense*, *supra* note 147 at 456-473. Reliance on space in sociolegal scholarship to date has admittedly suffered from some conceptual slippage, and it is not always clear how "space" or "places of citizenship" provide greater analytical purchase than examining the public/private divide or the difficulties of intersectionality. As others have pointed out, space "is an all-purpose nostrum to be applied whenever things look sticky," and the concept has thereby been used with "abandon": see M. Crang & N. Thrift, "Introduction" in M. Crang & N. Thrift, eds., *Thinking Space: Critical Geographies* (London: Routledge, 2000) 1 at 1. In this chapter, I instead rely on space to ground my examination of gated communities as a particular form, despite it having no legal significance in its own right.

[157]This is to be expected, since law is often involved in adjudicating disputes over settled boundaries and in producing and organizing those boundaries in the first place: see E.W. Soja, "Surveying Law and Borders: Afterword" (1996) 48 Stanford Law Review 1421 at 1425-1426. In contrast to Soja, however, I only conceive of "social space" to the extent that this can be traced to conceptions of material space (M. Keith & S. Pile, "The Politics of Place" in M. Keith & S. Pile, eds., *Place and the Politics of Identity* (New York: Routledge, 1993) 1 at 2). Spatial analyses have elsewhere extended beyond material analyses, to rely on metaphors for understanding social positions and legal relations. For Blomley and Pratt, rights are themselves "geographical," both with respect to who may claim them and with respect to the social relations that rights may affect (N. Blomley & G. Pratt, "Canada and

research on local government law, with researchers arguing over the proper institutional framework for the boundaries of cities,[158] localities,[159] and communities.[160] Comparatively little research, however, focuses on law's existing vision of boundaries,[161] with most instead concerned with devising new forms of institutional design. A significant exception is Richard Ford's article on the boundaries of race, in which he argues that the deference paid by American courts to municipal borders can have disastrous effect on race relations.[162] Arguing that courts have mistakenly accepted self-defining localities (including homeowners associations) as unproblematic entities, Ford suggests that this deference has naturalized the residential segregation that is often instantiated by constructed borders.[163] How law conceives of borders[164]

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the Political Geographies of Rights" (2001) 45 Canadian Geographer 151 at 154). Similarly, Chouinard provides evidence that despite formal entitlements to equality, disabled Canadians find themselves in "places of shadow citizenship," limited in their ability to assert those rights due to the often marginalized positions in which they find themselves (V. Chouinard, "Legal Peripheries: Struggles over DisAbled Canadians' Places in Law, Society and Space" (2001) 45 Canadian Geographer 187). Relatedly, Sanchez describes the normative spaces of the sex trade, and the twinning of marginalized social and physical space of prostitution: "Spatial Practices and Bodily Maneuvers", *supra* note 124.

[158]*City Making*, *supra* note 56; R.C. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning" (1996) 105 Yale Law Journal 1165.

[159]*City Making*, *ibid.*

[160]J. Waldron, "Homelessness and Community" (2000) 60 University of Toronto Law Journal 371.

[161]Although rarely engaging with the more theoretical literature on space, I note that these scholars explicitly interrogate the uses to which material space can (and ought) to be put, and thereby denaturalize received ideas of location as neutral, unconstructed, and pre-political. These are, however, generally seen as normative contestations in their own right, rather than an examination of how these borders are conceived of in law. A significant exception would be Michael Heller, who has provided a thorough legal and economic analysis of the differences between physical boundaries and those that differentiate bundles of legal relations in property law: see M.A. Heller, "The Boundaries of Private Property" (1999) 108 Yale Law Journal 1163.

[162]Ford provides theoretical and empirical support that spaces themselves can become racially identified, and that this process can lead to disastrous effects for minority residents: "Boundaries of Race", *supra* note 64.

[163]*Ibid.* at 1860. Ford demonstrates that, by relying on two distinct visions of political space – one in which political space is natural and fixed ("opaque"), and one in which it is rendered so artificial as to be without real-world consequences ("transparent") – the case law has, while the effects of these boundaries are interdependently masked as being without significant consequence (at 1860-1878). Proposing instead an elaborate system whereby political boundaries are subject to change and voting is somewhat detached from spatial residency (at 1909-1911), Ford stresses that "political geography is the missing element" in reconciling competing tensions of majoritarian democracy, private property, racial equality, and cultural autonomy (at 1919-1920). This has since been taken up by others writing on the intersection of law and urban problems, with a particular emphasis on racial and residential segregation. See eg. D. Delaney, "The Boundaries of Responsibility: Interpretations of Geography in School Desegregation Cases" (1994) 15 Urban Geography 470; J.O. Calmore, "Racialized Space and the Culture of Segregation: 'Hewing a Stone of Hope From a Mountain of Despair'," (1995) 143 University of Pennsylvania Law

can thereby provide stark evidence of the imagination of community authorized by legal authorities, normative struggles over social relations,[165] and the forms of community that may instead find resistance in the courts.[166]

The focus on borders is particularly well suited to the context of gated communities, bringing together the privately governed aspect of the internal city streets with a restriction on accessing those streets that is demarcated by the gate. As this chapter demonstrates, contestations over the borders of gated communities can occur in cases of freedom of expression, criminal law, municipal services, vehicle codes, civil procedure, and property law. Furthermore, these contestations over borders are not solely about public and private power, and they engage both state and non-state actors in their relations with private gated communities.

In the present chapter, I seek to unpack the borders of gated communities as contested spaces in law.[167] My interest in so doing is not in providing a typology of cases, but to insist instead on a nuanced understanding of the production of boundaries, social mapping, and the constitution of community in these developments.[168] Focusing on the juridic parameters by which the

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Review 1233; R. Oh, "Apartheid in America: Residential Segregation and the Colorline in the Twenty-First Century" (1995) 15 Boston College Third World Law Journal 385; C. Thomas, "Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development" (1999) 9 Transnational Law and Contemporary Problems 1; A.G. MacFarlane, "Race, Space and Place: The Geography of Economic Development" (1999) 36 San Diego Law Review 295.

[164]Of course, as Davina Cooper's work demonstrates, borders need not be physical in order to come within law's gaze, as she brings to the fore the normative contestations that occur regarding the placement of as a symbolic perimeter. See D. Cooper, "Promoting Injury or Freedom: Radical Pluralism and Orthodox Jewish Symbolism" (2000) 23 Ethnic and Racial Studies 1062 at 1064-1065; D. Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (New York: Rivers Oram, 1998) at 123-142 [hereinafter *Governing Out of Order*].

[165]D. Pellow, "Introduction" in D. Pellow, ed. *Setting Boundaries: The Anthropology of Spatial and Social Organization* (Westport, CT: Greenwood, 1996) 1 at 3. See also "Limits of Localism", *supra* note 26 at 440. Space thereby operates as a "political technique": see *Governing Out of Order*, *ibid.* at 14-15.

[166]In this vein, Borrows argues that "[t]he law has put a culturally exclusive vision of geography at its service," one which has, in his analysis, severed Indigenous use of the environment from democratic institutions: J. Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 University of Toronto Law Journal 417 at 430-431.

[167]D. Pellow, "Intimate Boundaries: A Chinese Puzzle" in D. Pellow, ed., *Setting Boundaries: The Anthropology of Spatial and Social Organization* (Westport, CT: Greenwood, 1996) 111 at 132. As she concludes, what is central is not that boundaries exist, but "how they are framed and how they are realigned according to context."

[168]The concept of social mapping, itself an overlaying of spatial logics onto the sphere of social relations, opens the opportunity for thinking of both the forms and content of behaviour tolerated within spaces, and the differences in power and opportunity across them: see D. Pellow, "Concluding Thoughts" in D. Pellow, ed., *Setting Boundaries:*

boundaries of gated communities are contested and defined,[169] this chapter finds that courts adjudicating gated community cases are actively deconstructing the assumptions regarding insiders and outsiders that these developments claim for their residents and which later present themselves as material forms in the social environment.[170] I find that paying close attention to the forms of community actually *being* articulated by courts reveals a great deal – and that by relying on a spatial perspective to justify isolating those cases dealing specifically with gated communities and non-residents, one finds a vision of community that is far different from that presumed by the legal, criminological, and urban studies literature.

In analysing these cases, I further suggest that the disjuncture I locate between the visions of community presented by courts and gated communities reflects a disjuncture over the conception of space that each presents.[171] Comparatively little work has focused on the spatial nature of citizenship and the creation of the "social."[172] Yet the vision of geography that is presented by gated communities, which in this situation is precisely what provides community with so much of its rhetorical force, is one of small, distinct, and sovereign spaces – both protected from the world beyond the walls while also able to enjoy the conveniences of modern life that linkages to that world present. The vision of community that is instead presented by the courts, as we will see, is one that insists on the obligations that come with those linkages, and which thereby insists on a somewhat more homogenized vision of space. In this vision, local decisions to seal off a

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The Anthropology of Spatial and Social Organization (Westport, CT: Greenwood, 1996) 215.

[169]R.J. Lawrence, "The Multidimensional Nature of Boundaries: An Inrtegrative Historical Perspective" in D. Pellow, ed., *Setting Boundaries: The Anthropology of Spatial and Social Organization* (Westport, CT: Greenwood, 1996) 9 at 13 [original italics removed] [hereinafter "Multidimensional Nature of Boundaries"].

[170]This is perhaps the inverse of Blomley's analysis of how legal definitions can be displaced through a counter-politics of property and space: "Landscapes of Property", *supra* note 1.

[171]In another context, Shamir explores the importance of how courts define locality, arguing that the very culture of Bedouin Arabs is acted upon through the visions of space deployed by Israeli courts. R. Shamir, "Suspended in Space: Bedouins under the Law of Israel" (1996) 30 Law & Society Review 231. See also R. Mawani, "In Between and Out of Place: Racial Hybridity, Liquor, and the Law in Late 19th and Early 20th Century British Columbia" (2000) 15 Canadian Journal of Law & Society 9.

[172]See L. Zhang, "Spatiality and Urban Citizenship in Late Socialist China" (2002) 14 Public Culture 311 at 314-316; M. Poovey, "The Liberal Civil Subject and the Social in Eighteenth-Century British Moral Philosophy" (2002) 14 Public Culture 125; J. Painter & C. Philo, "Spaces of Citizenship" (1995) 14 Political Geography 107; T.P.R. Caldeira, *City of Walls: Crime, Segregation and Citizenship in São Paulo* (Berkeley: University of California Press, 2000).

physical area – and to present a feudal image of sovereign spaces, carving up a pre-defined polity into heterogeneous sub-elements – is resisted, in favour of a flatter, less imbricated (or what I call here, "homogenized") vision of political space. From legal and political perspectives, this contestation is over boundary setting – what spatial area ought to be included in assessing relationships of inclusion and exclusion – but from a geographic perspective, this further takes on a dimension of determining the amount (and type) of authorized spatial imbrication.

In focusing specifically on the material form of gated communities, I find that courts have sought to generate limits on the ability of these developments to assert their particularity and insularity, and these limits are closely linked to the ability of outsiders to continue to engage in economic, legal, and political relationships with those residents within the gates.[173] As I discuss below, each of these three relationships is the subject of adjudication in these cases, and it is through this adjudication that the image of a broader polity, or a "social body" – one in which a free flow of interactions must extend between those inside and those outside the gate – is constructed by the courts.[174]

V. The Adjudication of Community through Spatial Ordering

The adjudication of cases involving gated communities and non-residents provides a setting in which to examine conflicts over community and space within one particular legal complex. This is akin to Rose and Valverde's approach to studying legal governance: rather than studying how law regulates common interest communities as a general matter, I rely on insights from anthropology and geography to instead study how one particular aspect of the legal complex, in this case courts, imagines gated communities as a target of government, and the premises and

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[173]I am not suggesting that courts somehow enjoy an innate effectivity through which to replace the dominant discourse on gated communities with an alternate vision of community. I am particularly cautious about making such a claim given the lack of attention that even legal scholars have paid to the courts' arguments and decisions in these cases.

[174]It is the attention to the built environment in recent anthropological work that I find most relevant here, and I seek to respond to Lawrence and Low's interrogation of how history and social institutions – in this case, courts – play a role in generating these material forms: "Built Environment and Spatial Form", *supra* note 122 at 455. Admittedly, I do here rely on a state-centric vision of what it means to come within law's gaze. For alternative accounts of the use of space as a counter-politics, see "Landscapes of Property", *supra* note 1; M. Oikawa, "Cartographies of Violence: Women, Memory, and the Subjects of the 'Internment'" (2000) 15 Canadian Journal of Law & Society 39 at 57-69.

assumptions that are brought to bear in this process.[175]

To date, David Kennedy's argument that gated communities ought to be conceived of as state actors is the article most concentrated on those cases dealing specifically with gated communities.[176] Yet, since Kennedy's work is most concerned with the negative effects of these residential developments on non-members, his focus is not on the vision of community that is being put forth, but on the ability of courts to offer redress. Kennedy's analysis thereby glosses over the normative logics already being competed over in these cases, including law's treatment of the explicitly material forms that are instantiated in the borders of these gated developments. Instead, he examines these cases as evidence of local conflicts, and argues that courts can more effectively solve such disputes if they rely on his proposed state action framework.

In this section, I return to this area, both in order to adopt a different focus from Kennedy as well as to expand such analysis to include several new cases. I demonstrate that courts dealing with the boundaries of gated communities appear to recognize these as distinct spatial forms, and are further resisting the claims being made by these communities in excluding outsiders. This judicial vision appears instead to locate community in political, legal, economic and social relationships that extend across time and space. I further demonstrate that in these cases, courts do leave open the possibility for gated communities to exclude non-members, yet the decisions appear to limit these circumstances so severely that residents of such communities would have to disengage entirely from external relationships. In so doing I seek to demonstrate that contrary to what the literature to date suggests, isolating those judicial decisions dealing specifically with gated communities – as a unique spatial and cultural form – provides evidence of an existing, ongoing normative conflict over the reach and exclusionary capacities of something called "privatopia" or "fortress America."

a) Gated communities as a new and unique assemblage

In contrast to much of the research to date, courts adjudicating cases that pit gated communities (or their residents) against the interests of non-residents do recognize the cultural

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[175]N. Rose & M. Valverde, "Governed by Law?" (1998) 7 Social & Legal Studies 541 [hereinafter "Governed by Law?"].

[176]"Residential Associations as State Actors", *supra* note 48.

specificity of this material form. Rather than beginning their analyses by simply equating gated communities to other private developments, the *novelty* of this form is instead commented on by judges in framing their decisions.

In an early case involving commercial speech in a Californian gated community, the California Court of Appeal frames its *Laguna Publishing* decision as a response to "the gated and walled community" being "a new phenomenon on the social scene," and concludes that *despite this innovation*, "the ingenuity of the law will not be deterred in redressing grievances" presented by these physical barriers.[177] Twelve years later in *Citizens Against Gated Enclaves*, this same court continues to express concern over the erecting of gates in particular, identifying the proliferation of gating as "a return to feudal times."[178] Conceiving of gated developments as a distinct social fact[179] leads this same court to elsewhere remark on the surprising lack of attention given in law to gated communities as specific entities – finding, in a civil procedure case involving a gated community that would otherwise have been quite straightforward, that "[d]espite the great number of gated communities in the state, no California court has addressed this issue."[180]

The proliferation of gated communities as a distinct form is, as discussed earlier, closely aligned with the services, advantages, and separateness that residents of these developments are seeking. The impact of this assemblage, taken here as the coming together of a material form, market demands, and cultural resonance, is noted by the Florida Court of Appeal. In a decision upholding the legality of special tax districts for residents seeking enhanced municipal services, the Court refers to gated communities as having particular features not shared even by other private developments:

> An increasing number of communities are choosing to protect their persons and property

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[177]*Laguna Publishing Company* v. *Golden Rain Foundation*, 182 Cal. Rptr. 813 at 826 (Ct. App. 1982) [hereinafter *Laguna Publishing*], appeal dismissed for want of a substantial federal question, 459 U.S. 1192 (1982).

[178]*Citizens Against Gated Enclaves* v. *Whitley Heights Civic Association*, 28 Cal. Rptr. 2d 451 at 457 (Ct. App. 1994) [hereinafter *Citizens Against Gated Enclaves*].

[179]I here rely on Rabinow's use of the term, extending beyond the Durkheimian perspective to include representations: see "Representations are Social Facts", *supra* note 18.

[180]*Bein* v. *Brechtel-Jochim Group*, 6 Cal. App. 4th 1387 at 1391 (1992) [hereinafter *Bein*].

> by supplementing municipal and county police service with walled communities, neighborhood crime watches, off-duty police officer patrols, and protected entrances, including guard gates and guardhouses, manned with off-duty police officers or security guards.[181]

As the Florida decision itself demonstrates, these real estate choices then lead to distinct questions for litigation – in that case, an objection to the boundaries of the special taxation district and a concern that others will be able to free-ride on this enhanced security without paying their fair share, an objection that would be highly unlikely in the context of a guarded, vertical condominium. Courts themselves are aware of the price premium that residents pay for gating, similarly reflected earlier in the economic literature, and this has specific consequences for adjudication of cases involving residents.[182] This is parallelled by the externalities that gated communities can create for non-residents, which are referred to as "unique problems" by a recent New Jersey appellate decision:

> We pause first to note the unique nature of Panther Valley. It is a gated residential community ... [these types of common interest developments] fill a particular need in the housing market but they also pose unique problems for those who remain outside their gates, whether voluntarily or by economic necessity. The understandable desire of individuals to protect themselves and their families from some of the ravages of modern society and thus reside within such communities should not become a vehicle to ensure that those problems remain the burden of those least able to afford a viable solution. We hasten to add that we recognize that not all gated communities are refuges for the wealthy. They are a spreading phenomenon that can be found among all economic strata. Their growth has been fuelled by the public's fear of crime and need for safety.[183]

Imagining gated communities in terms such as their *unique nature*, filling a *particular need*, and posing *unique problems*, the New Jersey appellate court here expressly considers some of the social effects of gating. In so doing, the Court interprets gated communities as a move away from social insurance forms of risk pooling, and toward a model – identified by others as an

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[181] *Rushfeldt* v. *Metropolitan Dade County*, 630 So. 2d 643 at 644-645 (Fla. Ct. App., 1994) [hereinafter *Rushfeldt*].

[182] See eg. *Landry and Landry* v. *Hilton Head Plantation Property Owners*, 317 S.C. 200 (Ct. App., 1994); *Norton* v. *Morningside Community Association*, [2001] Cal. App. Unpub. Lexis 344, online: LEXIS (MEGA); *Oak Park Trust and Savings Bank* v. *Therkildsen*, 209 F. 3d 648 (7th Cir., 2000).

[183] *Mulligan* v. *Panther Valley Property Owners Association*, 337 N.J. Super. 293 at 301-307 (2001) [internal citations omitted] [hereinafter *Mulligan (2001)*].

instance of neoliberalism[184] – that instead pits certain economic classes against others, with "those least able to afford a viable solution" presented as unwitting victims of this reorganization of risk. This logic presents the potential for risks (what the Court calls "the ravages of modern society") as a good that is subject to market demands, and is thereby hierarchically distributed along class lines. This turns Ulrich Beck's now famous logic on its head – while Beck admits that, in "risk society," risks are not randomly distributed, he argues that exposure to risk is not coextensive with class position. As such, Beck's statement that "poverty is hierarchic, smog is democratic"[185] is here brought into conflict with a neoliberal reliance on gates as forms of risk management, and an emphasis on the differential effects this cleavage can carry across the population. In its contemplation, the New Jersey appellate court is concerned that gated communities may not only provide differential levels of security in the population, but may further exacerbate the risks faced by non-residents, "perhaps exposing those within that remaining [non-gated] corridor to a greater risk of harm than they might otherwise have had to confront."[186]

Other courts have expressed similar concerns over the cultural consequences that might flow from the tendency of gated communities to isolate their residents from the remainder of the population. A New Jersey trial court expressed its concern that a gated and secured retirement village would become a "political 'isolation booth'," a concern that appears to have been prompted by the act of gating itself, rather than the decision of elderly residents to live in close proximity to each other. Reflecting this concern, the court expressly relies on the gates themselves, both physically and metaphorically, in deciding that "this court feels compelled to hold ajar the gates" of the community and allow outsiders to enter the development.[187] The California Court of Appeal, also allowing outsiders to enter a gated development, was overtly sarcastic of the implicit concern that doing so would mean that "some infectious, undisciplined

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[184]*Powers of Freedom*, *supra* note 21 at 167-196.

[185]U. Beck, *Risk Society: Towards a New Modernity*, trans. M. Ritter (London: Sage, 1992) at 36.

[186]*Mulligan (2001)*, *supra* note 183 at 306 [internal citations omitted].

[187]*New Jersey* v. *Kolcz*, 114 N.J. Super. 408 at 416 (1971) [hereinafter *Kolcz*].

rabble would overrun" the neighbourhood.[188] And yet another decision of the California Court of Appeal determined that, although individuals can choose to live wherever they like, "they do not have the right to control who may sue or serve them by denying them physical access."[189] These decisions echo the earlier case of *Citizens Against Gated Enclaves*, in which the California Court similarly refused to find legislative support for gating that would allow for "each suburb being a fiefdom to which other citizens of the state are denied their fundamental right of access."[190]

Although I return to each of these cases in the analysis that follows, it is important to note the distinct attention that the judicial gaze is claiming for gated communities. Courts in these cases appear to resist the cultural assemblage of the gated community, which I argue has implications for the discursive production of community and space in these cases. As I discuss, all courts dealing with gated communities and non-residents offer instead a vision of community that relies heavily on the intertwined nature of legal, economic, and socio-political relationships. I am not claiming that this distinct social form translates to a distinct legal form, such that separate legal norms are developed in order to respond to this type of property. Rather, gated communities are presented as a distinct social and material form, and the vision of community underlying it – one which allows for isolation from the world outside while enjoying the advantages that world has to offer – is resisted by the courts. This furthers signals a resistance to the concept of space as it is produced by gated communities – rather than deferring to any uniqueness and narrow sovereignty of the space of gated communities, courts instead conceive of a homogenous vision of social space, in which legal, economic, and political relations flow without restriction. In contrast to a view of space as delineable, particular, and specific, the courts instead invoke a conception of relations that abstracts from an emphasis on place and instead imagines a modern life based on networks of exchange.[191] It is the voluntary distance from these networks, such as the social distance claimed and aspired to by the respondents in Setha Low's anthropological

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[188]*Laguna Publishing*, *supra* note 177 at 831.

[189]*Bein*, *supra* note 180 at 1393.

[190]*Citizens Against Gated Enclaves*, *supra* note 178 at 457.

[191]*Making a Social Body*, *supra* note 31 at 25-31.

research, that the courts here reject.

This disjuncture signals a legal vision of community that stresses networks of relationships and obligations, stemming not from a spatial assertion of difference – which is how gated communities may be conceived of culturally – but rather a premise that conceptualizes community from a modernist, transactional based view of solidarity, in which rights and obligations are defined solely in order to ensure the smooth operation of existing relationships rather than designed to promote the relationships themselves (ie. rather than designed to create "community"), and rather than designed to promote a communitarian vision of latent shared values (or a "thick" version of community). While it is tempting to suggest that the obligations placed on gated communities and their residents echos what Nikolas Rose refers to as the "social citizen," close attention to these cases suggests that this is not precisely the case. Whereas the social citizen is said to act with "a constant normative social evaluation of duties and responsibilities,"[192] the vision of community presented in these cases is one that highlights the presence of legal, social and economic networks, rather than seeking to create those relationships or to guide those relationships toward any particular normative outcome or purpose.[193]

In and of itself, this is obviously a normative position that is being taken by the courts, imposing normative obligations on residents based on empirical determinations of their relationships with others. As the cases demonstrate, courts are busy developing norms to guide the resolution of disputes over gating and its exclusionary effects. These normative positions are premised on values (though often not articulated as such) regarding how relationships with non-residents ought to be conducted. Yet I suggest that, in forming these normative obligations, the courts' values tend toward a form of social imaginary that conceives of a "radically secular" vision of the public, which is "grounded purely in its own common actions" rather than one which is linked together by a *prior* framework of ideas or beliefs as to what the goals of those interactions should be, or even whether interactions between residents and non-residents have value in and of themselves.[194]

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[192]*Powers of Freedom*, *supra* note 21 at 133.

[193]See eg. A. Riles, *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2000) at 172, discussing the effectiveness of the form of the "network" itself, rather than the content of the network.

[194]C. Taylor, "Modern Social Imaginaries" (2002) 14 Public Culture 91 at 115-116 [hereinafter "Modern Social

This is an important point. While strongly resisting the claims of gated communities against the entry of non-residents, as articulated in these cases the responsibilities that courts place on gated communities and their residents stem not from any inherent moral or normative bond to these non-residents – that non-residents ought, as a matter of principle, be allowed to cross the gates – but rather from the sociological fact of their situatedness in relations with others. A close reading of these cases suggests that at a conceptual level courts do appear willing to accept claims, made by gated communities or their residents, that seek to block access by outsiders – but that in order to succeed with such a claim the gated community must be *truly* isolated from the social body as a whole, and cannot enjoy access to relations outside the gate while restricting access by outsiders at the same time.

This possibility of a truly isolated development, in which restricting access by outsiders would not be resisted by courts, is thereby held out as a Weberian ideal type, highly abstracted from reality, yet which provides a guidepost for decision-making.[195] By relying on this conception of an "ideal type," I suggest that rather than simply holding out a consistent, hypothetical gated community in each case, these courts are instead working with a latent image of an isolated gated community – against which they compare the gated communities before them – and I use the concept of the ideal type to describe that image. As I will discuss, these courts at time invoke hypothetical scenarios, but it is the image on which these hypotheticals are based that I am interested in here. As a practical matter, however, none of these courts find that such an isolated, ideal type community exists before them, and instead determine in every case that the boundaries of these gated communities need to be open to non-residents due to existing social, political, legal, and economic relationships in which they are embedded.

b) Borders and Socio-Political Relations

While I later focus on cases dealing with legal and economic relations between residents and non-residents of gated communities, I begin here with three decisions that focus on the

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Imaginaries"].

[195]M. Weber, "Basic Sociological Terms" in G. Roth & C. Wittich, eds., *Economy and Society: An Outline of Interpretive Sociology*, vol.1 (Berkeley: University of California Press, 1978) 3 at 20 [hereinafter "Basic Sociological Terms"].

relationship of these residential areas to the broader social and political spheres. These three decisions provide evidence of a judicial resistance to the group independence claimed on behalf of gated communities, and present instead an alternative vision that promotes residents as part of a broader civic polity. Courts are 'thinking the polity' here, as Benedict Anderson might suggest:[196] these decisions highlight a resistance to the dominant cultural form of gated communities as secluded enclaves, imbued with the capacity to enjoy access to the outside while disengaging from political and social concerns that extend beyond the gate. Articulating this resistance requires courts to reject the spatial differentiation claimed by gated communities. As I discuss in this section, the courts instead produce a vision of "abstract space,"[197] in which the social body as extending beyond physical spaces and centers instead on the discursive production of a political community, a social space in which individuals are imagined to share a common fate, though they are not bound by kinship or normative commitment to a thicker understanding of the polity.[198]

The earliest decision to take this approach to gated communities is *New Jersey* v. *Kolcz*, decided by the New Jersey County Court in 1971,[199] which focusses on the gated village of Rossmoor. Designed as a planned retirement village, Rossmoor was surrounded in part by a wall and gates with security guards, and enacted rules and regulations stating that "solicitors and unauthorized persons will not be admitted."[200] The conflict arose when a group of non-Rossmoor residents came to the village to solicit signatures on a petition. These individuals were residents of Monroe Township, of which Rossmoor is a part, and the petition sought to develop support for political change in the township generally. Confronted at the front gate, these non-residents were told they could not canvas residents of Rossmoor door-to-door, but could instead be present at the community centre. Having entered Rossmoor and canvassed residents' homes in

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[196]B.R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991) at 22.

[197]*Making a Social Body*, *supra* note 31 at 25-54.

[198]See M. Warner, "Publics and Counterpublics" (2002) 14 Public Culture 49 at 56 *n*3.

[199]*Kolcz*, *supra* note 187.

[200]*Ibid.* at 410.

spite of this restriction, these non-residents were charged with trespassing and convicted in municipal court.

Concluding that "there is no substitute for door-to-door communication" in political canvassing,[201] the County Court turned to Rossmoor's restriction on solicitors and unauthorized persons. Deciding that the village must allow political canvassers into the area, the court expressed its concern that to decide otherwise would be to unduly isolate residents of Rossmoor from the remainder of the political community of which it is a part:

> [T]he court feels that defendants were exercising a legal right in a legal manner and therefore were not trespassers. This court does not wish to open wide the gates of Rossmoor and thereby allow anyone to come in, at any time, for any purpose. Nevertheless, this court feels compelled to hold ajar the gates of Rossmoor under the present circumstances. To hold otherwise would, in effect, create a political "isolation booth."[202]

The Court's specific resistance to excluding outsiders from Rossmoor – that the village would become a *political isolation booth* – is what I want to pick up on here. There is no evidence that, if continued exclusion of non-residents were permitted in Rossmoor, the retired residents would simply disengage from the political issues facing the village and the surrounding township. Quite the contrary. With over 20% of the township's residents living in Rossmoor, it would appear that some residents were themselves campaigning within the village for political parties at all levels of government:

> [T]he district committeeman of one of the major political parties testified that each year he engaged in so-called door-bell ringing for one of two purposes: either to get his own petition signed so that his name would be on the ballot, or to advocate the candidacy of the national, state, county and local candidates of his party's choosing. He was told he could do it because he was a resident of Rossmoor ... Further testimony showed there had been, at various times, an introduction of political candidates at social affairs held in the community, but the only candidates introduced were residents of the community.[203]

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[201] *Ibid.* at 413.

[202] *Ibid.* at 416.

[203] *Ibid.* at 410-411.

The image of the "isolation booth," then, does not imply that external political issues would otherwise be absent from political debate in Rossmoor, *but rather that the views that are heard on this matter would be limited to those who are residents of Rossmoor.*[204] Contrary to what one might expect, this is not in order to protect the interests of those non-residents who will engage in leafleting; rather, the County Court argues that the very purpose of allowing these non-residents to enter the village is to ensure that each Rossmoor resident "decides what political and religious information he wishes to *receive*."[205]

This is an important distinction. What the Court is here rejecting is the ability of Rossmoor residents, as a group, to determine that the political canvassing they will choose to hear will be limited to those expressed by other village residents, and to wall themselves off from the opinions of outsiders.[206] The Court's emphasis thereby appears to be on ensuring the viability of a political sphere that will enjoy the same circulation across domains of public and private. This reflects a resistance to Rossmoor's suggestion that the spatial boundaries delineated by walls and security guards can themselves effect a segregation from these political networks and circuits of communication.

The Court's resistance to the imagination of community that this gated development presents is further evident in its determination that Rossmoor is a "self-sufficient community," and is thus subject to judicial scrutiny regarding who it excludes. This factual determination is itself

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[204]It is unclear whether the Court in *Kolcz* would have rendered the same decision if Rossmoor residents were not involved in county politics. The Village's initial contention was, in fact, that all political canvassing was barred in Rossmoor, whether conducted by residents or by outsiders, and that as a result exclusion of these non-residents was not problematic. The Court rejects this claim, based on the testimony of others, including a district committeeman. However, that the argument was put forth suggests that village representatives would rather have the Court believe that Rossmoor was devoid of all organized political activity, than that non-residents were selectively excluded from political canvassing in the village. The distinction here, one might say, is between a "political isolation booth" and a "booth isolated from politics" – and the Court appears to be pronouncing on the former, while not rendering a decision on the latter. While at some points, the text of the decision appears to argue that non-residents must be allowed to enter for political canvassing under any circumstances (see, for instance, *ibid.* at 416: "the court cannot allow the corporation to decide to bar what it knows to be a bona fide political endeavor",) it is not clear that the court would determine that it had authority to intervene, a question which for it appears to rely on whether Rossmoor is "self-sufficient."

[205]*Ibid.* at 416 [emphasis added]. While there is some language in the decision that suggests that it is the interests of non-residents that is here being protected, this quotation makes it clear that the *purpose* of such protection, according to the County Court, is to protect the *recipients* rather than the *distributors* of political speech.

[206]It should be pointed out that all Rossmoor residents were members of the corporation that enacts and enforces the village's rules, and that the Court was aware of this fact. See *ibid.*

suggestive of judicial concern that Rossmoor is overly disconnected from the broader polity, particularly since this determination had no basis in law at that time (contrary to the Court's assertion).[207]

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[207]The invocation of Rossmoor's 'self-sufficiency' is said to justify judicial intervention in this case. The County Court invokes the U.S. Supreme Court's decision in *Marsh* v. *Alabama*, 326 U.S. 501 (1946)[hereinafter *Marsh*] that a company-owned town could not prohibit political or religious leafleting, and states that Rossmoor is similarly constrained:

> This court believes that decisions relating to municipalities are equally applicable to Rossmoor, *since it is in many essential regards a self-sufficient community*. The corporate officers may speak for the citizens of Rossmoor on matters relating to health, welfare and safety. These officers may believe that it is their duty to protect the Rossmoor residents from annoying or obnoxious sales methods, but the court cannot allow the corporation to decide to bar what it knows to be a bona fide political endeavor.

Ibid. at 415-416. This raises two questions: first, why would a "self-sufficient community" be akin to a municipality? And second, what does it mean to be a "self-sufficient community"?

On the first question, it is not clear why the self-sufficiency of Rossmoor is treated as determinative by the County Court. This is not, contrary to what the Court implies, the test enunciated by the US Supreme Court. While the company town in *Marsh* was indeed found to have the internal attributes of a functioning town, the US Supreme Court stressed that it was "accessible to and freely used by the public in general" and indistinguishable from public areas "by anyone not familiar with the property lines." Key to determining that Chickasaw was equivalent to a municipality was the *openness of the town to the general public*:

> We do not agree that the corporation's property interests settle the question ... Ownership does not always mean absolute dominion. *The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.* Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm (*Marsh* at 505-506 [internal citations and footnotes omitted, emphasis added].

In fact, at the time of the Rossmoor decision, the U.S. Supreme Court had stated that *Marsh* turned entirely on the question of public accessibility. In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968) [hereinafter *Logan Valley Plaza*], the Court determined that the owners of a shopping mall were also bound to respect the constitutional rights of picketers under the First Amendment. In so doing, it stressed that "[t]he general public has unrestricted access to the mall property," that "[t]he shopping center premises are open to the public to the same extent as the commercial center of a normal town, and that "the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through'" (at 318-319 [internal citations and footnotes omitted]). Being open for public use has since continued to be a central component of this test, despite a retreat from the *Logan Valley Plaza* standard. *Marsh* is now interpreted as applying to cases that are both open for public use and containing the internal attributes of a functioning town: "The Constitution and Private Government", *supra* note 5. But although public access has been central to *Marsh* throughout, the County Court here conceives of Rossmoor in these terms even though it was visibly *closed* to the general public, being *surrounded in part by a wall* and *gates with security guards*.

What are the attributes of Rossmoor that lead the Court to determine that it is "self-sufficient"? At first blush, this appears to be a reference to the town of Chickasaw from *Marsh*, with Rossmoor including not only homes, but a church, a community hall and a small shopping area (*ibid.* at 409). And yet, "self-sufficiency" is not the language used in *Marsh*. The US Supreme Court had instead stated that "the town of Chickasaw does not function differently from any other town" (*Marsh* at 508), and that to the public's perspective "there is nothing to distinguish" it "from any other town and shopping center" (*Marsh* at 503). The County Court's use of the term 'self-sufficiency' is

As such, while individual Rossmoor residents remain free to decide whether to receive any political information brought to their door,[208] the Court is reluctant to allow Rossmoor residents, as a group, to spatially entrench a political cleavage between them and other residents of the Township. The Court here defers to the state-centred boundary of the township, while resisting any attempts to further carve up political space through resident-erected boundaries. While accepting state-defined boundaries as fixed and opaque,[209] within these boundaries there is a latent image of political space that is unconfined, and even borderless.[210] This vision of the public sphere, premised on modernist conceptions of idea exchange and political speech, is here brought into conflict with the privatopian ideal of small, manageable spaces and seclusion from strangers, in which security is itself viewed as shelter from the broader sphere of activities the court seeks to promote.[211]

This judicial vision then returns in the decision of the California Court of Appeal in *Citizens Against Gated Enclaves* v. *Whitley Heights Civic Association*.[212] Gates surrounding the Whitley

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therefore surprising. Given the Court's concern with Rossmoor being a "political isolation booth," however, I suggest that it is the combination of Rossmoor's internal functioning with the already existing political engagement of its residents, that the Court is flagging. I draw further support for this argument from the following passage in *Kolcz* (*ibid.* at 415):

> This court believes that decisions relating to municipalities are equally applicable to Rossmoor, since it is in many essential regards a self-sufficient community. The corporate officers may speak for the citizens of Rossmoor on matters relating to health, welfare and safety ....

This suggests that part of being a self-sufficient community is not only the existence of stores, sewers and the like (which were mentioned in *Marsh*), but the political representation of the corporate officers representing Rossmoor residents.

While the Court's logic remains unclear, the misadaptation of the *Marsh* test and the invocation of "self-sufficiency" rather than the language of *Marsh* itself, both suggest that there is something motivating the Court's decision that goes beyond the physical attributes of Rossmoor. As with the specter of a "political isolation booth," the Court's express reliance on the self-sufficiency of Rossmoor suggests that it is concerned with the potential for *residents* to become disengaged *as a group* from the diversity of those outside, rather than a concern with the interests of outsiders who are seeking access to Rossmoor and its residents.

[208]*Kolcz*, *ibid.* at 416.

[209]"Boundaries of Race", *supra* note 64 at 1860-1878.

[210]*Making a Social Body*, *supra* note 31 at 8-9.

[211]*Fortress America*, *supra* note 3 at 20.

[212]*Citizens Against Gated Enclaves*, *supra* note 178.

Heights neighbourhood in Hollywood Hills had been erected in 1991-1992, as a result of residents' petitions stemming from an increase in crime, graffiti, and violence that had begun to occur in the late 1970s. This fear of crime stemmed from the neighbourhood's proximity to Hollywood Boulevard, which had been suffering from commercial decline and an increase in crime.[213] It was no secret that municipal authorities were overwhelmed by the problems of Hollywood Boulevard, and residents of Whitley Heights – a neighbourhood that, while up on a hill, was only a few blocks away from these problems and had begun to witness some spillover on its streets – sought increased protection, with suggestions ranging from gates to armed patrols to the blocking off of neighbourhood streets.[214] The gating project included isolating the streets and walkways in Whitley Heights from public use, with homeowners of the less than 200 private homes[215] in the area paying over $350,000 for the gates themselves.[216]

In response to these gates, however, a group of 47 California residents[217] – Citizens Against Gated Enclaves – sought to require the Whitley Heights Civic Association to remove the seven gates that encircled the neighbourhood, arguing that they rely on the streets in Whitley Heights for commuting, recreation, and parking. Media reports included one activist stating that "[a]fter what happened in the riots, we don't need any more gated communities. It just emphasizes the differences between the haves and the have-nots,"[218] with gate supporters elsewhere retorting that "[p]eople who are trying to improve the city are being victimized by political interests."[219]

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[213]For more on the crime problem faces by these residents, see D. Ferrell, "Locking Up: Hollywood Hills Community Seeks to Shut out Crime with Mechanical Gates" *Los Angeles Times* (23 May 1985) 9-1 (Westside Section) [hereinafter "Locking Up"]. Ferrell describes the geographic proximity of Whitley Heights to Hollywood Boulevard, with the commercial decline of this Boulevard being blamed for much of the increase in crime in the area. According to a Los Angeles Police Officer quoted by Ferrell, the area extending from Hollywood Boulevard into Whitley Heights suffered the highest crime rate in Hollywood.

[214]*Fortress America*, *supra* note 3 at 104-105.

[215]"Locking Up", *supra* note 213.

[216]*Citizens Against Gated Enclaves*, *supra* note 178 at 453.

[217]P. Mcmillan, "Citizens Group Sues to Keep Streets in Neighborhood from Being Gated" *Los Angeles Times* (19 May 1992) B2.

[218]*Ibid.*

[219]P. Mcmillan, "Judge Disallows Gates Blocking Public Streets" *Los Angeles Times* (23 January 1993) A1.

This political history of Whitley Heights is important for understanding the decisions of the California courts in this case. Not having been initially developed as a private neighbourhood, the gating project was purely designed to control public access to the Whitley Heights streets. These streets, however, remained public, and the city continued to be responsible for maintenance and other municipal services.

Since these streets had not in fact been privatized, the California courts determined that they could not be withdrawn from public use through gating, emphasizing that the California Vehicle Code does not permit the partial closing of public roads in this fashion. On its face, the Whitley Heights decision achieves the same functional result as the Rossmoor decision. In both, non-residents succeed in penetrating the gates of the developments.[220] Although he does not discuss the Rossmoor case, David Kennedy has suggested that the decision of the California Court of Appeal is disappointing since its reliance on the California Vehicle Code renders the decision overly narrow and easily circumvented by the city abandoning/privatizing the streets in question.[221] Yet it is important to point out that the California Court of Appeal here invokes a vision of community and space that is more telling than simple reliance on the Vehicle Code might suggest:

> Even though Whitley Heights is arguably in a discrete and isolated area of the City, under appellant's reasoning, there is nothing which would prevent the City from applying this alleged power to withdraw streets from public use in other areas of the City. Although we understand the deep and abiding concern of the City and appellant with crime prevention and historic preservation, we doubt the Legislature wants to permit a return to feudal times with each suburb being a fiefdom to which other citizens of the state are denied their fundamental right of access to use public streets within those areas. If such action is necessary, then it should be expressly authorized by the Legislature along with whatever safeguards it deems necessary to protect the public interest in public streets.[222]

This concern over the potential return to *feudal times* suggests that, for the California Court of Appeal, it is the fracturing of the social body that is at issue here. This underlying political

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[220]In fact, the gates themselves were then removed, with the cost of doing so split between the Civic Association and the City: see *Fortress America*, *supra* note 3 at 107.

[221]"Residential Associations as State Actors", *supra* note 48 at 781-782.

[222]*Citizens Against Gated Enclaves*, *supra* note 178 at 457 [internal footnotes omitted].

concern is strikingly similar to that of the New Jersey County Court – whether using the language of *fiefdoms*, *political isolation booths*, or *self-sufficient communities*, these two courts are identifying *spatial differentiation* through gating as itself leading to social and political *isolation*. The use of the language of fiefdoms and feudalism is itself suggestive, as it relies on an analogy to a politically divided social body with divided loyalties and fragmentation of state authority, and itself the result of a spatial division of land. Doing so further suggests that gated communities themselves instantiate a *pre-modern* view of social relations, to which the Court of Appeal responds with a vision that stresses a modern view of social and political life, along with a strong central state that can protect the "public interest" in these situations.

Returning to David Kennedy's criticism of this decision, it does seem surprising that the Court appears to implicitly allow for gated communities, so long as these are developed on private streets. From this perspective, it would appear that the Court simply does not allow gated communities to have it both ways – gated communities cannot exclude the public if they are erected on public land. What Kennedy misses, however, is the Court's insistence that, in order to privatize such streets (and thereby enjoy the power to exclude non-residents), the City must first meet an empirical burden. It must *first* find that the streets in question are no longer necessary for vehicular traffic, and only *then* can it choose to abandon the streets entirely, at which point they could also be gated. This cannot, however, be determined arbitrarily: the Court stresses that unless it meets this empirical determination, the City cannot "wave the magic wand and declare a public street not to be a public street."[223] This is a critical dimension of this decision. By requiring that the extent of public use of the streets be determined before allowing gating to proceed (even if supported by the City), the California Court of Appeal here suggests that gated communities cannot disentangle themselves from existing relationships with non-residents. This renders the decision akin to that of the New Jersey County Court: existing relationships outside the walls of the development, be they political relationships with the Township in *Kolcz* or more generally social in *Citizens Against Gated Enclaves*, motivate the courts to allow access by non-residents beyond the community walls.[224]

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[223] *Ibid.* at 456.

[224] This argument regarding *Kolcz* could derive further authority depending on the analysis one accepts of the Court's 'community self-sufficiency' standard for judicial intervention: see *supra* note 207.

As the California Court of Appeal notes, the desire of residents to distance themselves from the broader polity through gated communities is often related to a concern with crime. As I discuss in relation to both Megan's Law and community policing efforts, it is often difficult to disentangle the constitution of community from the threat of crime itself – such that it may be unclear whether crime prevention efforts invoke a pre-existing "community," or whether "community" itself is produced through the strategy of crime prevention itself. As a result, these strategies may produce conflicting logics of community. This tension is perhaps most evident in a recent decision regarding Panther Valley, a gated residential community in New Jersey.

The gated community of Panther Valley passed an amendment declaring that no individual registered as a "Tier Three" offender under Megan's Law could reside within the development.[225] In the New Jersey Superior Court, the amendment was not challenged by a Megan's Law registrant, but rather by Elinor Mulligan, a lawyer and a property owner in the community, who argued that this represented an infringement on her right to alienate her property.[226] For Mulligan, this restriction represented an intrusion by the community on her individual rights,[227] and "to be as free as any property owner anywhere"; for the community association, this restriction represented the very basis for association, arguing that "[i]t becomes ironic when you have a gated community and the greatest threat is within the community."[228] At stake in Panther Valley was the very nature of the development as separate from the broader political community:

> "Many community associations offer a range of amenities like day care and aerobics classes. It would change life once you knew a [sex] offender lived inside," says J. David

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[225]*Mulligan (2001)*, *supra* note 183.

[226]*Mulligan (2001)*, *supra* note 183 at 304. Mulligan made three arguments: that this represented an unlawful infringement on her property rights, that the amendment requires her to unlawfully seek out and identify Tier Three registrants, and that the amendment is contrary to public policy.

[227]Mulligan is described as "a crusader against what she has argued in the past is autocratic behavior by an out-of-control governing body trampling on Panther Valley's homeowners rights," who has brought other suits against the Panther Valley Trustees: see H. Gottlieb, "A Test of Megan's Law's Power To Exclude" (3 May 1999) *New Jersey Law Journal*, online: LEXIS (NJLAWJ).

[228]G. Sealey, "A Wholesale Dilemma: Megan's Law Creates Confusion in Real Estate Market" *abcnews.com* (18 January 2000), online: ABC News Internet Ventures <http://abcnews.go.com/sections/us/DailyNews/meganslaw000118.html> (last accessed: 24 January 2002).

> Ramsey, the attorney who is representing the Panther Valley Property Owners Association.
>
> "We always believed the attacks would fail because sex offenders are not a protected class," Ramsey adds. "We are not the government. If you choose not to associate with a criminal, that is your right."[229]

While the restriction was upheld at trial,[230] this decision has since been reversed on appeal – with the appellate court being concerned precisely with the obligations of Panther Valley to the broader community.[231] What is most interesting is that the appellate division rejected all of Mulligan's arguments regarding her private property rights, finding that any restriction this entailed was minor, and that on this basis alone the Court "would reject her position out of hand."[232] What the appellate court does stress, however, is that the restriction may be contrary to public policy, given the negative effects it may entail for sex offenders and for other, law-abiding, non-residents:

> We do not know from the record how many common interest communities exist within the State and we do not know from the record how many of those communities have seen fit to adopt comparable restrictions ... We are thus unable to determine whether the result of such provisions is to make a large segment of the housing market unavailable to one category of individual ... We recognize, of course, that [Megan's Law] Tier 3 registrants (and indeed convicted criminals) are not a protected group within the terms of New Jersey's Law Against Discrimination ... It does not necessarily follow, however, that large segments of the State could entirely close their doors to such individuals, confining them to a narrow corridor and thus perhaps exposing those within that remaining corridor to a greater risk of harm than they might otherwise have had to

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[229]D. Baker, "Slamming the Door: N.J. Court Lets Homeowners Turn Down Renters, Buyers on Megan's Law List" (2000) 86 ABA Journal 24, online: LEXIS (ABAJNL).

[230]At trial, the amendment was upheld, with the court determining that the effect of the amendment would be negligible (given the small percentage of Tier Three registrants in New Jersey), and that given the benefit of the restriction to homeowners, it was not an unreasonable restriction on Mulligan's property rights. See *Mulligan* v. *Panther Valley Property Owners Association* (1999), WRN-188-99 (N.J. Super. Ct, Warren County). See discussion in P. Cassidy, "Gated Community Can Exclude Tier 3 Megan's Law Registrants" (22 November 1999) *New Jersey Law Journal*, online: LEXIS (NJLAWJ); "New Jersey Report: NJ Superior Court Permits Exclusion for Megan's Law Offenders" *Duane, Morris & Heckscher, Real Estate Review* (Spring 2000) 4 at 4, online: Duane Morris LLP <http://www.duanemorris.com/publications/rer_sp00.pdf> (last accessed: 14 November 2002).

[231]*Mulligan (2001)*, *supra* note 183 at 307.

[232]*Ibid.* at 304.

confront.[233]

Determining that it cannot defer to Panther Valley's restrictions without this additional information, the net effect of the appellate court is to allow these outsiders – in this case, Tier Three sex offenders – to purchase property in the neighbourhood. The Court's logic inverts that of the gated community: whereas Panther Valley's lawyer explicitly disclaims responsibility for the broader public interest, the New Jersey Superior Court instead presents Panther Valley as responsible for the negative effects that its actions may cause non-residents (be they sex offenders or those who must otherwise live with their presence), and as implicated in a broader social network that includes the decisions of other private developments that may make similar choices. In short, the Court suggests that Panther Valley cannot act in a vacuum – it must instead take into account the practices of other common interest communities, and must also assess the negative externalities its actions may cause on non-residents. The social body is overtly spatialized here: concern is had over the "narrow corridor" to which sex offenders may be relegated, and this is closely related to a concern over class conflict, which in Poovey's terms may "undermine [the] image of a single, harmonious body."[234]

One might object that, as with the decision in *Citizens Against Gated Enclaves*, the New Jersey Superior Court has here set up a relatively simple way to sustain a gated community's restrictions on outsiders.[235] So long as a gated development can demonstrate that its restriction on sex offenders would not increase the risk of harm for non-residents, and would not unduly impact the housing choices available to the offenders themselves, it may well be able to exclude them. In both these cases, then, it is the existence of *empirically determinable entanglements* that prevents gated communities from excluding non-residents – if these relationships did not already exist, the courts here suggest that exclusion might not itself be problematic. In *Citizens Against Gated Enclaves*, evidence of a lack of traffic can lead to privatization of the street and gated restrictions on non-residents; in the Panther Valley case, evidence of a lack of harm that would

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[233]*Ibid.* at 305-306.

[234]*Making a Social Body*, *supra* note 31 at 59.

[235]It must be stressed that the plaintiff is herself a resident. As a result, this is a victory for her, but in the name of non-residents.

befall sex offenders and neighbouring residents could similarly provide gated communities the freedom to exclude. Even in the Rossmoor case – which, in some ways, reaches an opposite doctrinal result[236] – it may be that a gated community which barred all political canvassing could successfully exclude non-residents.[237]

It is not simply that courts are not expressing an opinion about whether exclusion would be allowable under these circumstances – thereby leaving the question open – but a reading of the courts' language suggests that the problem with exclusion is *based* on the fact of the existing relationships, so that these courts would need to introduce a new basis for resisting exclusion in the case of a fully isolated gated community. It is the fact that the streets are trafficked that is deployed to authorize judicial intervention in Whitley Heights; intervention appears to only be authorized in Rossmoor based on an assessment of already existing opportunities for canvassing by members of the larger political community; and in Panther Valley, it is only the potential for creating undue burdens on surrounding areas (a presumption which can be rebutted by the gated community) that provides the court with the basis for restructuring the ability to exclude registered sex offenders from the development. In each of these cases, the courts seem to contrast existing relationships with a vision of a more isolated gated community that might allow for a different result, but in each the courts only hold this out as a theoretical possibility, while presently allowing the access that non-residents seek. I return to this point later in this chapter, but for now I flag it as indicative of a reluctance to ground this social body in a normative social commitment, and that as a result the courts hold out the possibility of upholding the boundaries of a gated community – in the remote case that it would successfully disengage from the social body entirely.

Taken together, these three decisions – spanning over twenty five years – suggest that courts are resistant to the social fragmentation that these gated communities are often said to represent. Particularly when taken in conjunction with the cases I discuss in the following two sections, these decisions provide an important corrective to work that suggests that there is little resistance

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[236]Note that, in the *Kolcz* decision, the New Jersey County Court intervenes because Rossmoor is too "self-sufficient"; in contrast, the courts in these other two decisions intervene because the gated communities are insufficiently disentangled from the world around them.

[237]See *supra* note 207.

to the increase in gated developments and the image of privatopia they offer. Isolating cases involving gated communities, in fact, provides evidence for a judicial vision of community that is quite different from the one offered by residents and representatives of these communities. What is important to note, however, is that the potential for highly local, exclusive, and disengaged communities seems to be maintained by the courts as a theoretical possibility – but in practice, each court finds that the gated development exists within a web of social and political relationships, and each court then develops normative positions that seek to regulate these relationships. As we will see, this logic presents itself equally in cases involving both economic and legal relations with non-residents.

c) Borders and Economic Relations

With courts resisting disaggregated, local, sovereign spaces in favour of an abstracted social and political domain, the California Court of Appeal has similarly resisted the borders of gated communities as placing barriers to commercial and economic exchange. In *Laguna Publishing* v. *Golden Rain Foundation*,[238] Laguna Publishing was seeking access to the neighbourhood beyond the guarded security gates of the Leisure World community, so that it could distribute its promotional newspaper to the wealthy residents of the community. Although denying general access to Laguna Publishing,[239] the Golden Rain Foundation, which owns the streets, sidewalks, and common areas within Leisure World, had instead authorized the distribution to all residents of the Leisure World News,[240] a free publication that is similar to the Laguna News-Post, and relies on the same advertising dollars. This exclusive access to the affluent residents of the community allowed the Leisure World News to enjoy an extremely large return on its original investment, in large measure because of the lack of competitors who could reach the 20,000

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[238] *Laguna Publishing*, *supra* note 177.

[239] In fact, the Foundation had come to allow Laguna Publishing to enter the community and deliver its newspaper to subscribers. This was an unrealistic opportunity, since this is a promotional newspaper that subsists on advertising rather than subscriptions.

[240] Even those that are not members of Golden Rain, to which the Court takes exception. That the Golden Rain Foundation rendered all residents of Leisure World into subscribers of the Leisure World News is a critical element of the Court's resistance to excluding of the Laguna News-Post, since the Court makes a doctrinal distinction between who residents allow in/exclude, and who is allowed in/excluded by management: see discussion below.

residents of Leisure World.[241] The profit enjoyed through this exclusive access appears to have had the further effect of subsidizing a second publication, the News Advertiser, distributed outside of Leisure World by related publishers.

For the California Court of Appeal, the exclusion of the Laguna News-Post highlights a conflict between private property rights and what it contemplates as "the needs of the social whole,"[242] a tension that it suggests is instantiated in the built environment by gated communities:

> ... [T]he gated and walled community is a new phenomenon on the social scene, and, in the spirit of the foregoing pronouncement [that property rights must be responsive to the needs of the social whole], the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities where such insistence is irrelevant in preventing any meaningful encroachment upon private property rights and results in a pointless discrimination which causes serious financial detriment to another.[243]

Suggesting that new real estate categories may themselves produce new social problems, the Court of Appeal here stresses the need for law itself to adapt to these changing material forms and the conflicts they may engender. For the Court, the novelty of gated communities as a distinct form renders the analysis of the *Leisure World* conflict particularly difficult. The community is fully walled in, with access permitted to residents through guarded security gates,[244] and as such "the public is not invited but excluded" and outsiders are "rigidly barred."[245] As a result of this exclusion of outsiders, the Court finds that it cannot compare the gated community to company-towns or shopping malls, each of which have been found to owe obligations to outsiders given the public access they encourage, and are thereby found to be subject to judicial intervention because of their 'town-like' characteristics. It is at this juncture, however, that the Court invokes the "ingenuity of the law" and determines that regardless of its

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[241] *Laguna Publishing, supra* note 177 at 822-824.

[242] *Ibid.* at 826.

[243] *Ibid.*

[244] *Ibid.* at 815.

[245] *Ibid.* at 825.

exclusion of outsiders,[246] Leisure World may be similarly subject to judicial control over such practices:

> While the public is not invited into Leisure World, Leisure World in many respects does display many of the attributes of a municipality. That is to say, although the public generally is not invited, there is substantial traffic into Leisure World of a variety of vendors and service persons whom the residents of Leisure World do invite in daily to accommodate the living needs of a community this large. By this we mean to refer to plumbers, electricians, refrigeration repairmen, painters, United Parcel deliverymen, to name a few, plus the carriers of newspapers to which the residents have subscribed.[247]

From a legal perspective, this is an important finding. Further determining that the Golden Rain Foundation engaged in content-based discrimination against one newspaper in favour of another, the court concludes that this combination – attributes of a municipality combined with discrimination – renders Golden Rain into a state actor, and subject to judicial intervention.[248] As a result, the Court determines that Laguna Publishing is "entitled to enter Leisure World" and deliver its unsolicited newspaper door-to-door.[249]

Yet, it remains unclear precisely *how*, or *why*, the inviting of outside servicemen into Leisure World has the effect of rendering it similar to a municipality. Why would the entry of outsiders, *invited in to the area on an individual basis by community residents*, and who presumably only remain for short periods of time (to deliver a package, to fix a refrigerator, etc), change the nature of the development so that it displays "many of the attributes of a municipality"?[250] For

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[246]And regardless of the fact that Leisure World is made up entirely of private residences and recreational facilities (unlike the company town in *Marsh*): See *ibid.*.

[247]*Ibid.* at 826-827.

[248]Although the Court is somewhat unclear on this point, this appears to be the most cogent way to read this decision. It could not be the case that the finding of discrimination renders Leisure World into having town-like characteristics. Rather, it is that the traffic and border permeability of Leisure World (then defined as attributes of a municipality), when combined with the finding of discrimination, lead to the application of a state action doctrine.

[249]*Ibid.* at 837.

[250]From a doctrinal perspective, the stance in Leisure World is directly contradictory to the New Jersey decision dealing with Rossmoor (the California decision, it should be noted, never refers to the New Jersey case, nor have the two been compared in the literature). Whereas the development in Rossmoor was found to be akin to a municipality because it was self-sufficient, Leisure World is found to be akin to a municipality precisely because it is not self-sufficient, with vendors and service persons invited in to the development by individual residents. The California Court, then, is not concerned with the potential political isolation that residents of Leisure World may experience, but is rather more concerned with the potential that Leisure World has for imposing negative

the Court of Appeal, this appears to be evidence of the limits of the choice that the residents and management of Leisure World have made. Later asserting that "*it was the management of Leisure World itself which let down the bars*,"[251] the logic of the Court of Appeal is that Leisure World does not exclude outsiders systematically – for this court, it would appear that once there is *any* openness of the gates to the world outside the gates, "the needs of the social whole" come into play,[252] and the courts can then determine if any discrimination is taking place.[253]

Of course determining whether the exclusion of Laguna Publishing was discriminatory requires some reference point, and the Court here locates this in the County at large, rather than with respect to Leisure World and its residents in particular. As such, the restriction against Laguna Publishing is discriminatory *because it competes for the same advertising dollars within Southern Orange County*,[254] a comparison which conceives of this gated community as within a larger economic domain – in contrast to what the Court could have contemplated, namely that the Leisure World News is incomparable to the Laguna News-Post because only the former was specifically conceived of as being targeted to Leisure World residents in particular. In fact, this more localized basis for determining whether discrimination took place, although recognized as possibly "true," is explicitly rejected by the Court of Appeal, privileging an economic domain that is said to extend beyond the gated community over a separation of Leisure World from this

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consequences on non-residents (in this case, content-based discrimination). This doctrinal difference is itself indicative of a more general background political theory each court engages. The more paternalist model of the New Jersey court in 1971, concerned as it is with the wisdom of the social cleavage Rossmoor represents, is here contrasted with a more liberal model of the California court in 1982, concerned not with the wisdom of resident's choices for themselves, but with the negative externalities that these may cause to others.

[251] *Ibid.* at 829-830 [emphasis in original].

[252] This quote is cited by the Court of Appeal with approval: see *ibid.* at 826.

[253] The logic of the Court of Appeal is rather inconsistent on this point. Because of the actions of individual residents in inviting servicemen beyond the gate, gated communities share common elements to a municipality. Once it has this semi-public attribute, the gated community cannot engage in content discrimination against one actor rather than another. Analysis of the infringement here shifts levels of analysis – while the actions of private residents in inviting servicemen into Leisure World seemed sufficient to render it akin to a municipality, it is the action of Golden Rain to exclude the Laguna News-Post that is found discriminatory. The Court here suggests that the outcome might be different if the residents themselves sought to exclude the Laguna News-Post (see *ibid.*, especially at 830-831), but that here, "that decision is not made in concert with the residents." The reasoning appears flawed, since the choice of residents to invite in outsiders appears critical to conceiving of Leisure World as a municipality, but the Court then locates the discrimination in the action of Golden Rain rather than the residents.

[254] *Ibid.* at 829.

broader field, suspiciously viewed as mere "sophistry":

> Referring to Golden Rain's current petition for rehearing, we note that a vigorous argument is again made that the Leisure World News is a "house organ" quite different in its content and purpose from those give-away type newspapers, including plaintiff's, which have been excluded. While this may be true in a sense, it conveniently overlooks the compelling feature of the Leisure World News and of those excluded which is the same, namely their advertising content ... Whether the Leisure World News is or is not a "house organ" has no significance as a fact for consideration in reaching our decision ... In other words, what is significant is that the Leisure World News carries advertising and that it is the only give-away type newspaper carrying advertising which reaches the huge audience comprised of the residents of Leisure World. It is a competitor for the advertising dollar which retailers spend in this area of Orange County, and the fact that it has a captive audience of 20,000 affluent people whom advertisers are trying to reach is an overriding factor which no amount of sophistry emphasizing that the Leisure World News is a "house organ" can evade.[255]

It is by starting its analysis outside of Leisure World's walls – imagining the County as a whole, rather than the readership within the gates – that the Court can here admit that the two newspapers are different at the local level, while maintaining the level of analysis at a broader economic domain, constrained by state-centric geographic boundaries.[256] It is from within this economic domain that the Court can then determine that the two newspapers are similar in critical ways, a choice that minimizes other substantive, but more local, differences between these two newspapers.

From this emphasis on maintaining a uniform economic domain, in which local differences are smoothed out in favour of imagining local spaces as interchangeable and functionally equivalent,[257] the Court of Appeal's concern is with the potential for gated communities to be used to circumvent economic competition, by creating zones of exclusivity:

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[255]*Ibid.* at 823.

[256]Whether the decision is motivated by state-centric, or market-centric, geographic boundaries is open to debate. However, while the Court does speak of advertising dollars, it confines that analysis within jurisdictional boundaries, without any evidence presented in the judgement that the advertising market is itself coextensive with these state boundaries. It is certainly the case that *within* these state boundaries, the Court is expressing a concern with economic competition – but rather than seeking evidence to define the boundaries based on market evidence (eg. that advertisers within a given radius compete with each other, whether or not these are within County borders), the Court instead relies on state boundaries, perhaps presuming these to be coextensive with market boundaries.

[257]*Making a Social Body*, *supra* note 31 at 28-31.

> [W]e do not regard this case as one likely to generate a great constitutional upheaval despite the stentorian tones in which Golden Rain has portentously argued it. The reason this litigation was commenced and has been so vigorously defended is money, and it has nothing to do with protecting any private rights of association. It began because of a fight between two newspapers over advertising revenues ... This is purely and simply a discrimination case with substantial economic consequences, and not one truly involving the resolution of the rights of free speech in conflict with the vested rights of private property.[258]

As a result, the Court is not concerned with the potential for gated communities to exclude individuals. In fact, the Court appears quite willing to allow for some discriminating here between residents and non-residents – so long as this is not used to prevent economic competition through the erection of guarded borders:

> [M]uch is made of the fact that residents of Leisure World actually performed the distribution of the Leisure World News, the implication being that some infectious, undisciplined rabble would overrun Leisure World if plaintiff were allowed to distribute its newspaper there. If this is truly a concern, we see no legal problem in Golden Rain's imposing a regulation which would require employment of only Leisure World residents for delivery of *any* unsolicited publication.[259]

The California Court of Appeal here presents the gated community as part of the economic space in which the Leisure World News competes with other newspapers for advertising revenue and residential circulation. When interpreted in conjunction with the Court's earlier assertion that the gate itself has already been compromised by residents of Leisure World, the Court of Appeal here seems to suggest that if residents were to never order newspapers, receive parcels, hire non-resident electricians or order pizzas, then the Laguna News-Post could very well be barred from crossing the gate. For the Court, then, *once the residents of Leisure World are engaged with the broader economic domain* (though the delivery of goods or the hiring of servicemen), then Leisure World cannot discriminate within the economic domain by providing exclusive access to its residents to some actors rather than others.[260] It is because only because

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[258]*Laguna Publishing, supra* note 177 at 831 *n*14. In fact, at 830, the Court of Appeal is highly suspicious of the argument that there would be any imposition on privacy or property rights here.

[259]*Ibid.* at 831 [internal footnotes omitted; emphasis in original].

[260]The Court is careful to clarify, however, that this is not the case for every individual that residents invite into Leisure World. Residents can invite servicemen in to Leisure World without having to give equal time to other

there is "substantial traffic" of non-residents that Leisure World is said to take on attributes of a municipality, and only on that basis that the Court builds the ability to enforce the normative position that it articulates. Unless the Court were to find a new basis for determining that the gated community is similar to municipality – none of which are mentioned in the decision – the logic of the decision suggests that it could not otherwise require Leisure World to open its gates. For the California Court of Appeal, it is not that Leisure World residents must remain closely connected to those outside the gate, but rather that *given their empirically present entanglements with the economic sphere*, the gates cannot be relied on to disrupt the homogeneity and interchangeability of economic interactions across non-state spatial divides. As Poovey suggests, this analytical move is critical to imagining a social body as uninterrupted by locally-defined boundaries, with modern space "conceptualized as isotropic (as everywhere the same) and as reducible (or already reduced) to a formal (that is, empty) schema or grid."[261] This is a familiar finding in the literature on critical geography, in which economic relations are said to be premised on an erasure of space,[262] and capitalism itself seeking to overcome ("annihilate") space through innovation and expanding sets of relations.[263]

Finally, by contrasting Leisure World with a latent ideal of a truly isolated community, the Court here rejects the neofeudal form of community in which outside services are enjoyed by residents but some can be barred from entering. As a result, the decision in *Laguna Publishing* provides further evidence of a judicial suspicion regarding gated communities and the vision of sovereign spaces they instantiate, but a suspicion that appears predicated on evidence of existing entanglements with the outside world rather than on a normative commitment to a unified social space as a legally enforceable normative goal in and of itself – leaving open the remote possibility that residents of Leisure World could seal off their gate entirely, if they would be

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servicemen – it is only for those who are discriminated against by Golden Rain, rather than by individual residents. This confusion stems from an illogic at the heart of the Court's decision: see *supra* note 207.

[261] *Making a Social Body*, *supra* note 31 at 29.

[262] *Postmodern Geographies*, *supra* note 80 at 50.

[263] *Condition of Postmodernity*, *supra* note 83 at 232.

willing to accept the (apparently drastic) consequences of so doing.[264]

d) Borders and Legal Relations

While economic and sociopolitical challenges to the borders of gated communities have been

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[264]A similar stance is taken in two recent cases involving the availability of municipal services for gated communities. Since these do not involve non-residents seeking access beyond the gate, I do not deal with these cases in this chapter. The logic of these cases is, however, worth noting. In *Mayfield Heights* v. *Woodhawk Club Condominium Owners Association*, [2000] U.S. App. LEXIS 1835 (6th Cir.), online: LEXIS (MEGA) [hereinafter *Woodhawk Club*] and *Rushfeldt*, *supra* note 181, appellate courts at the federal and state levels resist attempts by residents of gated communities to enjoy both then choice-based benefits of private communities as well as the Keynesian benefits of risk pooling and shared services.

In *Woodhawk Club*, the City had agreed to exempt the Woodhawk development from certain portions of its Building Code Standards – thereby allowing more units to be built, and keeping costs lower both for the developer and for Woodhawk residents – in exchange for assurances that Woodhawk would be "a private, gated community without the need for City maintenance services." Nearly ten years later, a resident of Woodhawk began to demand that the City provide garbage removal services for residents. The Court of Appeals upheld the original agreement, and dismissed the complaint, arguing that residents could not enjoy privatization while demanding public services since they "knew and accepted from the outset that they would bear charges for snow removal, street repair, and garbage removal": *Woodhawk Club* at 12.

In *Rushfeldt*, the Florida Court of Appeal examined the validity of a County Ordinance creating "the Belle Meade Security Guard Special Taxing District." Through revenue earned from this special taxing district, the residents of Belle Meade are provided with a security guard gate and guardhouse services, a process that Rushfeldt argued was beyond the authority of the County. Finding that the County enjoys the authority to create special taxing districts for this purpose – and noting that "[a]n increasing number of communities are choosing to protect their persons and property by supplementing municipal and county police service" with such measures – the Court of Appeal presents gated communities as having special interests not served by general taxation. The plaintiff in *Rushfeldt* further argued that the Special Taxing District was improperly constituted on two grounds: first, the District applies equally to Eastern and Western residents of Belle Meade, and does not take account of an individual resident's proximity to the gate in the assessment process; second, the Taxing District does not assess residents of an adjacent island, which provides its own guard and gate, but who drive through Belle Meade and thereby make use of the security for which residents of Belle Meade are assessed. Although these arguments are somewhat dry, they do reveal a central tension in the creation of gated communities and the logic of privatized services. Rushfeldt, in this case, adopts a neoliberal position that is refused by the Court relying on Keynesian principles of risk pooling:

> As required by law and determined by the Board of County Commissioners, the properties assessed in this special taxing district are receiving a special benefit in excess of the special assessments to be levied. To require imposition of a distinction between eastern and western residents as urged by the Plaintiff could make it impossible to ever create a special taxing district. Such a requirement is not mandated by law and not supported by the record herein (at 645).

Yet the Court then justifies the exemption of residents of the adjacent island, this time on more neoliberal grounds:

> The record herein, when construed in a light most favorable to the plaintiff, certainly does not demonstrate that the residents and property owners of Belle Meade Island receiving security guard services from their own security guard special taxing district receive any assessable special benefit by driving through the Belle Meade Security Guard Special Taxing District (at 646).

Taken together, these logics suggest that the Florida Court of Appeal is willing to conceive of smaller sets of residents as having needs that require them to adopt special taxing districts in sub-state groups, while preventing any such community from being able to make any demands on those outside the group (in this case, the residents of Belle Meade Island).

brought by non-residents, these borders can also suggest a lack of homogeneity in the legal domain – and in these situations, the authority of the state can itself be implicated, in particular the authority of the public police to investigate crime within these developments. Richard Ford has recently provided a historical account of such tensions in the context of the common law, highlighting the struggle to coordinate territorial jurisdictions in an effort to develop a homogenous legal space.[265] As we will see in the following cases, courts respond to the borders of gated communities by maintaining a vision of legal relations that rejects the possibility of anomalous zones, geographical areas where legal rules are suspended, situations that although common, can be highly subversive to the governance and imagination of the legal domain itself.[266]

The first of these cases is *United States* v. *Harris*,[267] in which police obtained information that David Harris was supplying cocaine to drug dealers in Lexington, Kentucky. Through a vehicle registration check, the police located a residence for Harris in a gated community, and found a marijuana stem in his curb-side trash. Based on this discovery, the police obtained and executed a search warrant for Harris' home, in which they found marijuana, a kilogram of cocaine, and over $9000 in cash.

Seeking to suppress the evidence found at his residence, Harris argued that the marijuana stem found in his curbside trash was obtained illegally, and that as a result, the search warrant for his home was itself invalid. Among other grounds, Harris presented an argument regarding his decision to live in a gated community, and the signal that boundary presented to others, including the public police – arguing that he enjoyed a reasonable expectation of privacy within the entire area of the gated community, and that this whole area could be conceived of as his "home," rendering the curb-side search unconstitutional. This is, of course, the ultimate privatopia argument: that the emergence of gated common interest communities, secured and demarcated by private guards, defines a space of mass private property into one's "home," and thereby renders it inaccessible by non-residents, even when carrying with them the authority of

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[265]"Law's Territory", *supra* note 25.

[266]G. Neuman, "Anomalous Zones" (1996) 48 Stanford Law Review 1197.

[267]*United States* v. *Harris*, [2001] U.S. App. LEXIS 3918 (6th Cir.), online: LEXIS (MEGA).

the public police. In fact, this feeling of "home," from the moment one passes through the gate, is precisely what marketers and gated community developers aim to achieve, and what residents similarly express, a point that I develop earlier in this chapter. The argument, however, is quickly dismissed by the U.S. Court of Appeals:

> Despite Harris's arguments to the contrary, his curb-side trash can was not protected by the Fourth Amendment simply because Harris lived in a gated community. Although the gated community presumably somewhat limited public access to Harris's residence, so far as the record is concerned, it was still accessible to the other residents and their guests, garbage collectors, and other service providers. *Harris's argument that the entire community, encompassing approximately 200 houses, is within the curtilage of his home is overreaching, at best.* Harris was fully aware that other people had access to the street when he put out his curb-side trash can for pick-up and thus, he had no expectation of privacy.[268]

Before turning to this passage, it is worth noting that a similar approach has been taken by the Pennsylvania Superior Court in *Whritenour*.[269] Whritenour was convicted of public drunkenness and disorderly conduct after being found by police staggering in the middle of the street within the gated community in which he resided. Unlike the small neighbourhood of 200 homes in which David Harris resided, Whritenour's neighbourhood of Hemlock Farms included 2700 residences, a chapel, and a public library. Nevertheless, Whritenour similarly argued that he was not in "public" when the police officers arrested him – and that instead, by being beyond the gate, he was on private property at the time. Although not referring to *Harris* in its decision, the Pennsylvania Superior Court disposed of the matter in much the same way:

> Here, the argument is that the road in question was located in a private community, which necessarily excludes the public, and is accessible only to residents or those present by permission of a resident. However, the road was located in a neighborhood, *whatever its legal constitution*, and was traversed by members of the community and their invitees or licensees. *This "public," albeit a limited one, included residents of the homes in the community, their guests and employees, as well as visitors attending religious events, users of the public library located in the community, and delivery people of all kinds.*[270]

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[268] *Ibid.* at 9 [emphasis added].

[269] *Commonwealth of Pennsylvania* v. *Whritenour*, 751 A. 2d 687 (Super. Ct., 2000) [hereinafter *Whritenour*].

[270] *Ibid.* at 688 [emphasis added].

It is this element of "whatever its legal constitution" that I want to pick up on here, which I suggest provides some insight into the decision in both *Whritenour* and *Harris*. The *Whritenour* court similarly admits, later in the decision, that it has no evidence before it regarding "the legal theory under which the community was constituted."[271] In divorcing its analysis from the analytical determination of whether the neighbourhood is in fact "private," the Court instead relies on the physical, empirical, and material crossing of the boundary of the gated community by a range of individuals. The *Whritenour* Court appears clear that what matters here is the way in which the space is in fact *used*, with the court relying on a functional analysis of space in order to determine whether these defendants could justifiably claim the privacy interest they had been asserting.

In both *Harris* and *Whritenour*, then, the courts identify the presence of other gated community residents as well as the presence of outside service providers, visitors, and guests, and go on to determine that neither defendant could claim the whole development as private. While there is no indication as to which factor is most determinative here, at the very least the courts are here invoking the presence of non-resident strangers – delivery people, garbage collectors, visitors, and so on – in order to reinforce the claim that neither of these defendants could have truly felt that they were within private space. As such, although it remains unclear whether the result in these cases would have been the same had non-residents been rigidly barred (and whether the privacy claim could succeed in the presence of other community residents on the street), this judicial emphasis on the existing, empirical permeability of these gated communities fits squarely with the vision of these developments as an existing part of a broader social whole in the other domains discussed above.

While both these decisions provide the public police with access beyond the gated communities, it is perhaps surprising that neither of these cases argue that the public police – regardless of whether or not the gated community borders are crossed by outsiders on a regular basis – more simply maintain the authority to enter any such development, no matter how isolated the community may be. This fits, of course, with the broader pattern I have located

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[271] *Ibid.*

throughout these decisions, in which courts appear to be basing the ability to enforce normative positions on the fact that the gates of these communities are *already* opened to non-residents, rather than on a determination that gates simply cannot be used to exclude outsiders. Instead, the imagined isolated gated community, not subject to including outsiders by virtue of having successfully kept outsiders at bay, is left by the courts as beyond legal regulation – the bases for intervention that the courts produce are explicitly predicated on the empirical permeability of the gates on a daily basis. This conceptual possibility of an isolated gated community that can thereby continue to exclude non-residents provides some definition to the social body I suggest is being envisioned here: one which emphasizes existing relations among subunits, but refrains from conceiving of these as reflecting a normative consensus over the need for any "social" solidarity based on a vision of *creating* interactions in the first place. In this context, the importance of maintaining a legally homogenous space is part and parcel of ensuring normative consistency across social space more generally. As with the discussion of economic relations above, this often entails denying any specificity – or anomalous potential – to local spaces.

This tension comes through most clearly in the New Jersey Superior Court decision in *New Jersey* v. *Panther Valley Property Owners Association*.[272] In this Panther Valley case, the property owners association had requested that public law enforcement officials assume jurisdiction over Panther Valley's private roads, in order to enforce motor vehicle violations. Both the Township and the State Commissioner of Transportation approved this request, and this arrangement was reflected in the rules and regulations of the Property Owners Association and on a visible sign at the entrance to the residential development.

Nearly twenty years after this arrangement of public enforcement was reached, the Property Owners Association amended its rules and regulations, and now provided for an additional layer of *private* policing, conducted directly by the Association. This April 1995 amendment focused on speeding, reckless, and careless driving, and included a schedule of fines that motorists would have to pay when found to be in violation.[273] The enforcement of this provision is done without

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[272]*New Jersey* v. *Panther Valley Property Owners Association*, 307 N.J. Super. 319 (1998) [hereinafter *Panther Valley*].

[273]In a provision that demonstrates the potential increase in police powers in such a situation, In enforcing the Panther Valley fines, the rules further provided that the Association could impose a lien on the home of the property owner, even if it is a tenant of the owner who commits the violation.

any specialized or professional input, and is often based on the lay opinions of other residents:

> Grady W. Cook, PVPOA's general manager, enforces PVPOA's speeding regulations by utilizing a K-15 radar unit to monitor speed. When a vehicle is observed speeding, Cook sends a letter to the residence to which the vehicle is registered. The letter advises the member of the amount of the fine being assessed and his or her right to a hearing before the Covenants Committee.
>
> Reckless and careless driving violations are instituted only by citizens' complaints. These complaints include passing over a double yellow line, passing a stopped school bus and tailgating. Upon written complaint for reckless or careless driving, Cook sends the alleged violator a notice of hearing before the Covenants Committee, and the matter is handled in the same manner as speeding violations.[274]

Having been fined for a speeding violation, a Panther Valley resident advised the State prosecutor's office, which then sought to enjoin this practice of private enforcement. It is important to note that the prosecutor's stated concern was not the usurpation of the public enforcement power, but rather the very boundary between the gated community and the remainder of the municipality. The prosecutor expressed concern that "private enforcement of motor vehicle laws may hinder county-wide uniform enforcement of motor vehicle laws by the State Police."[275] At issue, then, is the ability to sustain the traffic enforcement boundary between Panther Valley and the remainder of the county – and the Court explicitly invokes the public interest of those outside of Panther Valley as well as residents within it, adopting as in the *Laguna Publishing* decision, a lens that begins with a broader social and geographic frame than the gated community alone:

> [T]here is a substantial public interest in the outcome of this litigation: the prosecutor was concerned that coextensive enforcement of Title 39 violations by a private entity may be inimical to the public good and safety of the public ... the ability of a nonprofit association to assess fines for violations of motor vehicle laws presents a novel question of substantial public interest and involves the county-wide law enforcement authority of the prosecutor.[276]

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[274]*Panther Valley*, *supra* note 272 at 324 [internal footnotes omitted].

[275]*Ibid.* at 326.

[276]*Ibid.*

With Panther Valley not being subject to New Jersey's *Condominium Act*,[277] the decision in *Panther Valley* turns instead on a technical reading of the original statute under which the public police had taken jurisdiction for local policing in the gated community. The relevant portion of the statute reads:

> The filing of a written request ... shall not be deemed to constitute a dedication to public use, of any such roads ... nor shall it be construed to prevent such persons, corporations or institutions, as owners of such property ... from prohibiting such use or from requiring other or different or additional conditions ... or *otherwise* regulating such use as may seem best to such persons, corporations or institutions.[278]

For the *Panther Valley* Court, it is the legislative use of the term "otherwise" that is determinative here. The Court thereby determines that, given its placement near terms such as "different" and "additional," the term "otherwise" must here be given a similar meaning – and that as a result, the Property Owners Association can only regulate the roads in ways that are not already contemplated by the motor vehicle statute. Of course, the very opposite conclusion could have been reached. The Court could have decided that, because of the proximity of terms such as "different" and "additional," the term "otherwise" must have been used precisely in order to connote a different meaning. I suggest that what appears to be driving the decision is not the statutory use of the term "otherwise," but a policy question regarding boundaries that the Court later articulates as a question of legal uniformity:

> The obvious intendment of giving broad oversight to the Commissioner was "to advance the interests of safety and uniformity in traffic regulation" throughout the State ... In our view, [the statute] must be read in the context of this overall legislative scheme of demanding uniformity in traffic regulation in the interests of public safety. PVPOA's construction of the statute clearly frustrates that aim. *Dual enforcement of the traffic laws by the police and private associations' own motor vehicle rules and regulations on its private roads once it cedes enforcement jurisdiction to a public law enforcement*

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[277]The internal spatial ordering of Panther Valley is the determinative factor here. The trial judge had initially determined that, since Panther Valley includes some condominium units, it is restricted in its ability to impose fines under the state's Condominium Act. On appeal, however, the Court instead determines that the mixed nature of the development – including single-family residences and townhouses, in addition to condominiums – renders the Condominium Act inapplicable. However it is interesting to note that, in *obiter*, the Court later returns to the *Condominium Act* to argue that it reflects "a tacit expression by the Legislature that any private homeowners association, condominiums or otherwise, have no business assessing fines for motor vehicle violations once they ceded enforcement jurisdiction to a public agency ....": *Ibid.* at 332-333.

[278]See *ibid.* at 328 [emphasis added].

agency may undermine the Legislature's quest for uniformity.[279]

The logic driving this statement is of central importance in understanding the Court's position regarding Panther Valley. The legal uniformity that the Court stresses here extends to the *private* streets in Panther Valley, once public officials have been brought onto those streets in order to control traffic (which did not have the effects of rendering the streets "public" in nature). This is akin to the *Whritenour* Court's dismissal of "whatever its legal constitution" in authorizing the public police to treat gated communities as public spaces. In *Panther Valley*, once the public police are authorized to control traffic in the community, uniformity is said to be in the public interest – but the lack of uniformity is not conceived of as problematic if the residents of Panther Valley have their own exclusive policing structure. Taken in the context of the quotation above, the problem is one of *dual enforcement*, and not of separate and differential enforcement, and I suggest that the following passage is premised on the same concern:

> Independent "speed traps" and use of uncertified radar devices by untrained members of a homeowners association, as here, has the clear capacity to obstruct lawful enforcement by patrolling law enforcement officers who apply approved methodology in a manner consistent with scientifically-accepted procedures.[280]

Read closely, the Court is not here suggesting that independent speed traps or untrained private patrols are in and of themselves problematic when conducted on private roads. It is because state enforcement is *also* present on these roads that there is a conflict here; put otherwise, it is because the public police have been granted jurisdiction over these roads that independent enforcement can't be tolerated, whereas this unscientific, untrained enforcement would not be objectionable if it took place on private roads with no traffic enforcement by the public police (which was itself the case prior to the agreement entered into with Panther Valley). As such, the Court's concern here is with the preservation of epistemological control over the form that public policing must take: should Panther Valley wish to enforce its own traffic rules (unscientifically), it must do so exclusively, presumably by ending the existing policing agreement with the State. It must, in short, disengage from the "public" in order to exercise local

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[279] *Ibid.* at 331 [emphasis added].

[280] *Ibid.*

legal authority in this matter, and once it does, the Court does not appear to present a basis for challenging such authority, even if it is exercised without the scientific procedures of the public police.

And yet, as the pattern of cases developed so far suggests, courts are reluctant to easily allow gated communities or their residents to disengage from the broader social, political, economic, or legal domains. In its 1992 decision in *Bein* v. *Brechtel-Jochim Group*,[281] the California Court of Appeal resists this disengagement by relying on one of the very images that gated communities present – though articulated unsuccessfully in both *Harris* and *Whritenour* – that the entire area constitutes each resident's private home, or domain. The plaintiff, Robert Bein, sought payment for a breach of contract by the Brechtel-Jochim Group, and in so doing further sought to serve the Jochim family at their home. With the Jochims living in a gated community, Robert Bein's process server was denied access by the gate guard each time he tried to serve the Jochims – and after repeated attempts, served the security guard instead, who appears to have thrown the papers on the ground but then retrieved them once the process server had departed.

As the litigation unfolded, Bein argued that serving the entrance guard of a gated community constituted effective service of a community resident under the state's Code of Civil Procedure. Among other requirements, the Code allows for substituted service on a residence so long as a copy of the summons is left with "a competent member of the household."[282] In finding that the security guard meets this requirement, the Court explicitly argues that gated communities cannot serve to prevent the resolution of existing legal relations and entanglements:

> The gate guard in this case must be considered a competent member of the household and the person apparently in charge. Appellants authorized the guard to control access to them and their residence. We therefore assume the relationship between appellants and the guard ensures delivery of process ... Litigants have the right to choose their abodes; they do not have the right to control who may sue or serve them by denying them physical access.[283]

In fact, the Court goes further. While in the above passage the Court's argument is premised

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[281] *Bein*, *supra* note 180 at 1387.

[282] *Ibid.* at 1393.

[283] *Ibid.*

on a principal-agent relationship between the guard and residents, it then goes on to argue that the gate itself is materially part of the home of each resident – that it "constitutes part of the dwelling,"[284] a conclusion that is precisely opposite to that reached by the *Harris* and *Whritenour* courts.[285] The effect of doing so, however, is the same: rather than allow residents of these gated communities to retreat behind the gates, the courts instead maintain the coherence of a legal space as against a competing synthetic jurisdiction that is instantiated by the gated community and its borders.[286] As when maintaining the homogeneity of other domains, however, the courts here do not ground this orientation in a deeper normative commitment to constructing a social whole, but instead to a more sociological conception of community, from which these gated communities could perhaps extricate themselves if they were to do so entirely.

VI. Conclusion

In a recent article on "Los Angeles and the Chicago School," Michael Dear argues in favour of reframing urban sociology.[287] In contrast to the Chicago School of old, Dear suggests that Los Angeles ought to be the model for a new sociological approach – one that would highlight social fragmentation, class-based fortification, homogenization of design, master planning, and privatopia. Reviewing recent work on these emerging themes, his somewhat apocalyptic conclusion is that urban centres, under the weight of privatization, crime fears, and class conflict, are now characterized by acute fragmentation and a "dystopian privatopian future."[288] While invoking different theoretical frames, the account that Michael Dear provides is not unlike the analyses of "privatopia" that pervade the criminological and legal literatures – in which social fragmentation, bolstered by the rise of homeowners associations, gated enclaves, and

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[284] *Ibid.* at 1394 *n*7. This is a claim based on the case law, suggesting that service is deemed to be effected at the location the process server is prevented from continuing. As such, I don't suggest that the Court has created this standard on its own, but the fact of relying on it in this case remains consistent with the broader narrative I find in this chapter.

[285] *Ibid.*.

[286] "Law's Territory", *supra* note 25.

[287] "Los Angeles and the Chicago School" *supra* note 23.

[288] *Ibid.* at 18.

private subdivisions are unremittingly redefining the logics of policing, security, and community. Law itself is said to be complicit in this seemingly unstoppable march toward social fragmentation, particularly through judicial deference to homeowners associations and a lack of legal resistance to claims made in the pursuit of suburbanisation.

In responding to Michael Dear's essay, urban sociologists have emphasized the importance of grounding these claims of fragmentation in empirical research.[289] Saskia Sassen, in particular, has responded by emphasizing the importance of empirical research on the built environment and the emergence of spatial forms, which she argues can themselves have their own effects on urban life.[290] Doing so requires a commitment to empirical research as well as an openness to new theoretical frames: as Sassen argues, "[m]ultiple spatialities may inhabit a given terrain, but only some of these may be evident, or be captured in standardized interpretations."[291] Understanding spatial dynamics thereby requires close attention not only to their proliferation, but to the effects they carry with them in the social environment.[292]

In this chapter, I have undertaken this task, though I pursue this analysis within a legal site – adjudication in American state and federal courts – rather than the more familiar terrains of urban sociology. In explicitly limiting my analysis to those cases in which the boundaries of gated communities are contested on behalf of non-residents, rather than including an analysis of the multiple spatial forms that make up the legal terrain, I reach a very different conclusion than that which dominates scholarship in this area. By treating these decisions as empirical manifestations of how courts deal with the borders of gated communities in the state and federal courts, I find that courts are highly resistant to the logics of community and space that gated developments represent (and in fact resistant to the legal arguments made on their behalf).

Since legal scholarship does not isolate judicial decisions on gated communities as a specific body of law, developing this claim has required grounding this analysis in recent literature,

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[289]See A. Abbott, "Los Angeles and the Chicago School: A Comment on Michael Dear" (2002) 1 City and Community 33. See also R.J. Sampson, "Studying Modern Chicago" (2002) 1 City and Community 45 [hereinafter "Studying Modern Chicago"].

[290]S. Sassen, "Scales and Spaces" (2002) 1 City and Community 48.

[291]*Ibid.* at 49.

[292]"Studying Modern Chicago", *supra* note 289.

mainly from anthropology and critical geography, that emphasizes the importance of spatial forms in the built environment. As I develop it here, this approach more generally emphasizes the importance of "forms" themselves – rather than reducing them to the truths said to lie underneath, be they privatization (thereby conflating gated communities with the rapid rise in common interest communities more generally) or private security (thereby conflating gated communities with shopping malls, theme parks, and airports). Whether forms "matter" is, I suggest, an empirical question, and this chapter finds that in the context of gated communities, the consistency of judicial decisions, and their apparent departure from the findings of local government legal scholars more generally, suggests that there is some weight given by courts to the specific materiality of the gated community before them.

In taking this approach, I reiterate that I am not claiming that these cases yield a "law of gated communities," but am making the more modest claim that when faced with a particular issue (allowing/excluding non-residents) and a particular spatial form (the gated community), courts have been remarkably consistent in resisting the privatopian arguments made on their behalf. Rather, with courts overtly engaged in resolving disputes regarding the borders of gated communities, I have taken this opportunity to investigate the potentially dialectical interactions between forms (in this case spatial),[293] norms (in this case the limits and boundaries of "community," or "modern social imaginaries"),[294] and knowledge production.[295]

Much of my emphasis in this chapter is not the particular form of community that is being instantiated in these cases, though I develop this point as well, but the benefits of conducting research that takes seriously how courts engage with particular material forms. There are three levels at which I present these findings. First, the results suggest that, whatever may be happening in other sites, when the borders of gated communities come within law's gaze there is a resistance to their logic of excluding non-residents while retaining access to the world

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[293]As the earlier review of the literature on space demonstrates, spatial forms are closely aligned with cultural specificities – I don't mean to say, here, that the gate does work *on its own*, but rather that *gating* is itself unique in a spatial-cultural way.

[294]"Modern Social Imaginaries", *supra* note 194.

[295]See "Infinity Within the Brackets", *supra* note 20; P. Rabinow, *French Modern: Norms and Forms of the Social Environment* (Cambridge, MA: MIT Press, 1989) [hereinafter *French Modern*].

outside the gate. At least in the courts, then, the evidence demonstrates that this privatopian logic does not march on unabated, a point that has been missed by those who ignore the effects that particular spatial forms can have, both discursively and in the built environment. Most of these cases have themselves not been discussed by the literature, since on their own they seemingly present little new in the way of doctrine or legal analysis. As a result, commentators to date have implicated law as not resisting this privatopian logic, generally by highlighting the judicial deference to internal disputes within homeowners associations or by noting the seemingly weak resistance of any one decision, such as that in *Citizens Against Gated Enclaves*. Taken as a whole, however, the consistency with which courts resist gated communities' exclusion of outsiders suggests that when specifically within the judicial gaze, courts are much more critical and resistant than the literature to date implies. As Rob Sampson's response to Dear's recent essay argues, it is theoretically informed empirical research that is needed to understand whether, and how, processes of privatopia are taking place.[296] I demonstrate that by conceiving of gated communities as a unique social form, or assemblage, one finds that as an empirical matter the legal gaze looks rather unfavourably upon the exclusion of outsiders these developments present.

At a second level, I argue that courts in these cases are presenting a distinct vision of community and of space. Drawing on Mary Poovey's analyses of British cultural formation, I argue that the judicial vision here is one akin to the 'making of a social body' she describes.[297] While Poovey further suggests that the creation of a British "social" was distinct from economic and political domains, I here emphasize the elements of *aggregation* and *abstraction* that run through the processes she describes, and the imagination of the population as an organic body that is understood only as a whole, abstracting from the specificity of any one element of the "system."[298] Similarly, by conceiving of gated communities and their residents as closely intertwined with others in the economic, social/political, and legal domains, courts have consistently resisted the attempts of these communities to imagine themselves as separate, and

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[296]"Studying Modern Chicago", *supra* note 289.

[297]*Making a Social Body*, *supra* note 31.

[298]*Ibid.* at 78-88.

thereby able to exclude, those relations. The courts instead imagine these domains as abstracted from spatial borders – except for those determined by the state, such as city or county lines, a finding that is consistent with those of other legal scholars – and as thereby at odds with the more localized visions of sovereignty that are claimed in these cases.

Earlier in this chapter, I stated that the boundaries against outsiders that gated communities present appear to be sticking "like undigestible bits of bone" in "the craw of modernity."[299] Coming back to this assertion, I suggest that the economic, legal, and social/political domains that I reference above are precisely those through which modernist views of community abstract from space, and present instead a logic of uniformity and commensurability, a vision through which "everyone belongs to one 'social body'."[300] It is not that the judicial decisions above somehow enjoy an innate effectivity through which to instantiate this vision of community. I am particularly cautious about making such a claim given the lack of attention that even legal scholars have paid to the courts' arguments and decisions in these cases. At the discursive level, however, where Bourdieu locates the force of law,[301] courts are actively engaged in this process. Political conceptions of space and community are here in issue,[302] even if any such vision can never enjoy full effectivity.[303]

I have emphasized throughout this chapter, however, that as an empirical matter courts do not present gated communities as inherently corrosive of community, or as weakening inherent bonds to others in these three domains. The bonds that courts focus on and from which they resist attempts by these communities to disentangle themselves, are empirically existing relations, rather than a shared normative or political commitment to a conceptual body politic. This reflects a secular vision of the public, bonded not by prior ideational frameworks (a

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[299]*Ibid.* at 53.

[300]*Ibid.* at 58.

[301]P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", trans. R. Terdiman (1987) 38 Hastings Law Journal 805.

[302]See eg. S.H. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15 Canadian Journal of Law & Society 91; J.J. Nelson, "The Space of Africville: Creating, Regulating, and Remembering the Urban Slum" (2000) 15 Canadian Journal of Law & Society 163.

[303]See generally "Multidimensional Nature of Boundaries", *supra* note 169. See also *Justice, Nature & The Geography of Difference*, *supra* note 83 at 310.

commitment to joining together, for instance), but instead by the very sociological fact of their situatedness in relations with others.[304] Presented with these relationships – often articulated by courts by referring to evidence that the community's gates are breached regularly – courts are engaged in normative exercises to regulate these relationships, but are not themselves positing that relationships with non-residents ought to be entered into in the first place. It would be easy to determine that this is simply a ruse – that in any case that came before them, courts would contest the exclusionary tactics of gated communities, even if the outsider seeking access could not point to any other permeability of the gate.[305] More to the point, courts are likely to find that in every case, gated communities are penetrated by outsiders making the ideal type inescapably, well, "ideal."[306] At a normative level, however, the fact of holding out this ideal type, rather than decrying gated communities as presenting a lack of social solidarity,[307] suggests a judicial vision that seeks to retain such uniformity while refraining from imbuing it with any particular content. Although there is little in the decisions to suggest why this might be the case, this may reflect a penchant for what Nikolas Rose describes as an imagining of community that is active, material, and technical, rather than one based on a common political solidarity.[308] If this is the case, however, one must ask why courts in these cases imagine the relevant community as extending beyond the neighbourhood gates, suggesting that in fact there is a latent political theory to the community that is being envisaged here, one which abstracts from local space in favour of state boundaries, despatialized (modern) economic, social, and legal relations, and

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[304]"Modern Social Imaginaries", *supra* note 194.

[305]Some evidence for this exists in the Rossmoor decision, in which the gated community was considered suspicious precisely because it was too "self-sufficient" – but as I discuss above, my analysis of that case indicates that the arguments made by the court are too complicated to determine what it meant by "self sufficient." See *Kolcz*, *supra* note 187.

[306]As Weber states, the "ideal type" is one where "it is probably seldom if ever that a real phenomenon can be found which corresponds exactly to one of these ideally constructed pure types ... The more sharply and precisely the ideal type has been constructed, thus the more abstract and unrealistic in this sense it is, the better it is able to perform its functions in formulating terminology, classifications, and hypotheses." See "Basic Sociological Terms", *supra* note 195 at 20-21.

[307]M. Valverde, R. Levi, C. Shearing, M. Condon & P. O'Malley, *Democracy in Governance: A Socio-Legal Framework* (Ottawa: Law Commission of Canada, 1999).

[308]*Powers of Freedom*, *supra* note 21 at 194-196.

internal spatial homogeneity. Citizenship, as others argue, has here taken on a relational form,[309] but one which resists enclaves of small, sovereign spaces that exclude some while retaining access to the broader world of relations.

In a legal context, such normative contestation over the spatial limits of community is perhaps best illuminated by Blomley and Bakan's work on critical legal geography.[310] Focusing on American and Canadian case law on health and safety legislation, Blomley and Bakan find that courts rely on spatial representations of the boundaries of the workplace and of the local community, and in so doing are able to classify individuals as either employees or as citizens – and so "[c]rossing the spatial/legal boundary effectively removes the worker from her community and re-classifies her in law as being outside the scope of her local community's legitimate concerns."[311] Redefining actors spatially thereby has the effect of redefining them legally as well.[312]

This brings us, then, to the third level at which this chapter is engaged. Choosing to isolate the case law on the borders of gated communities provides some evidence that, in this legal complex,[313] the material form of these developments is the object of specific contestation. This emphasis on form, drawing as it does from recent work in anthropology, may not always be coextensive with legal categories – gated communities, as I have stressed, are not subject to their own "law" as a result. As a more empirical exercise, however, this emphasis on form provides a vantage point from which to select cases that are otherwise ignored, and to work through the logics they present. As Paul Rabinow demonstrates, types, or forms, are not solely classificatory – they can themselves represent (and engender) conformity, attacks on established canons,

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[309]E.F. Isin, T. Osborne & N. Rose, "Governing Cities: Liberalism, Neoliberalism, Advanced Liberalism" (Urban Studies Working Paper (No. 19), York University, April 1998), online: York University <http://www.yorku.ca/isin/research/pubs/Isin%201998b.pdf> (last accessed: 14 November 2002).

[310]"Spacing Out", *supra* note 148.

[311]*Ibid.* at 679.

[312]*Ibid.* at 682. This close link between spatial boundaries and legal categories may be the very issue that is then framed within legal doctrine, with prosecutors in some of these cases arguing against judicial reliance on a public/private divide, and instead building arguments based on "the contiguity and spatial overlap" of work sites and the local community

[313]"Governed by Law?", *supra* note 175.

relationships to history, and political projects.[314] In the sociolegal context, Annelise Riles has argued that there may be "forms latent in the norms themselves,"[315] so that a reading of legal doctrine and language can itself suggest a pattern, or an aesthetic. While Riles focuses on the aesthetic form of legal documents,[316] I here take the vantage point of one specific material form when it is brought within the legal gaze.

A recent empirical analysis of gated communities argues that real estate developers have sold gated community residents a bill of goods – that because there is a lack of "community" in these developments, "the benefits of gated communities are not equal to the sales pitch touted by developers."[317] Based on the findings above, I similarly conclude that the residents of gated communities may not always enjoy the 'privilege' they are sold of excluding non-residents while retaining access to the world outside the gate. However, this is not because there is a "community" that can, or can't, be empirically found in these developments. Rather, as the cases above demonstrate, it is because "community" is itself subject to normative contestation – and within the legal gaze, the "community" of gated communities does not survive its privatopian promise.

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[314]*French Modern*, *supra* note 295.

[315]"Infinity Within the Brackets", *supra* note 20 at 378.

[316]See eg. A. Riles, "Eating Locality: Debates About Free Trade in a Japanese Suburb" (American Bar Foundation Working Paper (No. 2002), 2000); A. Riles, "Regulated Relations: Post-Europeans in Colonial Fiji" (American Bar Foundation Working Paper (No. 2004), 2000).

[317]"An Exploration of Sense of Community", *supra* note 98 at 609.

Chapter Five

Community Technologies, Technologies of Community

I. Translating Community

In the burgeoning area of science studies, researchers are seeking to emphasize the processes through which scientific facts come to be produced. Much of this work seeks to emphasize the social processes through which scientific knowledge is defined, and to thereby open up the "black boxes" of scientific knowledge, drawing out the arguments, networks, interests, resources and negotiations through which some approaches gain currency and some fail – though in both cases, these are generally black-boxed away from view.[1] Central to this eventual black-boxing is the concept of "translation," a continual (though not always intentional)[2] process through which support for scientific theories or projects develops, yet through which the objects themselves take on new attributes and inflections.[3] Much of this research emphasizes the importance of chains of translation in explaining the success or failure of scientific theories and inventions. This process of translation, through which the alliances and interest of new actors and resources are conceived of as integral to science in the making, is thereby argued to be critical in the successful development of scientific knowledge. This is rendered most stark in Bruno Latour's analysis of Aramis, a failed transportation system that had been poised to revolutionize public transit in France. The death of Aramis, for Latour, is attributable to the unwillingness of its proponents to allow for its adaptation and translation: as one engineer concluded, the failure of Aramis "was built right into the nature of things,"[4] right into the

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[1]B. Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Cambridge, MA: Harvard University Press, 1998) [hereinafter *Science in Action*].

[2]H. Doorewaard & M. van Bijsterveld, "The Osmosis of Ideas : An Analysis of the Integrated Approach to IT Management from a Translation Theory Perspective" (2001) 8 Organization 55.

[3]*Science in Action*, *supra* note 1; M. Callon, "Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fisherman of St Brieuc Bay" in J. Law, ed., *Power, Action and Belief: A New Sociology of Knowledge?* (Boston : Routledge & Kegan Paul, 1986) 196 [hereinafter "Elements of a Sociology of Translation"]; T. Edwards, "The Sociology of Translation: Technology Transfer & The Teaching Company Scheme" (Aston Business School Research Paper (RP 0005), Aston University, March 2000).

[4]B. Latour, *Aramis, or, the Love of Technology*, trans. C. Porter (Cambridge, MA: Harvard University Press, 1996) at 7 [hereinafter *Aramis*].

imagination of the technology as an autonomous entity that could thereby succeed on its merits and "under its own steam."[5]

Drawing on these concepts of translation and black-boxing, borrowed from science studies, provides an opportunity for pulling together the case studies in this dissertation. Through each of these case studies – Megan's Law, the Gang Congregation Ordinance, and private gated communities – I bring to the fore the struggles, negotiations, and redefinitions that "community" undergoes within legal sites. And so, while Roger Cotterrell has endeavoured to articulate *a* "legal concept of community," devised in a manner that promotes interpersonal trust and collective involvement,[6] I instead emphasize how close attention to the invocation and circulation of this concept within legal processes opens the possibility for examining the truths that are proclaimed in its name, and the specific effects these produce in the development of legal doctrine. This project does not displace an endeavour such as that of Cotterrell. I instead perceive these as complementary – in seeking to emphasize the work that the concept of community does in these sites, others can rely on these to develop normative positions regarding legitimate and illegitimate uses of the concept (now with some evidence regarding the effects that can result from different invocations of community), and even to devise an explicit position regarding what the concept of community ought to mean in law. In pursuing this project, I find that not only is "community" invoked for differential effects in these sites, but that its valence is equally at play in each, with the term itself subject to redefinition when deployed alongside other concepts, images, or knowledge formats. This dissertation, then, emphasizes the *translations* that the concept of community garners, across and within each site, as it is deployed for achieving governmental ends.[7] Yet whereas some research in science studies focuses on what is lost when concepts or ideas are translated (often noting that translations are by their nature treasonous),[8] I instead focus on the local effects that result when they are deployed, in order "to

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[5]*Ibid.* at 292.

[6]R. Cotterrell, "A Legal Concept of Community" (1997) 12 Canadian Journal of Law & Society 75 [hereinafter "Legal Concept of Community"].

[7]N. Rose, *Powers of Freedom: Reframing Political Thought* (New York: Cambridge University Press, 1999) at 47-51 [hereinafter *Powers of Freedom*].

[8]"Elements of a Sociology of Translation", *supra* note 3; G. Fourez, "Scientific and Technological Literacy as a

explore and describe local processes of patterning, social orchestration, ordering and resistance."[9] As such, rather than seeking to police local translations,[10] I am instead interested in empirically documenting the processes of translations themselves (which are otherwise often hidden from view, or black-boxed), their effects in each site, and the forms of power that are opened when "community" is invoked as a governmental technology.

Treating the concept of community – rather than "community" itself – as subject to empirical study in this way, I have tended to emphasize the divergent results it generates within legal sites. I thereby emphasize that the rhetoric of community, although suggested by others as perhaps leading to consistent results,[11] is not as stable as theories of advanced liberalism suggest. As I explore in this dissertation, close analyses of this sort provide insights that are otherwise missed in more general accounts: be it the diverse attachments community has with risk management (which cannot be fully explained by invoking a shift to an actuarial "risk society"), the inflections of law and community that are implicated in the constitution of community harm and the tensions this then raises in the context of constitutional adjudication, and the vision of community that is put forth in legal decisions that adjudicate the boundaries between gated communities and non-residents. In so doing, I have also resisted claims of the "limits of the legal paradigm" in engaging with the concept of community.[12] Instead, by emphasizing the different sets of knowledge, formats, and imaginaries deployed within legal sites, I have not sought to determine what community "means" in law, but instead to emphasize the work that the concept of community does in each site, and the valence that results each time this technology is negotiated and reconceived.

Social Practice" (1997) 27 Social Studies of Sciences 903.

[9]J. Law, "Notes on the Theory of the Actor Network: Ordering, Strategy and Heterogeneity" (1992), online: Lancaster University <http://www.comp.lancs.ac.uk/sociology/soc054jl.html> (last modified: 16 June 2001).

[10]T.H. Crawford, "An Interview with Bruno Latour" (1993) 1 Configurations 247 at 266.

[11]M. Constable, "The Rhetoric of Community: Civil Society and the Legal Order" in A. Sarat, B. Garth & R.A. Kagan, eds., *Looking Back at Law's Century* (Ithaca, NY: Cornell University Press, 2002) 213.

[12]N. Lacey, "Community in Legal Theory: Idea, Ideal, or Ideology?" (1996) 15 Studies in Law, Politics and Society 105 at 139-140.

II. Community, Crime, and the Preventive State

Analysed from this perspective, the case studies presented in this dissertation, reflecting three dominant technologies of crime control, provide additional substance to the claim of an emerging "preventive state" identified by Carol Steiker.[13] While these three case studies draw on one aspect of this preventive state – namely the emergence of "community" efforts to manage crime – I extend Steiker's analysis to include both public and private measures, thereby drawing on recent research that examines concrete processes through which broad fields, knowledge, and practices emerge and their development across a range of political actors, be they state or non-state.[14]

As with Steiker, my focus has been on legal sites, which I rely on here as a set of diverse forums (including courts, police regulations, prosecutorial guidelines, and legislative hearings) in which governance is articulated.[15] In so doing, I have identified an array of inflections that the concept of community takes on when dealing with crime and its control, and demonstrated that these have practical effects on the legal programmes and rationalities developed for the creation, implementation, and adjudication of different initiatives. Locating the discontinuities, disjunctures, and assembled rationalities that compose these aspects of the preventive state does not suggest that it is somehow arbitrary, but that it is 'precarious': authorizing hybrid forms of expertise and diverse political rationalities, and thereby rendering concepts such as "community" into unstable technical devices for governance.[16] This is not to isolate the concept of community

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[13]C.S. Steiker, "Foreword: The Limits of the Preventive State" (1998) 88 Journal of Criminal Law & Criminology 771 [hereinafter "Preventive State"].

[14]*Powers of Freedom*, *supra* note 7 at 4-11; A. Hunt & G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Chicago: Pluto, 1994) at 14-20.

[15]M. Foucault, "Questions of Method" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 73 at 78-82 [hereinafter "Questions of Method"]; M. Foucault, "Governmentality" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 87; C. Gordon, "Governmental Rationality: An Introduction" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 1.

[16]"Questions of Method", *ibid.* at 75.

as especially subject to such analysis – as Bruno Latour states, "everything is translated"[17] – but instead to trace the specific effects generated by the increasingly programmatic reliance on "community" in dealing with crime and its control.

The analysis of Megan's Law in chapter two links the constitution of community in this legal site with rationalities of risk and risk management. Focusing on the mechanisms through which Megan's Law is determined to be a non-punitive measure, I show that particular conceptions of "community" and of "risk," when combined, provide the basis for transferring to individual residents much of the responsibility for managing released offenders and preventing future offenses. At one level, the zone of community defined by Megan's Law is contemplated as requiring the support of the state: alternatively imagined as too highly trusting or as weakened by the ability of individuals to keep their past offenses a secret, invoking the community itself suggests a necessary reliance on the informational resources and actuarial risk expertise of the state. Yet, the design of Megan's Law further invokes this zone of community as one that can respond to sex offenders on its own, without the daily support of the state. While reliant on the state for information and scientific expertise, the community contemplated by Megan's Law is imagined as possessing the necessary skills for preventing reoffense. The importance of scientific expertise, while a critical component in ensuring the constitutionality of Megan's Law as being non-punitive, is displaced in favour of the "common sense" and lay expertise that can be mobilized by communities to monitor offenders and govern their own behaviour accordingly.

This zone of community thereby presents an identifiable site in which individuals can be said to be rational calculators of risk that, with sufficient education, information, and guidance (all supplied by the state), will take rational, common-sense, and protective measures, and not engage in harassment or vigilantism. Governing through community presents these individuals as part of a site that remains governable and controlled, while separate from state control. At a doctrinal level, this tends to relieve the state of responsibility for the negative consequences that may be suffered by offenders as a result of notification. Part of this is achieved, in practice, by limiting the interaction of residents within this sphere of community: while invoked as a safe zone that is composed of individual families, the implementation of Megan's Law shields the

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[17]B. Latour, *The Pasteurization of France*, trans. A. Sheridan & J. Law (Cambridge, MA: Harvard University Press, 1988) at 167.

state from liability by limiting the interaction of residents beyond their own families, achieved through contractual obligations to the state and the threat of criminal sanctions. Finally, despite the localism that "community" implies in the context of Megan's Law, the system of community notification allows for a generalizability beyond any individual locality: the zone of community, although geographically limited, is presumed to have internal relations generalizable to all localities with similar demographic characteristics. Taken together these logics of community, alongside shifting conceptions of risk that invoke actuarial expertise, common sense, legal expertise, and subjective factors, work to recode the roles of public and private, mandating intervention by the preventive state while insulating it from political criticism and legal challenge.

The sociolegal history of Chicago's 1992 Gang Congregation Ordinance in chapter three investigates the construction of a "community harm" through a range of legal sites, from residents' testimonies before City Council, through analyses of the municipal ordinance and police department regulations, to the decision of the U.S. Supreme Court regarding the ordinance's constitutionality. In conceiving of loitering as harmful to the *community*, the Gang Congregation Ordinance provides a lens for disentangling the mechanisms through which the sphere of community is operationalized in responding to crime. While the "community" remains spatially and temporally undefined, the concept of "community harm" as articulated in Chicago's public hearings has the effect of rendering residents' concerns into a *harm* – and thereby actionable by the state – even without individual complaints of behaviours that might themselves amount to a governable "harm." In so doing, the undefined zone of community becomes a locus of the harm that is experienced, and is further privileged as able to determine which problems ought to be responded to through state authority. Furthermore, a close reading of residents' testimonies demonstrates that the content of this "community harm" is not limited to the acts of urban disorder that are the subject of the hearings. Instead, residents appear to be implicating state law – at different times, both its manipulability by others and its abstraction from the everyday – as constitutive of this community/non-individual harm. Testimonial evidence suggests that residents are responding to the failures they perceive in state authority by resorting to extra-legal techniques to curb disorder, many of which involve neighbourhood efforts to build relations of trust, common bonds, and procedures for looking after one another

in their localities.

Given the valorizing of community as a locus of the harm being suffered and as the expert in determining the problems that ought to be conceived of as harms, and given the dissatisfaction with state law and the evidence of local, non-state solutions that are being undertaken as a result, it is perhaps ironic that, by the end of the testimonies, it is legal knowledge and legal expertise that are conceived of as the central remedy, with residents and aldermen invoking law as a resource that can be harnessed with the requisite amount of work and skill. The concept of "community," and the appropriate response to a "community harm," is thereby specified as one that can fit within the expertise of the Chicago Police – and in so doing, enhancing the people's welfare, a governance strategy that has strong historical roots in American legal history, is operationalized as expanding the powers of the public police while displacing alternative, more welfarist, measures proposed at the hearings.

The resulting municipal ordinance and police regulations operationalize this notion of the general or community welfare. Exploring this process demonstrates how the 'community's welfare' comes to be known, operationalized and rendered actionable by state authorities. This concept of the community's welfare is then reconceived in the constitutional adjudication regarding the Chicago ordinance. The U.S. Supreme Court, finds the Ordinance unconstitutional. However, in a departure from previous judicial approaches, the Court does not seek to limit the discretionary powers of state officials. Instead, it develops an approach that reconciles the governance of the people's welfare with neoliberal forms of crime prevention, rationalities of prudentialism, individualized risk assessment, and the ability of individuals to make informed choices. Governance of the "community's welfare," and the legal category of "police science" in which it is historically embedded are radically refigured by the U.S. Supreme Court, which broadly devolves the logic of police onto ordinary citizens, rather than being exercised by the state or more limited groups within civil society. The Court's approach also updates that devolution to fit with a conception in which individuals, and not the state, are said to manage their own risks and to be responsible for their own individual safety. The revised Chicago Ordinance, drafted in response to the Supreme Court's finding that the original loitering ban was unconstitutional, once again renegotiates this space of "community," valorizing it as the source of expertise on harm and policing, and in so doing has returned to the non-professional

foundations of the state police power while no longer positioning the state as the bearer of the people's welfare, calling instead upon the space of community as the source of knowledge and expertise in this domain.

Chapter four moves away from state-sponsored invocations of "community" to investigate the legal adjudication of cases involving the borders of private, gated communities. Drawing primarily on research in anthropology and geography, I show that in contrast to the general suggestion in the literature, the form of community that is invoked and instantiated by gated developments is sharply resisted by U.S. courts. Over a twenty-five year period, courts have instead proven highly reluctant to authorize the social fragmentation that gated communities present in the domains of socio-political, economic, and legal relations. In its place, courts present an image of a broader polity, or a "social body," in which a free flow of interactions is privileged between residents and non-residents of gated communities. This furthers signals a resistance to the manner in which gated communities invoke and produce space – in contrast to a view of space as delineable, particular, and specific, U.S. courts instead invoke a conception of social space that abstracts from an emphasis on 'place' and instead imagines a modern life based on unfettered relational networks.

Locating this judicial resistance to the boundaries of gated communities, however, requires an attention to spatial perspectives that is often ignored in legal analyses. In conceiving of gated communities as an assemblage that incorporates material and cultural elements, this case study finds evidence for a judicial imagination of a broader "social body" that has been ignored by the literature to date. At least in these legal sites, then, the privatopian impulse instantiated by gated communities is meeting with resistance, with courts actively deconstructing the assumptions regarding insiders and outsiders that these developments claim for their residents (and which present themselves as material forms in the social environment). And yet, a close analysis reveals no evidence that these courts object to gated communities as a matter of principle. On the contrary, while in each decision courts in fact deauthorize the exclusionary tactics of gated communities, the logics of these cases explicitly hold out the possibility that a truly isolated development – one which enjoys no connection with non-residents outside the gate – could successfully block access by outsiders. Taken together, I argue that this disjuncture signals a legal vision of community that stresses networks of relationships and obligations, stemming not

from a spatial assertion of difference (which is how gated communities may be conceived of culturally) but rather one that conceptualizes a broader social body from a modernist, transactional based view of solidarity, highlighting the presence of legal, social and economic networks rather than extolling the need for community members to enjoy shared moral or normative commitments. These courts are thereby resisting the use of gates to exclude non-residents in situations where residents retain access to the world outside the gate, while leaving open the possibility for residents to hive themselves off from the social body entirely. By resisting the cultural logic of exclusion that gated communities present, this last case study suggests that this private deployment of the concept of community, tied in here with spatial reconfigurations of the urban landscape in an effort to manage crime, is equally subject to negotiation, resistance, and redefinition in legal sites. In this case, this redefinition itself relies on a latent political theory of "community" that is envisaged by legal authorities, one which abstracts from local spatialities in favour of official state boundaries, despatialized (modern) economic, social, and legal relations, and internal spatial homogeneity.

In drawing out the multivalence of community in these three legal sites, the point is not to simply argue that either "community" or "the preventive state" are socially constructed – one would hardly need to engage in detailed analyses of its continuous renegotiations to reach that conclusion.[18] Rather, I investigate the detail of these translations and authorizations in order to draw out, in each instance, "what counts as truth,"[19] the programmes, strategies, and political relationships that are justified when the concept of community is deployed (in the particular, with reference to context and to other intellectual technologies being deployed alongside it), and the effects of these invocations on legal doctrine in these three sites. Once forged, concepts such as community – such as the community of Megan's Law, imagined as being in a particular form of partnership with the state – may carry that formal status in other sites, either opening or preventing new practices and policies.[20] Tracing these translations *across* sites is itself an empirical project that I have not undertaken, since I have here sought to emphasize the chains

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[18]See generally I. Hacking, *The Social Construction of What?* (Cambridge, MA: Harvard University Press, 1999).

[19]*Powers of Freedom*, *supra* note 7 at 30.

[20]*Ibid.* at 30-31.

of translation that occur within legal sites themselves. Rather, situating my analyses within law itself, I have traced the effects of particular invocations of community on legal doctrine, and demonstrated that in each case study, much turns on the truths, assumptions, and knowledges that are mobilized in the name of community.

In following these translations, I have sought to resist the implication that singular cultural logics, such as "neoliberalism," are themselves motivating the decisions and arguments of actors in these sites – and instead, have found that the invocations of "community" instead deploy other visions alongside (or instead of) dominant political rationalities. This includes the people's welfare of police science, the social vision reflected in 19th century British governance, and the varied knowledges that are authorized by law in constituting risk and its management. While I have endeavoured to contextualize this variation within recent debates on advanced liberalism, this has often involved providing evidence that demonstrates the hybridity of governance, and in turn the epistemological plurality that is taken up in legal sites. Drawing on the work of Michel Foucault, I have not sought to isolate "the unitary spirit of an epoch," or even the uniformity of concepts across sites,[21] but have instead developed detailed analyses of local, discrete practices and rationalities.[22] This renders what appears to be understood – or at least, what appears to be subject to generalization – more problematic than it initially appears.[23]

This extends, of course, to Steiker's identification of the "preventive state," one which now appears to enjoy less unity and linearity than her presentation suggests. Steiker explicitly seeks to identify diverse practices as presenting a coherent shift, or movement, that is afoot in criminal justice policy-making, which she refers to as "moving up a level of conceptual generalization."[24] I do not dispute that drawing out the commonality among practices can provide insights that are missed when each practice is analysed on its own. Furthermore, Steiker has provided the literature with an important shift in emphasis, away from analysing the constitutionality of

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[21]M. Foucault, "Politics and the Study of Discourse" in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality. With Two Lectures by and an Interview with Michel Foucault*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 53 at 55 [hereinafter "Politics and the Study of Discourse"].

[22]"Questions of Method", *supra* note 15 at 74-82.

[23]*Ibid.* at 82-85.

[24]"Preventive State", *supra* note 13 at 779.

individual measures, and focusing instead on political rationalities and their development in actual practices. Yet, Steiker then moves on to imbue this preventive state with an autonomy and force of its own, paying little attention to the process through which they come into being, the different logics they deploy, and the mechanisms through which they come to be inscribed as policy and implemented by legal authorities. In Steiker's presentation, the "preventive state" is developed as a new, pervasive entity, with characteristics of its own, the identity of which can be traced simply by identifying ostensibly preventive practices in different sites – "[t]he preventive state is all the rage these days, and it can be seen in many different guises"[25] – and this preventive state is further identifying as having a "unified" logic,[26] one which is its own "category,"[27] and its own "powers" that can be delimited.[28] In her account, this preventive state appears to have a motor all its own. "It"[29] 'acts,'[30] 'grows,'[31] and has "power,"[32] and there is even a "law of the preventive state."[33] And in all of these, there appears to be a radical break with the past – the preventive state appears as a new incarnation, divorced from earlier governance strategies and imaginaries, suggesting the dawn of a new age that has yet to be reconciled with doctrinal frameworks. In contrast, in investigating the practices themselves, pursued in this dissertation through legal sites, I present instead a hybridity of more local conflicts, truths, knowledges, and alliances, and which is as a result less easily reduced into a singular strategy or phenomenon that raises stable policy questions for legal scholars and for law reform. These practices are often rooted in earlier governance practices (despite the shifts they undergo

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[25]*Ibid.* at 774.

[26]*Ibid.* at 778.

[27]*Ibid.* at 779.

[28]*Ibid.* at 780.

[29]*Ibid.* at 774, 779.

[30]*Ibid.* at 779.

[31]*Ibid.* at 806.

[32]*Ibid.* at 780, 806.

[33]*Ibid.* at 793.

locally), and their power is demonstrably linked with the local conflicts they negotiate and the mechanisms they deploy. I suggest that any generalization to a phenomenon of the "preventive state," then, must be careful not to essentialize its existence. Apparent commonalities (such as the use of the concept of "community") may, upon inspection, reveal more diversity than is commonly assumed. Instead, tracing *how* something that appears to be a unified preventive state comes into being provides a basis for understanding the powers that these practices implement, and for closely documenting the shifts in political logics that are being undertaken in the name of prevention and concepts such as community. This, in turn, can provide the basis for scholars to pursue the more normative questions that Steiker asks – perhaps even retaining a term such as "preventive state" – but without presuming that this reflects a unified set of practices, that this abstraction enjoys its own effectivity, or that it reflects the dawn of a new age, unencumbered by more fluid, continual processes of governance.

III. Law and Society

While writing this dissertation, interlocutors (some real, some imagined) have often asked: so, at the end of it all, *is community notification unconstitutional?* Or, *is defining a community harm a constitutionally viable way of responding to urban disorder?* Or even, *are gated communities in some sense illegal?*

The analysis of the three case studies in this dissertation does not primarily seek to answer these questions. I have instead sought to develop an emphasis on *what* is being done in the name of community, *how* these programmes are conceived of, designed, put into place, and resisted in legal sites, and the *effects* of these developments on legal doctrine. In so doing, however, I have integrated analyses of the case law that equally provide the doctrinal responses to these questions. Rather than rely on the legal texts from a wholly external perspective, such as is often done in the field of law and literature or in quantitative analyses of judicial decisions, the stance I have taken instead takes the content of these decisions as itself critical to understanding the logics, tensions, and assumptions being deployed by judges and other actors in legal sites.

The empirical stance that I take here presents some tension with most work in the law and society tradition. The polarity invoked by distinguishing the "law on the books" and the "law in action" has, I argue, opened little conceptual space for reading the internal texts of the legal

field, such as case law or administrative documents, as themselves worthy of analysis. In so doing, I follow Cotterrell's emphasis on the importance of doctrine, and legal materials, in accounting for how the legal field operates.[34] By concentrating my analysis on "things said"[35] in the context of community and crime prevention, my approach relies on legal texts as social facts themselves. In so doing, however, I have sought to remain as faithful to the texts as a sociologist might seek to remain faithful to her interviewees – while drawing out elements that emphasize certain aspects of these texts, I have continued throughout to keep these in their doctrinal or institutional contexts. Yet, unlike the lens of critical legal scholarship, I have not sought to uncover the truth that legal doctrine hides from us: I have instead taken what is at the very surface, the arguments mobilized by legal actors themselves, and examined the ways in which they are used and the effects they generate in each case study. Since critical legal scholarship has a tendency to look *past* legal practices themselves – in order to explain legal doctrines or practices as products of social forces that are obscured by legitimation strategies[36] – there has been comparatively little attention paid to the *ways* in which legal authorities negotiate specific political programmes and the mechanisms through which concepts are assembled for particular legal effects. This stance leads me to a more narrow position than that of the critical legal scholars: in order to make many of its claims, much of the literature in critical legal studies presumes a direct link between legal decisions and other elements of the social world, thereby often presuming that legal decisions enjoy an innate effectivity. My focus instead is on the legal field itself, and the ways in which concepts come to be imagined and translated within these sites. While I maintain that legal regulation is part of the social world

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[34]R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (New York: Oxford University Press, 1995) at 37-40 [hereinafter *Law's Community*]; and R. Cotterrell, "Why Must Legal Ideas be Interpreted Sociologically?" (1998) 25 Journal of Law & Society 171. I do, however resist Cotterrell's assertion that "[t]he legal sociologist must become a lawyer in order to challenge or go beyond lawyers' conceptions of law" (*Law's Community* at 28). Cotterrell appears to suggest here that understanding law internally is required in order to go beyond lawyers' conceptions of law – I instead suggest that, as *part* of the legal field, understanding law's internal texts (and being able to reconcile internal and external readings) ought to be included in understanding the field, but without displacing the external work that has been conducted in the law and society tradition.

[35]"Politics and the Study of Discourse", *supra* note 21 at 63.

[36]Of course, this legitimation process is of equal interest to those who seek to rely on law as non-political. This insight suggests that the tendency of critical legal scholars to assume that others are being duped is off the mark. In the context of neoliberal reliance on law and legality in the area of development, see K. Rittich, "Who's Afraid of the *Critique of Adjudication*?:Tracing the Discourse of Law in Development" (2000) 22 Cardozo Law Review 929.

– as I suggest earlier in resisting a rigid distinction between the "law on the books" and the "law in action" – the effects it generates are themselves empirical questions, and concepts may be undergoing different translations in other sites. As I state in the introduction, I focus here on the rationalities of government and how government is articulated within legal sites, and thereby focus on texts, programmes, and systems of thought, and I emphasize these as "a historically locatable set of practices"[37] that can be empirically documented as evidence of how claims are created, translated, and produced, and the effects that these garner in law.

My task has not been to provide a theory of community that can inform public policy, nor has it been to demonstrate that recent invocations of the "community" in criminal justice are somehow without basis. Rather, by following this one concept through three legal sites – representing three dominant strategies of relying on "community" as a response to crime – I have sought to account for *how* the concept of community comes to enjoy particular forms of effectivity. In other sites, of course, there may be more translations to document. One reading of this might be to lament that the concept of community does not enjoy predictable effectivity across sites, and that as a result, it is not a particularly useful construction. I take this to be implicit in Cotterrell's endeavour to define "a legal concept of community."[38] Yet, a different reading might return to Latour's analysis of the death of Aramis, a failure that he attributes to the very lack of translations, and lack of negotiability, that were permitted by its proponents. As a result of this emphasis on purity, Aramis was never anything more than a "fiction seeking to come true,"[39] despite the promise it held for revolutionizing Parisian transportation. Because it was conceived of as "pure of all compromise,"[40] Aramis had to be abandoned.[41] Invoking Aramis as an imaginary interlocutor, Latour emphasizes the result: "... you didn't love me. You

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[37]P. Rabinow, "Representations are Social Facts: Modernity and Post-Modernity in Anthropology" in P. Rabinow, ed., *Essays on the Anthropology of Reason* (Princeton: Princeton University Press, 1998) 28 at 34.

[38]"Legal Concept of Community," *supra* note 6.

[39]*Aramis*, *supra* note 4 at 18-19.

[40]*Ibid.* at 295.

[41]*Ibid.* at 288.

loved me as an idea ... because of that insistence on purity, what am I? Nothing but a name!"[42] On this second reading, then, the concept of community – itself continually subject to translation and renegotiation – might be conceived of as a project in the making, engaged and struggled over in legal sites, and for which the very lack of consensus is itself productive.

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[42] *Ibid.*

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Brief for the United States as Amicus Curiae Supporting Defendant/Petitioner in *Doe* v. *Poritz*, No. 39,989 (filed April 1995) (1996) 6 Public Interest Law Journal 75.

Brief of the Attorney General of New Jersey in *W.P.* v. *Verniero*, No. 96-5416 (filed 26 August 1996).

Brief of the U.S. Conference of Mayors, National League of Cities, National Association of Counties, National Governors' Association, Council of State Governments, International City/County Management Association, and International Municipal Lawyers Association as Amici Curiae in Support of Petitioner, in *Chicago* v. *Morales*, No. 97-1121 (filed 19 June 1998), [1997] 1997 U.S. Briefs 1121, online: LEXIS (BRIEFS).

Brief of Washington Legal Foundation, U.S. Representatives Henry Hyde and Luis V. Gutterrez, Allied Educational Foundation, Northwest Neighborhood Federation, and West Avalon Civic Group, Inc. as Amici Curiae in Support of Petitioner in *Chicago* v. *Morales*, No. 97-1121 (filed 19 June 1998), [1997] U.S. Briefs 1121, online: LEXIS (BRIEFS).

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