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## Governing Through Crime Metaphors

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# GOVERNING THROUGH CRIME METAPHORS\*

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## INTRODUCTION

In an era when historic ambitions to fuse law and the social sciences have so often been frustrated,<sup>1</sup> I believe we should approach cognitive science with two impulses. First, we should have a great deal of skepticism toward the “normal science” posture of this field.<sup>2</sup> Second, we should borrow as many of its considerable insights as possible. The publication of Steven Winter’s *A Clearing in the Forest: Law, Life, and Mind* provides those of us in legal studies with a windfall in both respects.<sup>3</sup> Winter, who came to cognitive science through reflection on his own experience in litigation, harbors few of the normal science longings of the discipline. At the same time, he reports a broad range of the findings of the cognitive science research community and does so in the context of a critical reading of twentieth century American jurisprudence.

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<sup>1</sup> Jonathan Simon, *Law after Society*, 24 LAW & SOCIAL INQUIRY 143 (1999)

<sup>2</sup> Cognitive science shares the unfortunate trait with political science that it seems to be begging its scientific status every time it speaks its name, a disability not shared by economics or physics. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (1962).

<sup>3</sup> STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001).

Winter's cognitive reading of law can be usefully applied beyond the classic jurisprudential territory of making sense of judicial interpretation. In recent work, I have argued that crime is becoming a model "problem" for governance in American institutions.<sup>4</sup> This is more than a matter of election rhetoric, although that is telling in a democracy. Crime and fear of crime have become privileged terms by which the needs of individuals and communities are represented. We can speak of crime, in this sense, as a metaphor, a construct from one domain, the law of public wrongs, that is transferred into a wide array of other domains and makes visible new truths about those domains. As law and society scholars have shown, law frequently transfers to popular discourse and to the self-interpreting activity of non-legally trained people.<sup>5</sup> Governing through crime points to a more specific phenomena, the metaphoric use of crime by people with the power and responsibility to help narrate the uses of power for themselves, their agents, and their subjects.<sup>6</sup>

Part I of this Article draws on cognitive science to explore the role of metaphors in the domain of political reason. Part II then takes up a specific example of the use of metaphor in the law making process, President Johnson's statement issued along with his signing of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>7</sup> the law that began more than thirty years of federal legislation. Part III draws a political inference from cognitive science and suggests we move from metaphors revolving around crime to ones involving the fight against cancer. If the productivity of certain ideas and rationalities for law and governance is rooted in their cognitive

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<sup>4</sup> See generally Jonathan Simon, *Governing Through Crime*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 171-90 (George Fisher & Lawrence Friedman eds., 1997); Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 *LAW & SOCIAL INQUIRY* 1111, 1113 (2000).

<sup>5</sup> See generally PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STUDIES FROM EVERYDAY LIFE* (1998).

<sup>6</sup> On organizational narratives see CHARLES BRIGHT, *THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE "BIG HOUSE," 1920-1955* at 15 (1996); JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS 1890-1900* at 9 (1993).

<sup>7</sup> Pub. L. No. 90-351, § 502, 82 Stat. 197 (1968).

effectiveness, as Winter argues, opposition must marshal its own cognitive strategies.<sup>8</sup>

# I. GOVERNING THROUGH CRIME AND ITS COGNITIVE DIMENSION

In his deeply insightful book, *Moral Politics*,<sup>9</sup> pioneer cognitive scientist George Lakoff uses crime discourse as one of the clearest examples of his claim that underlying contemporary American politics are competing metaphors of the nation as family. Conservative politics is animated by a metaphor of the nation as a family with a stern and disciplinary father as its leader.<sup>10</sup> To the political advantage of conservatives, they have clearly identified the centrality of this metaphor and made it an explicit part of their public appeal.<sup>11</sup> Liberal politics, although it tends to hide its moral commitments, is no less rooted in a metaphor of the nation as a nurturing family with a nurturing parent at its head.

Lakoff's model helpfully explains why crime has loomed so large, albeit in slightly different form, to both conservatives and liberals. Crime figures largely in conservative politics for several powerful reasons that mark what cognitive scientists would call "radial categories."<sup>12</sup> First, it exemplifies the disciplinary father's fundamental claim to power and the necessity of reproducing it even with violence. Without his coercive capacity, the stern father as leader implies that the inherently sinful pull of undisciplined human nature will lead the weaker members of the family/nation into crime and violence of their own more vulnerable parts (children, women, minorities, the poor). Not surprisingly, conservatives have offered the punishment of crime as the main form of domestic

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<sup>8</sup> GEORGE LAKOFF, *MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T* (1996).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 33.

<sup>11</sup> *Id.* at 19.

<sup>12</sup> *Id.* at 7-8; WINTER, *supra* note 3, at 72-74. As Winter lays out in some detail, radial categories map the way meaning can be extended from the central examples of the type (e.g., cardinal or blue jay for bird) to a whole range of quite different examples that are also grouped within the same broad category (for birds, hawks, penguins, ostriches). As a larger model of meaning, radial categories represent an alternative theory to the dominant rationalist approach in Western science and philosophy.

government and made their promise to punish crime their prime appeal.

Second, the substantive rules of criminal law (at least those noticed by popular culture) exemplify the simple commands that form the disciplinary father's preferred technology of power. The strict father speaks in the language of rules backed by the threat of punishment. Conservative majorities in Congress and in the state legislatures have likewise made new criminal laws their preferred response to social problems while attacking regulation and private litigation as oppressive and counter-productive responses.

Third, the act of punishing is understood to be the privilege and responsibility of the father and is critical to his rule as father. Crime, in this sense, has a certain Durkheimian inevitability.<sup>13</sup> If the strict father is going to be able to exercise the power to punish, and in so doing reproduce that power, there must be crime to discover and confront. However, one can no longer be as confident as Durkheim that crime and punishment will produce a common emotional response; one that gives substance to "society" as a collective moral sensibility.

Liberals have often seemed to be playing catch up on crime and punishment, but on Lakoff's account this is an illusion driven by their own loss of contact with the moral and family dimension of politics.<sup>14</sup> In fact, the war on crime metaphor was pushed first by the Johnson Administration when it sought to implement a federal improvement program for local law enforcement along the lines of the Great Society model of social science expertise and liberal reform objectives. Throughout the 1970s and 1980s, liberal members of Congress and the state legislatures supported and initiated crime legislation.<sup>15</sup>

Following Lakoff, one can see the nurturing family in the policies most avidly advanced by liberals in the crime field including gun control, strict treatment of domestic and child

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<sup>13</sup> EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 63 (1984).

<sup>14</sup> LAKOFF, *supra* note 8, at 18.

<sup>15</sup> Edward Kennedy's co-sponsorship with Strom Thurmond of the legislation that authorized the shift to sentencing guidelines in the federal courts is a case in point. See CHRISTIAN PARENTI, *LOCK DOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* 50 (1999).

abuse, recognition of hate crimes, and new quasi crimes like sexual harassment in the work place. Crime is an issue for the nurturing family, not as an inevitable war between good and evil that must go on in each household (as it is for conservatives), but as a threat that late modern conditions pose to the actual safety of the family in their homes, in their schools, and in their neighborhoods.<sup>16</sup> Because of this focus, liberals have tended to be somewhat more supportive of police (perceived as capable of providing preventive control) and somewhat less supportive of punishment (especially the death penalty). At the same time, liberals have been enthusiastic about moving the policing of crime into the family, the work place, and the school.

Winter's *A Clearing in the Forest* will undoubtedly compel legal scholars to take stock of the success of cognitive science over the last three decades in producing a rigorous science that at the same time is not anchored in classic rationalist epistemology. Within cognitive science it may serve the purpose of historicizing a mode of analysis that (like most structuralisms) tends to celebrate the stability of determinants rather than change.<sup>17</sup> Almost all of Winter's examples are focused on legal change and the role of cognitive processes in moving legal rules through a process of paradigm shift. Unlike the literary reading of the metaphor, Winter's cognitive analysis shows metaphors not merely as signs that a new set of intentions is reshaping the law, but as tools of change itself, structures that do the work of legal reasoning.

In the remainder of this Article, I draw on both Lakoff's reading of crime in moral politics and Winter's studies of the role of cognition in legal reasoning to examine the role of crime as a governmental metaphor. Legal reasoning relies upon metaphors not simply as adornment to judgments but as ways of providing a circuitry of knowledge and power that bring fact

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<sup>16</sup> See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2000).

<sup>17</sup> Lakoff's reading of politics, for example, focuses us on the compelling force of moral identity in building political majorities. But from this perspective it is all too easy to see the victories of the New Right in 1980, 1984, 1988, and 1994 as inevitable products of the deep cultural conservatism of the white majority in America. Yet what then needs explaining is the success of the New Deal model of political solidarity in the face of a cultural morality even less eroded by the sheer velocity of change in the information age.

and doctrine into a productive relationship. In a similar way, crime today functions as the principal metaphor of political reason.

Crime in this regard frames the broader role of regulatory power. Consider one of Winter's major examples, Justice Holmes' famous "free trade in ideas" metaphor in his *Abrams v. United States*<sup>18</sup> dissent. In his majority opinion for the Supreme Court in *Schenck v. United States*,<sup>19</sup> Holmes endorsed a far less protective standard for subversive speech, analogizing it to falsely shouting fire in a crowded theater. This is a powerful example for Winter because it is so obvious once he points to it that Holmes has relied on striking metaphors in both opinions. In *Schenck*, the source domain is behavior likely to panic people in a setting where that could easily become very dangerous or even lethal.<sup>20</sup> The target domain of subversive speech is mapped in a way that makes government intervention seem natural and valid. In *Abrams*, Holmes drew his source from economic exchange to map the target domain of subversive speech. In this new setting, government intervention would be presumptively invalid and unnecessary.<sup>21</sup>

The metaphor in *Schenck* is really a metaphor of crime. Falsely yelling fire in a crowded theater would almost certainly have been treated as a serious crime (at a time when deadly fires in such places were all too common), perhaps even murder if deaths occurred. Moreover, the example could almost have come from a case or hornbook discussing the problem of "abandoned and malignant heart" murder, a common law theory of murder liability premised on the moral culpability of one who deliberately takes a huge risk to the lives of others for no socially redeeming purpose.

The marketplace of ideas metaphor, in contrast, offers a picture of speech operating in a very different governmental

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<sup>18</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); WINTER, *supra* note 3, at 271.

<sup>19</sup> 249 U.S. 47, 52 (1919); WINTER, *supra* note 3, at 270.

<sup>20</sup> *Schenck*, 249 U.S. at 52.

<sup>21</sup> Winter argues that the free trade in ideas metaphor is less a creative tour de force than a quite conventional example of a conduit metaphor, i.e., one where ideas are objects inside a mind that functions as a container. Winter argues that the metaphor does much of the doctrinal work of the new Holmes test, bringing over from the source domain of economic activity "a systematic set of entailments that supersedes the limitations of the older free speech model." WINTER, *supra* note 3, at 272.

context, not crime but business. If speech is more like a business transaction than like a violent crime, the problem of governance remains but is placed in a very different position.

What cognitive science calls conceptual metaphors<sup>22</sup> form the building blocks of more specialized and culturally specific devices.

Unlike literary metaphors, conceptual metaphors have their most significant effects not in the initial transplant of an image from one domain to another, but in the entailments that the metaphor produces. If life is like a journey, there must be obstacles, vehicles, and objectives.<sup>23</sup> If speech is like a marketplace of ideas, then speakers are like entrepreneurs, the public are consumers, and the role of the government is both to assure the health of the market and the well being of consumers faced with inordinately powerful producers.<sup>24</sup> For Winter's analysis of law, the key lies in "idealized cognitive models" deployed in legal reasoning. These models, like the marketplace of ideas, do more than invoke a literary experience. Cognitive or conceptual metaphors provide a map through which people can know and act on, for example, unruly speech.<sup>25</sup> Crime functions as something similar which we might simply call governmental metaphors, that is, those metaphors that work not simply to transplant a series of meanings from one domain to another but through that and other processes to transmit forms of power and knowledge from one domain into another.

Governing through crime metaphors may likewise have had largely political objectives but its entailments alter the way we know and act on the nation as a body politic. Perhaps its most important entailment has been the construction of the crime victim as an idealized citizen subject. Much follows from this in a representative democracy with a popularly elected law-making body. Although victims as such are rarely mentioned in the text of the Omnibus Crime Control and Safe Streets Act, in comparison to its more recent descendants, the 1968 law initiated a circuitry of knowledge and power that has

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<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 16.

<sup>24</sup> *Id.* at 272.

<sup>25</sup> Winter contrasts this approach to metaphor to the influential theory of Donald Davidson. See WINTER, *supra* note 3, at 55.



made the crime victim one of the most visible faces of public need before Congress and state legislatures. In a real sense, the victims who have come to dominate the narrative of more recent crime legislation were produced as governmental subjects by the 1968 law and its entailments.

If the citizen is a victim, then the task of government is to fight crime. The nation is territorialized as a street in which crime takes place. The ideal forms of the state become the police officer and the prison where the substantive rationality of punishing crime is allowed to have its full sway.

## II. REIMAGINING THE NATION THROUGH CRIME: METAPHORS OF THE SAFE STREETS ACT

This act will help to lift the stain of crime and the shadow of fear from the streets of our communities.

-President Lyndon Johnson, June 19, 1968.<sup>26</sup>

Crime victims are only the most recent and currently most dominant of a whole panoply of idealized political subjects that have entered (and more rarely left) the stage of American political development. At earlier points in the history of the United States, idealized political subjects, such as the yeoman farmer, the freed slave, the industrial worker, and the biologically vulnerable consumer, helped not only in assembling enduring political majorities but in imagining the proper scope and approach of government. At various times in our nation's history, each of these subjects has been the focus of great waves of both federal and state legislation. Yeomen farmers, for example, were the idealized subjects at the center of a series of laws that Congress enacted over the last two-thirds of the nineteenth century dealing with the settling of public lands in the territories of the United States.<sup>27</sup>

These subjects were more than ideological fictions. Each idealized political subject included real features of the

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<sup>26</sup> Lyndon B. Johnson, Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, 1968 PUB. PAPERS 725, 727 (June 19, 1968) [hereinafter Johnson Statement].

<sup>27</sup> See generally MARION CLAWSON, *THE LAND SYSTEM OF THE UNITED STATES: AN INTRODUCTION TO THE HISTORY AND PRACTICE OF LAND USE AND LAND TENURE* (1968).

American population that were being highlighted by historical conditions (changing technologies, political regimes, etc.). They also represented projects of social construction. Each ideal identifies general features of a population that make it capable of the democratic ideal of self governing, but the other side of these virtues are vulnerabilities that require governmental responses.

Today it is in the experience of criminal victimization and (much more commonly) the imagined possibility of victimization that the political community and its governable interests are being redefined in law making. It is the outlines of this victim subject, projected by advocacy groups, the media, and law itself, that frames the purposes of legislation and the features of the subject that this legislation must take into account. Indeed, to the extent that earlier ideals seek to recuperate their political currency, it is through a narrative representation of them in crime victim mode.

Thus, in an era when civil rights is little attended to by Congress, hate crimes have emerged as the dominant focus for those lobbyists and legislators loyal to that cause.<sup>28</sup> At a time when regulation of consumer industries is increasingly voluntary, laws creating new kinds of safety crimes, e.g., driving while speaking on a hand-held cellular phone, are growing.

Crime legislation is part of a dialog whose main interlocutor is the crime victim and those who speak for victims. The following quote comes from a speech delivered by former Attorney General Janet Reno to a meeting of victim's rights advocates, but most of our recent Attorney Generals and many other politicians have said remarkably similar things.

I draw most of my strength from victims for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and again for what is right . . . you are my heroes and heroines. You are but little lower than the angels.<sup>29</sup>

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<sup>28</sup> Jeffrey Gettleman, *Ex-Klansman Convicted in 1963 Alabama Church Blast; Crime: Life Term is Given in Bombing that Killed Four Black Girls and Galvanized the Civil Rights Movement*, L.A. TIMES, May 2, 2001, at A1; Marlon Manuel, *1963 Birmingham Church Bombing; Guilty on All Counts*, ATLANTA J. & CONST., May 2, 2001, at A1.

<sup>29</sup> Bruce Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment*

Notice that one could substitute the words "yeomen farmers," "freedmen," or "industrial workers" without any strain. This is the best description possible of what it is to perceive an "idealized political subject."

As with the great pieces of Reconstruction and New Deal legislation, the Safe Streets Act merits recognition at three levels: as a solidifying political victory for a new governing coalition in American politics; as a critical growth point for a set of specialized knowledges and technologies of power about governing crime, i.e., crime, criminals, and victims, but also law enforcement, courts, and correctional agencies; and as defining a new set of privileged subjects for government, including victims, state law enforcement, courts, and correctional systems. Such a subject embodies the major struggles that endanger the freedom and well-being of all citizens. Not surprisingly, once a political culture has adopted yeomen farmers, industrial workers, or crime victims as ideal political subjects, one would expect to find them valorized in popular culture, pedagogy, and certainly political speeches as heroes or even quasi-divine figures.

#### A. *The Omnibus Crime Control and Safe Streets Act*

The dominance of crime legislation over the imagination of lawmakers began with the adoption of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>30</sup> The Act was enacted June 6, 1968 with only four senators and seventeen representatives voting against it.<sup>31</sup> The "omnibus" legislation, as it self-advertised, consisted of several distinct elements, although with the presumption that all would contribute to the substantive titles of "crime control" and "safe streets."

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is a *Bad Idea*, 264 THE NATION, Feb. 19, 1997, at 11.

<sup>30</sup> Pub. L. No. 90-351, §§ 201-406, 82 Stat. 197 (1968) [hereinafter *Safe Streets Act*].

<sup>31</sup> RICHARD HARRIS, THE FEAR OF CRIME 14 (1969).

1. Title I. Federal Funding for Law Enforcement Research & Development

Title I was the core of the original Johnson Administration bill, first introduced in 1967, which envisioned a major investment of federal dollars in state and local law enforcement.<sup>32</sup> This section embodied Johnson's strategy for handling the crime issue that he had already seen in the campaign of his 1964 opponent, Senator Barry Goldwater. The bill would provide funds for new equipment, new training, and even some new law enforcement officers, but tied to an agenda of substantive reform and improvement in policing, courts, and corrections.

Title I retained the Johnson Administration's objective of funding, but structured it through a form of "revenue sharing" that diluted the federal role in setting the agenda. Title I funds would be available directly to state and federal law enforcement. Governors and mayors would have direct roles in seeking and distributing funds. Rather than directing reform, the federal government would act as a grant reviewer, making sure that the proposals conformed to formal features of planning and research driven strategies. The final bill authorized over 400 million dollars in federal revenue, a number to be multiplied many times over by subsequent legislation.<sup>33</sup>

2. Title II. Repudiating the Warren Court's Criminal Procedure Jurisprudence

The most controversial provisions of the Safe Streets Act were those establishing rules of evidence for criminal trials in federal court that clearly conflicted with Supreme Court doctrine on confessions.<sup>34</sup> The most famous provision allowed

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<sup>32</sup> Safe Streets Act §§ 201-406. For Johnson's thinking about the funding part of the Act see, ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES 1961-1973* at 409 (1998).

<sup>33</sup> Safe Streets Act § 502.

<sup>34</sup> Ironically, these provisions have proved largely immaterial. Starting with the Ford administration, it has been the policy of the Department of Justice to ignore Title II. When a portion of the law was finally tested by the U.S. Supreme Court in 2000, it was at the prompting of private public interest lawyers and an ultra-

statements of a suspect in custody to be admitted at trial even if taken without the benefit of explicit warnings such as those required by *Miranda v. Arizona*,<sup>35</sup> so long as the trial judge deemed them "voluntary."<sup>36</sup> The language of Title II was the product of a coalition of conservatives from both parties. Many of them had long resented the Supreme Court's interference in school segregation and in law enforcement. Liberals in both parties opposed this part of the bill as unconstitutional. The new standard, if read literally, had the effect of mandating federal courts to ignore several new criteria that the Supreme Court had established on top of the traditional voluntariness test, a position ultimately validated by the Court itself in 2000.<sup>37</sup> President Johnson's dislike for this aspect of the law led him to veto the version of it passed by Congress in 1967. But the increasing violence of 1968, surging crime, riots, and assassinations, compelled him to accept what he acknowledged to be a flawed bill.

### 3. Title III. Wiretapping and Eavesdropping

Some states, like New York, permitted wiretapping but the Federal Communications Act of 1934 made it illegal to intercept telephone communication.<sup>38</sup> Since 1934 the Attorney Generals had sought, without success, permission from Congress to do wiretapping in criminal cases.<sup>39</sup> In the meantime the FBI operated on a tacit understanding that this did not apply to national security.<sup>40</sup> The Kennedy Administration introduced several bills calling for

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conservative appeals court. See *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>35</sup> 348 U.S. 436 (1966).

<sup>36</sup> The statute did allow that trial judges should consider such warnings or the failure to deliver them in evaluating voluntariness.

<sup>37</sup> *Dickerson v. United States*, 530 U.S. 428 (2000). The law also purported to establish by statute that a suspect could be held for at least six hours by the police before being brought to an arraignment before a judge without jeopardizing any confession taken from the suspect during that time due to simply to failure to bring the suspect to arraignment more promptly.

<sup>38</sup> 48 Stat. 1103 (1934); see also VICTOR S. NAVASKY, *KENNEDY JUSTICE* 72 (1971).

<sup>39</sup> Navasky, *supra* note 38, at 72.

<sup>40</sup> *Id.*

authorization of wiretapping, but with increasing safeguards.<sup>41</sup> President Johnson's Attorney General, Ramsey Clark, became the first Attorney General to oppose wiretapping, a position on which he influenced the President.<sup>42</sup> In his 1967 State of the Union address, President Johnson called for the outlawing of all public and private wiretapping except for the narrow needs of national security.<sup>43</sup> In its original proposals for a major crime bill in 1967, the Johnson administration had sought legislation that would have used federal law to place restrictions on state and local use of wiretaps.<sup>44</sup> The legislation the President signed in June of 1968 for the first time authorized state and federal law enforcement to seek wiretap warrants from federal courts and set internal standards to govern the granting of such warrants.

Critics of the wiretapping provisions, including then Senator Robert F. Kennedy, argued that it gave the President too much leeway to define national security and thus made wiretapping possible against domestic political opponents, like the civil rights movement, or anti-war protesters.<sup>45</sup> Critics also questioned whether wiretapping was truly responsive to public concern about armed robberies and violence in the streets which rarely involved the kind of ongoing planning and organization that wiretaps could realistically hope to capture in time to prevent crime.<sup>46</sup> Most proponents would have sided with the sentiments expressed by Robert Kennedy a few years earlier when as Attorney General he had supported wiretapping only on the grounds that law enforcement truly believed it would help them prevent and punish crime.<sup>47</sup>

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<sup>41</sup> *Id.* at 75.

<sup>42</sup> DAVID HARRIS, *JUSTICE: THE CRISIS OF LAW, ORDER AND FREEDOM IN AMERICA* 38 (1970).

<sup>43</sup> *Id.*

<sup>44</sup> MALCOLM M. FEELEY & AUSTIN D. SARAT, *THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-1978* at 41, 45 (1980).

<sup>45</sup> HARRIS, *supra* note 42, at 36.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

#### 4. Title IV. Gun Control

Liberals had their chief victory in the establishment of the first federal laws regulating gun sales on a nation-wide basis. The law set up a federal licensing structure for gun dealers, requiring them to keep information on the purchases of weapons, banning hand gun sales by mail order, and banning sales altogether to a range of presumptively dangerous subjects including dishonorably charged veterans, felons, and the insane.<sup>48</sup> The provision was originally defeated, but the assassination of Senator Robert Kennedy by gunfire in a Los Angeles hotel days before the vote on the overall law resulted in reconsideration and passage of the gun control provision.

#### B. *Crime and the National Political Debate*

Contemporary observers in the late 1960s saw the crime issue as the most significant challenge in decades to the liberal domination of domestic policy. This was especially true of President Johnson, who understood the cultural contradictions of the Democratic majority as much as any politician in the twentieth century. LBJ famously quipped on the signing of the Civil Rights Act of 1964<sup>49</sup> that he had "just delivered the South to the Republican Party for a long time to come."<sup>50</sup> But losing the South might have been worth it, in exchange for locking up a progressive coalition in the Northeast, Midwest, and California.

Johnson intuitively understood how dangerous violent crime was to the post-New Deal coalition he was seeking to reestablish. Barry Goldwater had invoked crime in the streets in his 1964 landslide defeat, but LBJ had succeeded in turning the campaign on Goldwater's own extremism not Democratic permissiveness. LBJ recognized that crime was driving a wedge through the Democrat's urban coalition, peeling off white voters to the suburbs and the Republican Party. He told pro-civil rights union leader Walter Reuther that "nearly every

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<sup>48</sup> Safe Streets Act § 902.

<sup>49</sup> 78 Stat. 253 (1964).

<sup>50</sup> E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 81 (1991).

white man in this country would be frightened if he thought that the Negroes were gonna take him over.”<sup>51</sup>

The specter of violent criminal assaults by blacks on whites and their property surely invoked the worst of these white fears of losing privilege. Almost from the start of Johnson's own term, public anxiety about riots and crime was a constant in the news: Even the *New York Times*, a paper not easily swayed by short term popular interests, documented the political rumbling of this issue in the headlines of the mid-1960s: “Hasidic Jews Use Patrols to Balk Attack”;<sup>52</sup> “Philadelphia Police Using Dogs to Curb Violence in Subways”;<sup>53</sup> “[Mayor] Wagner Orders A Night Patrol on All Subways”;<sup>54</sup> and “Fear of Muggers Looms Large In Public Concern Over Crime.”<sup>55</sup>

The apparent rise in violent crime, primarily armed and unarmed robberies and aggravated assaults, was concentrated in the big cities that were the traditional anchors of the New Deal style of government with its emphasis on regulation and expert decision makers. This kind of one-on-one crime was linked to the riots and anti-war protests that had become common for the first time in a century during the mid-1960s. Both types of events were associated with blacks and students, two groups that seemed to be often identified with a liberal federal approach to government.

While the Safe Streets Act was enacted during the presidential campaign to succeed him, Johnson had not waited until the last minute to turn to this issue. From the start of his term he had pursued a consistent strategy consisting of three elements. First, he spoke frequently and forcefully about his concern for the harm crime was causing and the absolute necessity of combating it. He fostered the creation of expertise about crime and the criminal justice system. Most famously, his President's Commission on Law Enforcement and the Administration of Criminal Justice began work in 1965 and

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<sup>51</sup> GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE 20<sup>TH</sup> CENTURY* 290 (2001).

<sup>52</sup> Reprinted in 7 *THE NEW YORK TIMES, CRIME AND JUSTICE: THE GREAT CONTEMPORARY ISSUES* SERIES 219 (1978).

<sup>53</sup> *Id.* at 221.

<sup>54</sup> *Id.* at 224-25.

<sup>55</sup> *Id.* at 230.



issued reports in 1966 and 1967.<sup>56</sup> Based on their work, he proposed in 1967 to launch a grant in aid program to fund local units of government struggling to reduce crime.<sup>57</sup>

Other forces were at work as Congress took up the proposal in 1967 and 1968. Richard Nixon, seeking the Republican presidential nomination for 1968, was steadily flogging the crime issue. In 1968, George Wallace, then known for his confrontation with the Kennedys over the integration of the University of Alabama, which he resisted vigorously, campaigned as an independent candidate for president, emphasizing crime as a dominant issue in his appeal to northern voters. Both Nixon and Wallace argued that the crime problem was ultimately a problem of government. Both viewed the federal courts as the major villains, especially the Supreme Court under Chief Justice Earl Warren, which had impeded the efforts of police and prevented prosecutors from using evidence. The concern over increasing violence in American cities was evident in Nixon's view that the courts "have gone too far in weakening the peace forces against the forces of crime."<sup>58</sup>

To its liberal critics, the Safe Streets Act represented a moment of reactionary regression on the part of government. British journalist Richard Harris, writing in the *New Yorker*, described it bluntly as "a piece of demagoguery devised out of malevolence and enacted in hysteria."<sup>59</sup> It is not difficult to see why they reacted so strongly. LBJ's "Great Society" strategy to fight poverty and reform local governance was still in its infancy both administratively and as a successor to the New Deal approach to government. Along with the administration's landmark civil rights decisions, these new programs engendered strong resistance from both traditional Republican opponents of expanding the New Deal and Southern Democrats defending segregation. The Omnibus Crime Control and Safe Streets Act of 1968 represented the first fruits of the union between those forces in Congress; a union that has dominated American politics ever since.

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<sup>56</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

<sup>57</sup> MALCOLM FEELEY & AUSTIN SARAT, *THE POLICY DILEMMA* 41 (1980).

<sup>58</sup> *THE NEW YORK TIMES*, *supra* note 51, at 266.

<sup>59</sup> RICHARD HARRIS, *THE FEAR OF CRIME* 14 (1969).

LBJ was keenly aware of all this when he signed the Safe Streets Act. It was a dramatic moment. Johnson had already withdrawn from seeking a second term and was attempting to negotiate a cease fire to the Vietnam War. Johnson vacillated on whether or not to sign the legislation, waiting until the last possible day to sign the bill before it would have become law without his signature. He asked for the comments of each cabinet agency and was able to state that none had advised him to veto it.

Johnson's official statement on signing the bill provides ready evidence of his ambivalence. He described the law on balance as doing "more good than bad."<sup>60</sup> He expressly rejected the wiretapping and police interrogation portions of the law, and following the advice of Attorney General Ramsey Clark, he made clear that they would not be federal policy for the remainder of his administration. He touted the enormous commitment of federal funds to reforming local law enforcement, avoiding mention of the law's new block grant structure, although it represented the first major step away from the style of Great Society legislation he had pushed through Congress earlier.

When he attempted to justify placing his signature on the law, however, Johnson turned to a series of powerful metaphoric images. The opening line of his statement deployed one of the most common cognitive metaphors, the idea of a "journey" narratively applied to something very different in life like a love affair, a career, or in this case the development of a law.<sup>61</sup> "The Safe Streets and Crime Control Act of 1968 has had a long journey,"<sup>62</sup> the President stated. Johnson recounted his efforts, beginning in his very first year as an elected President, to appoint a national crime commission and apply its expert findings to the wealth and power of the federal government in the name of aiding local law enforcement.<sup>63</sup> To this end, Johnson had introduced legislation in Congress in February 1967, shortly after the publication of the Crime Commission's

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<sup>60</sup> Johnson Statement, *supra* note 26, at 725.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Report. "Now," Johnson announced, "almost 500 days later, the legislative process has run its full course."<sup>64</sup>

The journey image is prologue to a whole series of additional metaphors that seem aimed at elaborating his governmental act of signing the bill into law.

### C. *The War on Crime*

The most prominent metaphor is military imagery. The "war on crime" has become so common an idea that it is easy to forget it is a metaphor, arguably one of the most successful governmental metaphors of the twentieth century. Although it is widely associated with President Nixon (he actually declared the war on drugs), President Johnson used it in public statements throughout his presidency. In March 1967, before a White House conference with 500 state, city, and private law enforcement and corrections specialists, the President spoke of "our war on crime."<sup>65</sup> The Presidential statement given when he signed the Safe Streets Act bristled with a whole series of more specialized metaphors.

Recounting the origins of the law in the first bill he had introduced to Congress in 1967, Johnson described his legislation as a call upon Congress to "strike a sure and swift blow against crime in America."<sup>66</sup> In this image, one variation on the war on crime theme, the lawmakers are treated as a physical body. Today, thirty years into the development of governing through crime, we are apt to follow that metaphor through to an image of corporal or even capital punishment, or hand to hand combat. Johnson turned it into his Great Society vision, imagining the limbs as great streams of federal money flowing to increase the capacity of local law enforcement. The provision of federal funds and expertise would allow state and local communities to "plan, organize, and mount a concerted and effective attack on crime."<sup>67</sup>

In his closing paragraph, Johnson returned to the war on crime metaphor, imploring local officials to: "Support the

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

<sup>65</sup> DALLEK, *supra* note 32, at 409.

<sup>66</sup> Johnson Statement, *supra* note 26, at 725.

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

policemen, the law enforcement systems and to move promptly to support the policemen, the law enforcement officers, and the men who wage war on crime day after day . . . .<sup>68</sup> Here the metaphor has shifted to one more consistent with our current imagery. The war on crime emerges as a war on criminals (and by implication those who look like they might be criminals, primarily young minority men in the inner cities). Police are depicted as soldiers engaged in active combat.

The war on crime metaphor provides a clear example of what I call governmental metaphors. What is being transferred from one domain (war) to another (law enforcement) is specifically a vision of the role of government. Someone more enamored of normal science than I might talk about cognitive political science, or political cognitive science. It seems justifiable, at any rate, to view metaphors like these as operating in the realm of political reason.<sup>69</sup>

The origin of war as a metaphor for recasting government developed out of the American experience of World War II. This was a war of total mobilization in which economies of great societies were largely given over to total war production. In that sense, it has had no real parallels. All the U.S. wars since 1945 have been conducted while maintaining high civilian living standards. Nonetheless, the images of a war on poverty, war on crime, war on cancer, war on drugs, and war on terrorism continue to invoke the image of an empowered central government mobilizing the nation and its resources to undertake systematic measures against an enemy that poses a mortal threat.

### 1. The Street

Running through the Johnson war on crime metaphor is the image of streets. The idea of titling the administration's major 1967 legislative initiative on crime the "Safe Streets Act" came from Housing and Urban Development Secretary Joseph

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<sup>68</sup> *Id.* at 728.

<sup>69</sup> Political reason is used here in Michel Foucault's sense of a rationality proper to the problem of government itself and not simply mapping that terrain from theology or economics. See Michel Foucault, *Governmentality*, in 3 *ESSENTIAL WORKS OF FOUCAULT*, 1965-1984 at 201 (James D. Faubion ed., 2000).

Califano.<sup>70</sup> One of the administration's leading liberals, Califano wanted to emphasize that anti-crime measures were not goods in themselves but ways to "restore public and private safety."<sup>71</sup> In the name of the Act and in the language of Johnson's signing statement, streets come to operate as a metonymy for American society generally, and especially the great American cities. Johnson's metaphor expressed not simply an ideology or a set of beliefs but a strategy for retooling liberalism to govern the changing urban landscape, the unstable "habitus" of the great cities on which Johnson's Democratic majority remained dependent.<sup>72</sup> Johnson claimed, "I sign the bill because it responds to one of the most urgent problems in America today—the problem of fighting crime in the local neighborhood and on the city street."<sup>73</sup>

Crime was defined as one of America's "most urgent problems," but Johnson's strategic message was embedded in the images that followed: "fighting crime," "local neighborhood," "city street." Fighting crime is an entailment of the war on crime metaphor. What do armies do at war but fight? However, the fight is neither nowhere nor everywhere, it is in two places, "the local neighborhood" and "on the city street."

These two locations point to subtly different terrains. Local neighborhoods, to be sure, contain city streets (and in many older cities they are mostly streets), but the referents of local and neighborhood suggest something culturally more specific. By multiplying "local" against the semantically close "neighborhood," the Johnson statement invokes the intimacy of private residences and the immediate surrounding area including your "block," perhaps a neighborhood school, and park. The term "city" modifying streets in the next image, "city street," gives us one final clue. By implication, the "local neighborhood" is not city. Today it is specifically "suburban"

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<sup>70</sup> DALLEK, *supra* note 32, at 407.

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

<sup>72</sup> In this regard he shared the sentiment of many of the more liberal Democrats who had voted for the law because to do nothing courted a "real possibility that the people will lose their faith in the government's ability to protect them" HARRIS, *supra* note 59, at 99 (quoting Senator Philip Hart, a liberal Democrat from Michigan, and an opponent of the crime bill, regarding the reasoning of the Act's Democrat supporters).

<sup>73</sup> Johnson Statement, *supra* note 26, at 725.

but in 1968 the term still coded many of the outlying neighborhoods within city limits but differentiated from the urban core designated colloquially as "the city." If local neighborhood codes the private, the residential, the local, and often parochial, we can assume that "city street" codes something far more specific than municipal roadways, these are downtown, public, business, and shopping streets.

The combination of these images produces two separate but related dynamics. One is a classic public/private split that has long been observed as central to liberalism as a form of political thought.<sup>74</sup> Throughout the statement, Johnson seems to tack back and forth, referencing "homes and families" in contrast to streets. The gun control provisions of Title IV are extolled in the statement as a partial step toward "the protection of our homes and families."<sup>75</sup> Likewise, Johnson is concerned that wiretapping and eavesdropping could become abused and threaten the privacy by producing

a nation of snoopers bending through the key holes of the homes and offices in America, spying on our neighbors. No conversation in the sanctity of the bedroom or relayed over a copper telephone wire would be free of eavesdropping by those who say they want to ferret out crime.<sup>76</sup>

In contrast, when Johnson returns to streets at the end of the statement, it is to invoke a day-by-day war raging in those streets between forces of crime and forces of law and order. Thus, while the private spaces, neighborhoods, homes, and offices are to be protected not only against crime but against law enforcement's own excesses, the streets are to be scoured by an unforgiving war.

Across this divided terrain Johnson wants to offer his party a strategy. Crime was an urgent problem, but specifically in the way it was undermining the Great Society on two of its most crucial anchors. On the one hand, there was the largely urban working class that had been made into a new kind of

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<sup>74</sup> On the public private split in liberal thought, see generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>75</sup> Johnson Statement, *supra* note 26, at 726.

<sup>76</sup> *Id.*

middle class by New Deal policies and post-War affluence, and the organized interests represented by those downtown streets, municipal unions, banks, and insurance companies with large real estate holdings, large public institutions like museums and universities, and the large corporations that sustain them. On the other hand, there was, by 1968, the civil rights community as a representative of black America.

a. "stain" and "shadow"

This political strategy is most powerfully expressed in what, in my reading, is the central metaphoric construct of the statement. In language widely quoted by newspapers at the time, President Johnson summarized his judgment to sign the legislation thusly: "I believe this measure, despite its shortcomings, will help to lift the stain of crime and the shadow of fear from the streets of our communities."<sup>77</sup> The term "stain" carries with it a powerfully evocative image of degradation. Consider a standard set of dictionary definitions:

1. a discoloration produced by *foreign* matter that has penetrated into or chemically reacted with a material.
2. a natural spot or patch of color different from that of the basic color, as on the body of an animal.
3. a permanent impairment to one's reputation; stigma.<sup>78</sup>

The three definitions suggest a possible metaphoric pathway, from stain that is caused by a foreign matter, to one that is a natural blemish, to one that is a moral blemish. Stain in a cognitive sense communicates several very basic metaphors that cognitive science treats as more or less cross-cultural and trans-historical. As Winter notes, these metaphors are generally associated with the body and the experience of being embodied and are progressively transposed on more abstract entities.<sup>79</sup> The most basic metaphor in the stain metaphor is light/dark as a metaphor of good and bad. Cognitive scientists have traced this pattern in a wide variety

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<sup>77</sup> *Id.* at 727.

<sup>78</sup> THE RANDOM HOUSE COLLEGE DICTIONARY 1282 (Jess Stein ed., 1975) (emphasis added) [hereinafter *DICTIONARY*].

<sup>79</sup> WINTER, *supra* note 3, at 22-32.

of cultures and across racial lines.<sup>80</sup> Stain builds on the light/dark metaphor and adds the sense of pollution associated with many stains. In other words, stains are usually treated as minor tragedies not simply because the discoloration is aesthetically unattractive, but because the source of the stain itself, food or drink consumed in the past, or bodily fluids, are invested with a culturally negative meaning that is also, one suspects, found in many societies.

Crime as a source of "stain" is an easy metaphoric leap as suggested by the third dictionary definition. That crimes were supposed to "stain" the offender literally is an image that authors have drawn on repeatedly. One of the best known examples being Shakespeare's *Tragedy of MacBeth* in which Shakespeare uses it twice for both his criminal protagonists.<sup>81</sup> When MacBeth emerges from murdering Duncan, Lady MacBeth points to the blood staining his hands and commands him: "Go get some water, and wash this filthy witness from your hand."<sup>82</sup> Two acts later in one of the play's most haunting scenes Shakespeare modifies the metaphor from a stain of visibility to one of smell. Lady MacBeth is shown in a sleep walking state trying unsuccessfully to wash the smell of blood from her own hands: "Here's the smell of the blood still. All the perfumes of Arabia will not sweeten this little hand. O, O, O!"<sup>83</sup>

Shadow of fear has much the same structure. Fear does not literally cast a shadow any more than crimes leave stains.<sup>84</sup> The metaphor is another variant of the light/dark system in which positive attributes are light and negative ones are dark. Fear darkens what, one's sentiments, one's prospects, one's countenance? These darkenings are also not good, but they do not necessarily communicate permanent alteration of appearance or reputation in the same way that stains tend to.<sup>85</sup>

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<sup>80</sup> Indeed race itself may be an extension of this metaphor of darkening or staining as making something morally less worthy.

<sup>81</sup> WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH*, in *THE RIVERSIDE SHAKESPEARE* (G. Blakemore Evans ed., 1974).

<sup>82</sup> *Id.* at 1368.

<sup>83</sup> *Id.* at 1382.

<sup>84</sup> To be sure, the development of DNA technology changes that dramatically. Now the metaphor of crime leaving a stain is becoming an organic reality for an astounding variety of crimes that leave even flakes of skin or bits of saliva behind (like mail fraud).

<sup>85</sup> Infamously, *Time Magazine* admitted to darkening a picture of O.J.



By combining two metaphors with great similarities at the most general level, the Johnson statement produces a hybrid governmental metaphor that is historically and culturally specific.

These images, however, are further situated by the phrase "streets of our communities."<sup>86</sup> It is the street that is stained by crime and shadowed by fear and the street is held out as a privileged subset of community. Street is immediately linked to community, setting up a form of metonymy in which the whole community is represented by the image of the street. On one level this means those communities defined by their streets—i.e., the great dense urban centers—especially their employed middle classes, are being "stained" by crime. They are losing not only their population base and economies but their moral standing in the polity. At the same time respectable citizens, the victims shadowed by street crime, have every incentive to exit those unsafe streets, a move subsidized by liberal federal governments to a tune far more generous than the Great Society spending on the poor.

Crime and fear, stain and shadow, seem to pick out different audiences; those who are morally stigmatized by crime and those who are made afraid by it. Johnson, a New Dealer at heart, was speaking to two important pieces of his quickly fragmenting Great Society coalition. The first piece was that composed of minorities and especially the urban black communities of the North whose annual summer riots, more than any single factor in the mid to late 1960s, seemed to doom his programs with their own stain of failure and worse. Yet Johnson had invested a great deal in urban black communities. By throwing his support fully behind the Civil Rights Act of 1964, he had cut his party's ties to many of its traditional white southern supporters. The "maximum feasible participation" element of his Great Society poverty programs was aimed directly at the community action orientation of the civil rights movement and also represented an effort to create

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Simpson for the cover of a 1994 issue detailing accusations of murder against him. See Deirdre Carmody, *Time Responds to Criticism Over Simpson Cover*, N.Y. TIMES, June 25, 1994, at A4.

<sup>86</sup> Johnson Statement, *supra* note 26, at 727.

direct federal support for movement organizations cut out from the establishment partisan spoils system.<sup>87</sup>

Johnson's historic gamble depended on the moral capital of the civil rights movement to hold the support of northern white voters. As long as blacks were perceived as a victim class, Johnson could demand significant federal remedial effort as an effort to correct historic injustice. But crime, both armed street robberies that surged during the 1960s and rioting, was reversing that moral polarity. That is why the riots were so damning; they took the image of violence and theft in the streets largely rooted in the habits of young men and defined whole neighborhoods as violent and crime prone. As soon as blacks were seen as morally stained by crime, Johnson had every reason to fear his policies would come to seem ineffectual and possibly responsible for the problem. Johnson's message to black voters and to the liberal wing of his party was that only serious efforts to actually reduce crime could remove the moral stain that was clouding the issues of the civil rights movement.

The second piece of the coalition Johnson seemed to be addressing were the urban middle classes who in the late 1960s were abandoning traditionally prestigious city neighborhoods for new suburbs in large numbers. At the time, a lot of attention was focused on the role of school desegregation in encouraging this white flight, but few doubt that fear of crime was a major factor and one that influenced attitudes<sup>88</sup> toward schools and integrated neighborhoods generally. This population was demographically weighted toward the immigrant families of the great European immigration waves from the middle of the nineteenth century through the adoption of exclusionary legislation in the mid-1920s: Italians, Irish, Jews, Germans.<sup>89</sup> Many of them were members of the new middle class whose dependencies on higher education incentives and high wage jobs rather than private capital made them traditionally loyal voters for the Democratic Party.

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<sup>87</sup> DALLEK, *supra* note 32, at 80.

<sup>88</sup> DIONNE, *supra* note 50, at 94.

<sup>89</sup> *Id.* at 214.

Fear of crime was beginning to build a major wedge between these voters and the liberal wing of the Democratic Party whose commitment to civil rights came to seem to many in this population as indifference to their fear of black criminality. Lifting the shadow of fear meant policies aimed at inducing this population to remain within the cities, if they had not moved yet, or to at least remain politically supportive of the urban agenda if they had already removed themselves to the suburbs.

## 2. Law Enforcement

A second strand of the war on crime metaphor that runs through Johnson's statement is that of law enforcement as the embodiment of the way government serves the people. Just as streets become a metonymy for society, police become a metonymy for the state as a whole. Throughout the text, Johnson uses law enforcement to mean, at a minimum, the entire criminal justice process. In a complex movement, Johnson simultaneously offers law enforcement as the solution to the community beset by crime and fear of crime (stain and shadow) and as a special victim class of its own that needs special federal attention. The end result is to mark both citizens fearful of crime and state and local law enforcement as requiring a privileged status as federal subjects.

While later presidents would conflate themselves with local law enforcement (and Congress has followed suit by federalizing much local crime), Johnson saw the federal government largely as a facilitator for the improvement and reform of law enforcement. True to his New Deal heritage, Johnson emphasized the expert knowledge behind his program. The job of the executive was to bring together on a national basis the kind of expertise that was unavailable at the local and state levels.

My program was based on the most exhaustive study of crime ever undertaken in America—the work of the President's national crime commission. That commission—composed of the Nation's leading criminologists, police chiefs, educators, and urban experts—

spotlighted the weaknesses in our present system of law enforcement.<sup>90</sup>

In touting the part of the Safe Streets Act that he liked the most, the Great Society-like action grant program was designed to motivate the innovation and reform Johnson promised would “strengthen the sinews of local law enforcement—from police to prisons to parole.”<sup>91</sup> Here the statement deploys one of the oldest of governmental metaphors, one so old that it is inscribed as a dictionary meaning of sinew. Literally, sinew is the Greek term for tendon, the connective tissue that lies between bands of muscle and key bone structure.<sup>92</sup> Metaphorically, sinew has long stood for the “source of strength, power, or vigor.”<sup>93</sup>

The metaphor offers a subtle response to the by then loud criticism from the right that crime in the streets was a response to the liberal administration’s failed policy of rewarding morally and socially bad behavior in the name of fighting poverty. By locating the problem of crime in the weakness of state and local law enforcement, Johnson denied both that there was an essential weakness in American society and that the federal government was the source of it. On the contrary, the federal government alone could lead the kind of reconstruction of local power that would be necessary to make American streets safe in the last part of the twentieth century. The ambition was nothing less than reconstructing the power of law enforcement at a molecular level. The federal role was to collect a national base of expertise through the new National Institute of Law Enforcement and Criminal Justice (later the National Institute of Justice) which the President referred to as “a modern research and development venture which would put science and the laboratory to work in the detection of criminals and the prevention of crime.”<sup>94</sup> Federal money would also flow to pay off college loans and attract a new college educated work force into law enforcement, as well as open up

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<sup>90</sup> Johnson Statement, *supra* note 26, at 725.

<sup>91</sup> *Id.*

<sup>92</sup> *DICTIONARY*, *supra* note 78, at 1226.

<sup>93</sup> *Id.* The entry goes on to give as an example a political metaphor “the sinews of the nation.”

<sup>94</sup> Johnson Statement, *supra* note 26, 726.

new training and salary enhancements. In short, the war on crime for Johnson looked a lot like a war on poverty with police in the role of community development agencies.

One of the most consequential features of the Safe Streets Act, revealed in the statement, is the intertwining of police and citizens as victims. Police are held out as the party that can most effectively prevent victimization. "But at a time when crime is on the tip of every American's tongue, we must remember that our protection rests essentially with local and State police officers."<sup>95</sup> At the same time, law enforcement would become the privileged subject of governance itself, parallel to the citizen in the local community in relation to the nation and its executive.

### 3. Governing the Streets

In the concluding paragraph of the statement, President Johnson brought the whole constellation into view, the war on crime, its territorialization into streets, the centrality of law enforcement. He did this in a paragraph that addressed itself to other governing officials.

Today, I ask every Governor, every mayor, and every county and city commissioner and councilman to examine the adequacy of their State and local law enforcement systems and to move promptly to support the policemen, the law enforcement officers, and the men who wage the war on crime day after day in all the streets and roads and alleys in America.<sup>96</sup>

The Safe Streets Act, as read by President Johnson, was a call to reform governance, "State and local law enforcement systems," a mandate from the federal government to state and local leaders. The "war on crime" was situated between parallel structures of repeated invocations of law enforcement and streets. First comes the human element of law enforcement, "policemen," "law enforcement officers," "men who wage the war on crime day after day." Second comes the naming of

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<sup>95</sup> *Id.* at 727.

<sup>96</sup> *Id.* at 728.

"America" in an almost Whitmanesque elegy to its "streets and roads and alleys."

### III. IMAGINING AN ALTERNATIVE: GOVERNING THROUGH CANCER

Winter<sup>97</sup> and Lakoff<sup>98</sup> are in agreement that there is generally no law and reason without metaphor. Both treat this as a feature of reason itself. Michel Foucault's concept of governmentality, a condensation of "governmental" and "rationalities" sheds a similar light on the relationship between governance and reason. Foucault suggests that the task of acting on the actions of others (government) is bound up with ways of reasoning about governing.<sup>99</sup> If governing through crime and its metaphors is undesirable, it is not because they fail the test of a fully transparent and democratic will formation that is supplanted or distorted by crime and the moral panic it gives rise to. From a governmentality perspective, evaluation is difficult to separate from the rationality of government itself that tends to define what is knowable and more importantly to produce truth selectively only in ways that are a byproduct of its own strategies of intervention.

Both cognitive science and governmentality research suggest that governing through crime and its metaphors can only be contested with other metaphors and other ways of rationalizing governance. American political culture has produced a great many metaphors to govern by including the yeoman farmer, the freed slave, and the exploited industrial worker. The dominance of the crime victim today as a subject of governance has not completely eclipsed any of these; they remain deposits of power that can help change the trajectory of governance.

I believe one of the most productive subjects of governance is the problem of preventing cancer. Like crime,

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<sup>97</sup> WINTER, *supra* note 3, at 64.

<sup>98</sup> LAKOFF, *supra* note 8, at 7.

<sup>99</sup> Foucault, *supra* note 69, at 201.

cancer has always been a hot issue for Americans.<sup>100</sup> Beginning at the end of the nineteenth century, a national discourse about cancer emerged, as well as the nodes of a national network of power and knowledge.<sup>101</sup> After World War II, for a variety of reasons, fear of cancer moved to the front of that national legislative agenda. In this new phase, cancer was primarily problematized as a preventable disease rooted in unhealthy industrial practices of production and consumption. Popularized by authors like Rachel Carson, this fear of a cancer backlash from America's industrial affluence after World War II gave rise to the modern environmental movement.<sup>102</sup>

Seeking to capture this growing energy, Richard Nixon declared a "war on cancer" in 1971.<sup>103</sup> Nixon was keenly aware of the potential for the environmental movement to spawn a new governmental rationality quite different from the traditional focus on work place conflict between capital and labor, one focused on the externalities of industrial production in both the workshop and home. His war on cancer, however, proved a pale effort compared to the far more politically successful war on drugs.

If only for what it can teach us about our current conjuncture, I propose that we re-launch the war on cancer as an alternative metaphor to the war on crime, this time without the restraints that guaranteed the war on cancer would remain a small scale spending war compared to the governance shaping war on drugs and crime that has continued through three decades. Like violent crime, cancer invokes a deep fear associated with that which cannot be prevented or treated once it strikes. Moreover, like crime it arrests Americans across all divides striking a common chord of dread and despair. In that sense it offers something capable of mobilizing action across society.

There is much, however, in the history of governmental efforts to fight cancer that suggest it might not be an improvement on crime. As Susan Sontag shows in her path

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<sup>100</sup> See generally JAMES T. PATTERSON, *THE DREAD DISEASE: CANCER AND MODERN AMERICAN CULTURE* (1987).

<sup>101</sup> *Id.* at 167.

<sup>102</sup> See generally RACHEL CARSON, *SILENT SPRING* (1962).

<sup>103</sup> PATTERSON, *supra* note 100, at 35.

breaking study of illness as a political metaphor, cancer has often been associated with stigmatizing the victim.<sup>104</sup> Moreover, contemporary cancer treatment resembles the war on crime all too much with remedies that are visibly harmful to the patients and commonly fail to arrest the malignancy. Renewing the war on cancer means moving back behind Nixon's truncated war on cancer to the broader regulatory politics inspired by fears of carcinogens in the food supply during the 1950s. The new war on cancer should return to the focus on environmental causes of cancer (both behavioral and industrial) that animated the legislation of the 1950s and 1960s. While the war on crime has focused almost exclusively on punishing individual wrongdoers, this new war on cancer would focus on the myriad practices that alter the risks of cancer in humans and the potential to alter common practice to reduce that risk. As a problem, preventing cancer offers a mandate for the workplace, for the family, for consumption, and for the state.

As a metaphor, a war against the causes of cancer would carry entailments quite different than a war on crime. The war on crime from as early as the 1968 Safe Streets Act was visibly a war on criminals—those easily mistaken by the police for criminals. This population was predominantly poor, minority, and concentrated in poverty zones in the central cities. The targets likely to emerge from a war on the causes of cancer, like producers of significant carcinogens, are powerful corporations with significant political and cultural resources to compete in the production of knowledge and methods of intervention. The war on crime and drugs has made the police and the prison system the dominant model of winning. A war on the causes of cancer would have to enter into the household, into patterns of consumption, into lifestyle. The war on crime has made violence the chief technology of power. A war on cancer would quickly become a war of information in which the production of knowledge about the causes and cures of cancer would replace a top down law enforcement government with a bottom up effort to spread and interpret the flow of cancer information.

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<sup>104</sup> See generally SUSAN SONTAG, *ILLNESS AS METAPHOR* (1977).



In short, it would quickly break out of the war metaphor altogether and provide us with a model of governance itself. Cancer, quite unlike crime, is defined as the failure of regulation itself. If cancer replaced crime as a chief metaphor for reshaping government, the deployment of these same entailments on social problems could be expected to generate unpredictable but quite different effects than crime. Schools, for example, currently obsessed with mapping crime, drugs, and break downs in discipline, might turn to teaching the science of cancer biology, the environmental sources of cancer, and the capacity of students to avoid major cancer risks like smoking.

## CONCLUSION

In retrospect the signing of the Safe Streets Act marked the end of the Great Society era and the liberal pro-Civil Rights dominance of federal policy. It would rapidly produce its own theorists, political scientists Richard Scammons and Ben J. Wattenberg, who published *The Real Majority*<sup>105</sup> in 1970, only two years after the Act and the Republican take-over of the White House. The book used crime as the central example of how the Democratic Party was in real danger of losing its two generation long majority status by ignoring a profound shift of its traditional supporters on a host of "social" issues (including the race problem, abortion, family values, etc.). Democrats, in their view, had to move fast to stop talking about the root causes of crime and instead support tougher law enforcement measures to repress existing criminals, even if that trampled on Civil Rights concerns.

With remarkable speed, Democrats in Congress followed suit. Richard Nixon introduced numerous crime proposals during his first year in office but had no control over the legislative agenda since the Democrats held both houses of Congress by large majorities and were not anxious to allow Nixon to brand the crime issue effectively as his own. As the 1970 election approached, however, the Democrats rapidly took up and enacted with little debate virtually everything on the

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<sup>105</sup> RICHARD SCAMMONS & BENJAMIN J. WATTENBERG, *THE REAL MAJORITY* (1970).

administration's list including "no-knock entry" and "preventive detention" proposals for the District of Columbia, measures that would have been considered far too extreme for the Safe Streets Act.<sup>106</sup> On the campaign trail, liberal Democrats sought to explicitly define their moral commitment to rejecting crime. Edward Kennedy, running for re-election in 1970, told an audience at Boston University:

Those who seek change by the threat of use of force must be identified and isolated and subjected to the sanctions of the criminal law. They are the hijackers of the university . . . and like hijackers, they must be deterred and repudiated . . . . Any person who lends them aid and comfort, any person who grants them sympathy and support, must share the burden of guilt.<sup>107</sup>

History would show that this rapid turn would not restore liberals to their influence. Some would argue that they never moved far or fast enough to the right. Once the game of who could be tougher came to dominate, there was little chance of outrunning the issue since each election cycle brought a new crime bill with a new array of opportunities for one's commitment to punishment to be tested.

Governing through crime has pushed America in two directions that have had enormous consequences for the long term governability of the society, both suggested metaphorically in Johnson's signing statement of the Safe Streets Act. The first is the rise of the "street" as the nexus for a war on crime style of governance. Second is the extraordinary emphasis this has placed on policing in managing virtually all large organizations, public or private.

The Safe Streets Act made streets a metonymy for society in general and public areas of large cities particularly. In a metonymy, a part represents the whole, as when a scepter represents the royal sovereign. As a governmental metaphor (or metonymy), safe streets has had two different kinds of effects. First, it has reinforced a portrait of streets in general, and city streets in particular, as dangerous. Just as the phrase "working mother" implies that the prototype mother does not

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<sup>106</sup> John Herbers, *Democrats Shift to Right, in Line with G.O.P. on Crime Issues*, N.Y. TIMES, Oct. 12, 1970, at A26.

<sup>107</sup> *Id.*

work, the "safe streets" project put the federal government's imprimatur on the dangerousness of city streets. Although already determined, the years (even months) after June 1968 would see a rapid dissolution of the central sectors of great cities like Detroit, Cleveland, Los Angeles, St. Louis, and Newark.

Second, in making streets the site for the war on crime, the Safe Streets Act mobilized a major effort to reshape American streets to make it easier to fight crime them. In this sense the governmental metaphor of safe streets has contributed to the (in my view ultimately undesirable) transformation in the construction and governance of the urban environment. In a very real sense we live in the "safe streets" imagined by the war on crime declared in 1968.<sup>108</sup>

Johnson's contrasting images of homes and neighborhoods and streets has been reproduced in the contemporary suburban landscape. A new kind of street landscape has emerged in America since 1968 characterized by super wide roadways designed for the rapid movement of automobiles through an area and the easy passage and manipulation of emergency vehicles.<sup>109</sup> These new landscapes are replacing traditional neighborhoods in older cities and intersecting the new "edge city" suburbs. In the suburbs one finds segmented or even gated clusters of homes linked to roadways designed for rapid transportation and the movement of emergency vehicles rather than commerce in the old sense that had dominated. The same kind of "safe streets" have appeared in the inner cities as well, often in place of streets damaged by the riots of the late 1960s.

But turning our cities and suburbs into "safe streets" has had a significant effect on American middle class life. Some contemporary urban designers have come to see these streets as one of the sources of "social decline." Andreas Duany, Elizabeth Plater-Zyberk, and Jeff Beck, in a section of their planning manifesto against "sprawl" titled "Safe Streets versus Dangerous Streets," offer an unambiguous judgment against this new terrain:

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<sup>108</sup> There were earlier precedents to be sure.

<sup>109</sup> See generally ANDREAS DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

The problem with current street design standards is not that engineers have forgotten how to make streets feel safe but that they don't even try. Streets that once served vehicles and people equitably are now designed for the sole purpose of moving vehicles through them as quickly as possible. They have become, in effect, traffic sewers. No surprise, then, that they fail to sustain pedestrian life.<sup>110</sup>

An urban environment shaped around safe streets may facilitate governing through crime but it creates profound governance problems for families (how to drive and risk manage the kids through an environment they cannot negotiate until teen years at the earliest) and employers (whose employees face formidable challenges in balancing work and family at great distances).

As the last lines of President Johnson's statement suggest, the link between the war on crime and the streets, roads, and alleys of America are the police and law enforcement agents who fight there on a day-by-day basis. The major thrust of federal investments through the Safe Streets Act was directed toward improving police and specifically to equip them to take back control of the streets from rioters and criminals. Much of that money went into technology aimed at the street, including armored personnel carriers and other paramilitary equipment.

The city re-imagined as its streets must be governed more than ever by police. In communities of the affluent a great deal of this policing is done by private services and by exclusionary designs, like gated communities, aimed at making it easier to identify strangers. In communities of the poor this has meant public police and a vast penal system to remove from the streets those captured by the police.

In the end, the Safe Streets Act did not lift the "stain of crime" or the "shadow of fear" from American cities or their streets. Instead, whole communities remained isolated from the economic growth of the past three decades in large part because of the stigma of being high crime areas. The vast federal justice effort has encouraged this at every turn, for example, by promoting drug courier profiles that define most major cities in America as drug source or drug destination

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<sup>110</sup> *Id.* at 64.

cities. The shadow of fear has been generalized so that even suburban landscapes seem threatening enough that millions of Americans now feel safe only behind the wheels of SUVs.

There are signs of new politics that make governing through crime its focus. Across American campuses and in many minority communities, a movement against incarceration is building momentum.<sup>111</sup> The securitization of the school, workplace, and residential community is also generating a backlash as American individualism becomes affronted by a gated community world. Understanding how crime metaphors have worked to shape governance can help this growing resistance in two respects. First, by making visible the way the metaphoric system frames action possibilities, it becomes possible to challenge the entailments of the crime metaphors in terms of their origins. Second, by suggesting the necessity to promote new metaphors of governance that can compete with crime in its symbolic potency and global reach.

Fighting the causes of cancer is an example of an alternative metaphor for governance that can compete with and help undermine governing through crime. First, simply by thinking about the causes of cancer as an alternative focus of governance, the productivity of a metaphor like crime becomes more visible. Like the causes of crime, the causes of cancer provide a grid of concerns that are flexible enough to map onto almost any topic of governance, including education, health, the environment, or the family. Like crime, cancer provides the stimulus of an always present but rarely visible threat that demands governmental concern. Like crime, cancer is also capable of stigmatizing its victims and thus a war on cancer could become a war on cancer victims. But a serious war on the causes of cancer would inevitably move beyond the current obsession with controlling dangerous individuals and toward a confrontation with dangerous practices, habits, and technologies.

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<sup>111</sup> See Bell Chevigny, *Prison Activists Come of Age: In California Resistance to Prison Expansion Builds on the Past*, 271 THE NATION, July 24, 2000, at 1.