

COMMENTARY

GUNS, CRIME, AND GOVERNANCE

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I. GUNS AND CRIME

Robert Weisberg reminds us that while guns have been associated with many different agendas throughout American history, including republicanism, pioneering, slavery, and hunting, the current debate about guns in the United States arises at a time when both the popularity of guns and fear of them is associated with violent crime.¹ In his Frankel Lecture, Weisberg exposes the gaps that open within the discourses of both the pro-gun control and the pro-gun rights camps when they confront the singularity of the lethal violence issue to American gun politics. In this Commentary, I want to follow Weisberg's lead to see what purchase can be gained by viewing guns and gun control as part of a more general response to fear of lethal violence in America. While Weisberg focuses on the justificatory arguments of both pro-gun rights and pro-gun control forces, I want to explore the way lethal violence defines, for each side, the central problem of governance.²

Both those who now associate responsible behavior with gun ownership, and those who associate guns with irresponsibility, come to these positions through fear of crime and fear of violent victimization in particular. Indeed, both sides of the gun debate share a remarkably similar perception that lethal violence poses a significant and ongoing threat to their personal security, and their ability to protect their homes and families.³ Both gun control and gun rights proponents offer variations on a theme of governing through crime.⁴ For both viewpoints, the central question for governance is how to influence the occurrence and distribution of lethal violence—not simply in the management of the state, but also in the governance of personal security and everyday life.

For those committed to the broadest protection of gun possession, violent strangers form a constant, if variable, threat in the environment. This does not require one to be visibly

1. Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1 (2002). Weisberg draws on empirical research into the American peculiarity of lethal violence by Franklin E. Zimring and Gordon Hawkins. *Id.*; see also FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM* (1997).

2. While Weisberg can point to specific statements by each side, I will be relying on a necessarily more speculative analysis.

3. This has been true since the 1960s even though it has become common to treat the September 11, 2001, terrorist attacks as moving America from a state of confidence to one of fear.

4. Jonathan Simon, *Governing Through Crime*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 171 (Lawrence M. Friedman & George Fisher eds., 1997).

anxious or paranoid, only for one to recognize violent crime as a distinct and significant possibility. Consider the author of the law that permits Texas gun owners to take their concealed weapons virtually anywhere they go. Texas Representative Suzanna Hupp was a chiropractor in 1991, when a man drove his car through the front window of a popular cafeteria named Luby's in Killeen, Texas, and opened fire on the diners.⁵ Hupp was eating lunch with her mother and father, who were both killed.⁶ Hupp was already a believer in firearms; she had a gun in her car and would have had it with her in the restaurant were it not for a state law at the time which made it illegal to carry a weapon into a place of public accommodation like a restaurant.⁷ Since becoming a national spokeswoman for the National Rifle Association and a member of the Texas legislature, Hupp has attempted to translate her experience into law.⁸

While Hupp's gun rights perspective is considered extremist by supporters of gun control,⁹ it is an example of law defined through and through by the needs of society, as viewed from the perspective of one who thinks the chances are rather high that he or she will be the victim of a violent crime. In that sense it claims the same standing before government as do proposals for gun control. From this perspective, the world contains three kinds of people—violent criminals (essentially predatory monsters), vulnerable victims, and capable defenders. Violent criminals are defined wholly by violent drives that yield no broader meanings (other than evil). As Ms. Hupp describes them, they are “twisted individuals who are looking for easy victims . . . [and] for places where they can shoot fish in a barrel.”¹⁰ Vulnerable victims and capable defenders are distinguished not by the moral stature of their character, but by their beliefs about governance and their access to the resources of self-defense, especially firearms. Vulnerable victims become capable defenders when they realize that they are on their own when it comes to fighting crime, and that only a firearm can provide a meaningful response to the kind of monstrous violence that is presumed to be plenary and relentless. From Ms. Hupp's perspective, guns are the magic device that transform vulnerable victims into capable defenders.

5. Hector Tobar, *To Texas Lawmaker, Guns Are the Answer*, L.A. TIMES, Mar. 16, 2001, at A21.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (noting that one gun control supporter terms Hupp's viewpoint “insanity”).

10. *Id.*

“So when you give the potential victims the ability to protect themselves, you create an incredible deterrent.”¹¹

Other articulate and compelling victims of violent crime have become public spokespeople for gun control, like Sarah Brady, whose husband, Jim Brady, was severely wounded in 1981 by bullets aimed at President Ronald Reagan.¹² If we attend carefully to the discourse of advocates, whether Suzanna Hupp or Sarah Brady, we identify a common theme of public policy shaped by and through moments of extraordinary violence in American communities.

I want to suggest that this particular “interpretation” of what it is to be in the company of others is neither a universal feature of human societies nor a purely contingent fluctuation of opinion. It belongs to the long epoch that began in the early 1960s and continues today, defined by the apparent rapid rise and persistence of violent street crime, usually with guns. David Garland has written recently of “high crime societies” and their culture.¹³ The perception, justified or not, of aberrational levels of violent crime has colored the culture and politics of late modern societies—especially the United States. Just as importantly, crime has become a privileged rationale and rationality for governing. This is true both of the state and the governing that goes on beyond the state.¹⁴

This Commentary takes up Professor Weisberg’s suggestion that we recontextualize the debate about guns in the United States by bringing violent crime back into the frame. The result of my analysis is to decenter guns themselves into a much different debate about how we want to be governed through crime.

II. GUNS AND GOVERNMENT

Views about guns and gun control are deeply intertwined with views about government and governance. I want to use the latter terms to reflect on somewhat different, if overlapping, enterprises. Government refers to the political rule of state institutions like Congress, administrative agencies, and similar

11. *Id.*

12. Holly Yeager, *Guns in America, Two Close Calls: Sarah Brady’s Husband Was Shot—But Son Spurred Her to Act*, HOUS. CHRON., Oct. 22, 1997, at 21A.

13. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

14. Nico Stehr & Richard V. Ericson, *The Ungovernability of Modern Societies: States, Democracies, Markets, Participation, and Citizens*, in *GOVERNING MODERN SOCIETIES* 11–12 (Richard V. Ericson & Nico Stehr eds., 2000).

organs at state and municipal levels. Governance refers to a broader array of exercising power on the action of others.

The two terms both apply here. Gun politics since the 1960s has related to politics concerning the effectiveness of social policies promoted by the state, especially the U.S. federal government. Those who have opposed gun control and supported stronger rights for gun owners have seen the issue as one of surrendering rights to self-protection to an arrogant government that is mostly incompetent in its exercise of power, especially in response to crime. Worse yet, from this perspective, federal policy has been based on misguided permissiveness toward those populations that generate violent behavior. Gun control supporters generally feel that the government should be engaged in defining threats to public health and safety and intervening in private choices to protect such threats. Mostly they have seen the federal government as the only government really capable of doing an effective job—although they may recognize existing efforts as incompetent.

But gun politics is also about government in a somewhat different sense that was once very commonly used and is only now making a comeback in fields like urban planning and institutional economics—a sense that I use the term “governance” to invoke.¹⁵ In the broad sense used in the sixteenth century according to the late historian Michel Foucault, the term government “designated the way in which the conduct of individuals or of groups might be directed.”¹⁶ In this era, people were less likely to say things like “I don’t trust government” and more likely to say things like “he doesn’t do a good job governing his household.”¹⁷ On Foucault’s account, government

covered not only the legitimately constituted forms of political or economic subjection but also modes of action, more or less considered and calculated, that were destined to act upon the possibilities of action of other people. To

15. See generally MARIO POLESE & RICHARD STREN, *THE SOCIAL SUSTAINABILITY OF CITIES: DIVERSITY AND THE MANAGEMENT OF CHANGE* (2000); OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996).

16. Timothy V. Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 *YALE L.J.* 681, 698 (2001) (commenting on Foucault’s analysis of political rule).

17. Graham Burchell, *Liberal Government and Techniques of the Self*, in *FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT* 19 (Andrew Barry et al. eds., 1996) [hereinafter *FOUCAULT AND POLITICAL REASON*] (observing Foucault’s broad definition of “government” and stating that, in the sixteenth century, “government” referred “to the government of oneself, to the government of souls and lives, to the government of a household, to the government of children, and to the government of the State by a Prince”).

govern, in this sense, is to structure the possible field of action of others.¹⁸

Governance in this sense overlaps with the work of the state but is not coextensive with it. Within this perspective it makes little sense to say things like “less government, more freedom,”¹⁹ because governance is always about freedom. New forms of freedom compel the creation of new forms of governance. For example, the automobile generated geometric expansion in the freedom of people to move, work, and live, but demanded entirely new forms of governing at junctures and levels of life never before considered in need of governing.²⁰ Meanwhile, governance is always about how to act on the possibilities created by the new forms of freedom, including in the last generation freedom from quite broad and entrenched racial, gender, and sexual codes. In what remains I want to see what new purchase we can gain by thinking about guns and gun politics as part of a larger complex anchored around the interaction of crime and governance.

III. GUNS, GATES, AND SUVs: THE HABITUS OF THE HIGH CRIME SOCIETY

When we observe guns from the problem of crime and governance we can recognize important family resemblances which link the modern firearm with other artifacts of contemporary life. I want to talk about three in particular: SUVs, gated communities, and cell phones. Together, and along with many other things, they help form what we can call the “*habitus* of high crime societies.”²¹

18. Michel Foucault, *The Subject and Power*, in 3 *ESSENTIAL WORKS OF FOUCAULT 1954-1984*, at 341 (James D. Faubion ed., 2000).

19. This is an image frequently invoked by the Senior Senator from Texas, Phil Gramm. See, e.g., *Update-Campaign '96: February 14, 1996: Transcript* (quoting Phil Gramm's announcement ending his 1996 presidential election campaign, in which he stated, “As a member of the Senate, I'm going to continue to fight for less government and more freedom”), available at http://www.pbs.org/newshour/bb/election/update_2-14.html (last visited Jan. 3, 2002).

20. Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 *CONN. INS. L.J.* 521, 533-39 (1998) (noting that “the automobile placed tremendous pressures on strategies of governance”).

The mobility and consequent freedom engendered by the automobile introduced into the very midst of social life a new form of social space wholly unmapped by the prevailing forms of disciplinary management and largely ungraspable by the strategies of control developed to administer persons in fixed locations. This can largely be seen in the disciplinary strategies of governance within families, the workplace, the class system, and the criminal law.

Id. at 533.

21. In *The Logic of Practice*, Pierre Bourdieu explains:

A. Gates

Perhaps the most visible example of how governing through crime is embedded in our self-governing is the current popularity of “gated communities.” This real estate concept has quickly moved from the high end of the very wealthy or famous (for example, Malibu Colony in the 1960s) to become a ubiquitous feature in new housing subdivisions marketed to the middle and lower-middle class.²² By the late 1980s, a third of all new residential developments in Southern California were gated communities.²³ The dominant motivation for moving into gated communities is fear of crime and frustration at perceived government failure to deal with it.²⁴

As geographers and others are pointing out, these new developments break in important ways from the approach of the first waves of post-war suburban development.²⁵ Those communities sought to recreate the feel of small-town community life, protected from the corruption and crime of the city. The gated community, in contrast, abandons any real claim to realizing community.²⁶ In rejecting even the suburban municipality as a relevant structure for sharing opportunities and risks, the gated community signals an eventual retreat to the homestead itself.²⁷ Those others that live within the gates

the conditionings associated with a particular class of conditions of existence produce *habitus*, systems of durable, transposable dispositions, structured structures predisposed to functioning as structured structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them.

PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 53 (Richard Nice trans., Stanford Univ. Press 1990). David Garland, in *The Culture of Control: Crime and Social Order in Contemporary Society*, notes that the fear of crime has become “much more a part of the *habitus* of everyday life.” GARLAND, *supra* note 13, at 152–53.

22. EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 4 (1997) (noting that the early gated preserves “built by members of the East Coast and Hollywood aristocracies for privacy, protection, and prestige” remained rarities until the late 1960s and 1970s, during which time the proliferation of gates spread to middle-class suburban subdivisions).

23. *Id.* at 7.

24. David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 765 (1995).

25. See generally ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

26. BLAKELY & SNYDER, *supra* note 22, at 15 (“Gated communities have their antecedents in modern utopias, but they have been 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.”).

27. *Cf. id.* at 134 (noting that gates “do not in and of themselves produce any

may seem a tad closer, but that only represents the unaffordability for most of a completely private fortress.²⁸ Should the gates be breached it is every family for itself.

B. SUVs

The importance of crime fear and the strong desire for self-sufficiency in defense found in the gated community find an even more perfect and affordable realization in the SUV. While the popularity of the SUV has been ascribed to a number of factors including the rising incomes of many Americans²⁹ and the relatively inexpensive gasoline prices of the 1990s,³⁰ these factors facilitated consumers in purchasing what otherwise might have been too impractical—but they do not explain their appeal, which as for most vehicles is primarily cultural. According to market research conducted by the automobile industry itself, fear of crime is a critical factor distinguishing purchasers of SUVs from demographically indistinguishable purchases of minivans.³¹ SUVs are marketed to invoke a wilderness adventure lifestyle that clearly appeals to many contemporary Americans and is itself related to the emergence of neo-liberalism,³² but this adventure imagery is also designed to invoke the challenges of urban/suburban life, including not only overcoming crime threats directly but also the tasks that are themselves derivative of

stronger ties or feelings of interdependence” among those who live in the gated community).

28. *Cf. id.*

29. See Press Release, Economic Policy Institute & Center on Budget and Policy Priorities, State Income Inequality Continued to Grow in the 1990s, Despite Economic Growth and Tight Labor Markets (Jan. 18, 2000) (stating that during “the 1990s, the average real income of high-income families grew by 15 percent”), available at <http://www.cbpp.org/1-18-00sfp.htm>.

30. See *Oil Price History and Analysis*, ENERGY ECONOMICS NEWSLETTER (showing graphically that prices of crude oil in constant dollars were much lower after 1986 than they had been from 1979 through 1985, and stating that despite a 1990 Gulf War-related spike in oil prices, “crude oil prices entered a steady decline until in 1994 inflation adjusted prices attained their lowest level since 1973”), available at <http://www.wtrg.com/prices.htm> (last visited Jan. 5, 2002).

31. Keith Bradsher, *Was Freud a Minivan or S.U.V. Kind of Guy?*, N.Y. TIMES, July 17, 2000, at A1 (describing research by automakers comparing SUV owners with owners of minivans and finding that SUV owners “have strong conscious or subconscious fears of crime”).

32. Nikolas Rose, *Governing “Advanced” Liberal Democracies*, in FOUCAULT AND POLITICAL REASON, *supra* note 17, at 53–54 (explaining that neo-liberalism conceives of individual social actors as being “subjects of responsibility, autonomy and choice”); Jonathan Simon, *Taking Risks: Extreme Sports and the Embrace of Risk in Advanced Liberal Societies*, in EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 177 (Tom Baker & Jonathan Simon eds., 2001).

surplus crime fear in society, like the need to ferry children to all manner of managed after-school care.³³

C. Cell Phones

Another important contemporary object whose growth tracks governing through crime is the cell phone. In fact, cellular telephones have grown explosively in popularity around the world.³⁴ There is a big difference, however, between their popularity in the United States and almost everywhere else. In Europe, the Middle East, and elsewhere, affluent consumers turn to cellular phones to escape state monopolies that control access to wired telephone communication systems, resulting in long waits for expensive and poor service.³⁵ In the United States, however, the wired phone service was always far more efficient than its counterpart in other nations and became arguably more so after deregulation in the 1980s opened up considerable competition for long distance, and now local phone service. In the United States, instead, fear of crime has been the major vector for popularizing cell phones beyond the class of business users (generally salespeople) for whom the very expensive and bulky phones of the early 1980s were already attractive. Once in use, to be sure, cell phones find all kinds of uses³⁶ (and the companies are not shy about suggesting new ones),³⁷ but fear that consumers

33. Paul Roberts, *Bad Sports Or: How We Learned to Stop Worrying and Love the SUV*, HARPER'S, Apr. 2001, at 73 (stating that "SUVs are assiduously marketed as safer than ordinary cars, protecting occupants from the full range of threats: bad weather, rough roads, auto collisions, even the criminal element"). According to Roberts, Ford's publicists produced an advertisement showing a timeline to celebrate the ten-year anniversary of the Explorer marked with terrorist incidents, serial killers, and urban disorders. *Id.*

34. See, e.g., Andy Henion, *Boom in Cell Phones Curtails Pay-Phone Use: Popularity of Phone Cards Also Cuts into Pay-Phone Revenue*, LANSING ST. J., Sept. 2, 2001, at 1E (noting that Ameritech, owner of most of Michigan's pay phones, had to increase prices for pay phones due in part "to the exploding popularity of cell phones").

35. For example, Telebras, Brazil's formerly state-owned telephone monopoly, was known for its inefficiencies and high costs. Heather Bourbeau, *Brazil's Cell Companies Samba to New Heights* (1999), available at <http://www.thestreet.com/int/latin/844856.html> (last visited Jan. 5, 2002).

36. See, e.g., Janet Guyon, *The World Is Your Office: What Will It Be Like When You Can Be at Work or on the Net Wherever You Are, Whenever You Want*, FORTUNE, June 12, 2000 (noting that in Europe, consumers are using cell phones to check the time and trade stocks), available at <http://www.cnn.com/SPECIALS/2000/e.europe/stories/world.office/> (last visited Jan. 5, 2002).

37. See, e.g., Press Release, Cingular Wireless, Cingular Wireless Has 'Got Game': Communities, Interactivity Supercharge Cingular's 'Arcade'; On-Demand Games and Ringtones Add New Convenience, Personalization (announcing that Cingular was offering consumers access to interactive gaming on their cell phones), available at http://www.cingular.com/about/latest_news/01_11_06 (last visited Jan. 6, 2002).

will someday need to summon the police for assistance is a major factor in pushing them to commit to what is often a shockingly expensive supplement to wired phone systems that consumers continue to pay for.³⁸

For Bourdieu, the *habitus* functions as the solution to the social scientist's problem of how cultures can be both determinative and freedom granting.³⁹ When people grow up in specific social spaces with specific gear, they learn an entire way of being human in the world.⁴⁰ What do guns, gates, SUVs, and cell phones teach us about being human in this world?

D. They Highlight the Boundaries Around Person, Family, and Home

Like gated communities and SUVs, guns are—for a substantial portion of Americans—part of the answer to the question: “how can I be a responsible citizen and parent today?”, or to put it in my sixteenth-century terms: “how should we govern families and communities?”⁴¹ This reflects a view of crime as the dominant threat to the family and its members. It is not surprising that the most feared kinds of crime are those that invade the home or home-like spaces, and those that attack our personhood with violence: home invasion robberies, carjackings, or “smash and grab” muggings.

Unlike other kinds of public anticrime strategies, gun ownership—like gates and SUVs—fits almost glove-like around the space of the person and home. It is not something vague, like the community or the city, that is being protected, it is you and your family and your home.⁴² These sentiments about home and

38. Cf. Embark, *Do You Really Need a Cell Phone?* (encouraging students to invest in a cell phone), available at http://www.embark.com/articles/getready/doyouneed_cellphone.asp (last visited Jan. 6, 2002). The article lists five reasons for which a student might need a cell phone. *Id.* Two of the five, safety and emergencies, are related to summoning the police. *Id.*

39. BOURDIEU, *supra* note 21, at 54–57 (explaining that *habitus* allows “the free production of all the thoughts, perceptions and actions” that can exist within the pre-formed “system of dispositions”).

40. *Id.* at 54, 58–61 (stating that human “interaction itself owes its form to the objective structures that have produced the dispositions of the interacting agents, which continue to assign them their relative positions in the interaction and elsewhere”).

41. See, e.g., Al Baker, *Steep Rise in Gun Sales Reflects Post-Attack Fears*, N.Y. TIMES, Dec. 16, 2001, at A1 (noting that the Ithaca Gun Company is selling a “Homeland Security model for ‘our current time of national need,’” and that “[t]he Beretta gun company has its ‘United We Stand,’ a 9-millimeter pistol bearing a laser-etched American flag”).

42. *Id.* (quoting James Alan Fox’s statement in which he characterized the thinking of American gun buyers: “People may say: ‘Let Tom Ridge watch out for our shores. I’ll watch out for my doors.’”).

family and the pressure of lethal violence are not a monopoly of the gun rights movement. The same perceptions characterize the gun control position. Consider President Lyndon Johnson's statement on signing the first modern federal gun control law as part of the Omnibus Crime Control and Safe Streets Act of 1968 as a partial step "toward the protection of our families and homes."⁴³

Precisely because both gun control and gun rights advocates are motivated in large part by images of protecting home and children, their conflict is more explosive than the policy stakes would suggest. Consider the importance of gun choice to families with children. Children must be trained in and closely disciplined with regard to guns. There is no other choice. The person who has guns in his house—because he sees it as part of being a responsible parent—now must commit himself to making his children familiar with and wary of guns from the earliest possible age, in the same way nearly all parents for the last half century or so have intensively disciplined their children around and about automobiles. As a consequence, those children will almost certainly use and carry weapons from an early age.⁴⁴ For parents who choose guns, there are potent cultural narratives available for enriching this discipline and education with moral value for the child. Self discipline, responsibility, and competitive skill development are only some of the many child-rearing virtues that can plausibly be thought to follow from making rituals of gun ownership a centerpiece of family life.

If you are a non-gun owning responsible parent, you must be highly conscious of the danger that your children will encounter guns. Now you have two choices. If you think they are going to be regularly at risk of encountering a gun in their environment, you have to discipline and possibly train your children about guns. The same consequences follow, however, without the sense that this is a morally good link. Responsible parents who differ about guns will soon live in largely hermetically sealed worlds (or at least alternative gated communities).

43. Statement by the President Upon Signing the Omnibus Safe Streets and Crime Control Act of 1968, Document No. 320 (June 19, 1968), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1968-69*, at 726 (U.S. Government Printing Office ed., 1970).

44. See Rachael Schaffer, *Child Access Prevention Laws: Keeping Guns Out of Our Children's Hands*, 27 *FORDHAM URB. L.J.* 1985, 2004-06 (2000) (noting the ability of children to find guns at home and the early age at which children have the physical capability to fire guns).

E. They Lead to a Decline in Public Spaces and Goods

Guns, gates, SUVs, and cell phones reflect a basic mistrust that public goods will be available or safe. As discussed above, the pervasively armed person fears that social responses to crime cannot or will not prevent violent predators from seeking to invade their person, families, or households.⁴⁵ Gated communities advertise their residents' lack of confidence in public authorities.⁴⁶ SUVs and cell phones somewhat more subtly suggest their ability to protect people when the system fails. At the same time, those who invest in these kinds of goods find themselves disinclined to support taxpayer-based spending on community policing aimed at making public streets, public transportation, or even "public" phones more attractive.⁴⁷

F. They Invite Litigation and Coercive Regulation

Because guns, gates, SUVs, and cell phones all produce significant externalities, they invite both personal injury litigation and regulation aimed at disciplining their usage. Guns, SUVs, and cell phones have all become the target of litigation claiming collateral damage to others, either directly through the dangerous features of each instrument, or indirectly by the behavior changes they encourage in users.⁴⁸ Gated communities are blamed for displacing crime elsewhere and increasing it as eyes turn inwards away from surrounding areas.⁴⁹

All of these technologies, precisely because they are so focused on the space of family and home, suggest to many the appearance of selfishness and the presumption that users will

45. Refer to notes 5–11 *supra* and accompanying text (describing the view of gun advocates that guns transform "vulnerable victims" into "capable defenders").

46. See Kennedy, *supra* note 24, at 766 (quoting the national Community Association Institute as reasoning that the popularity of gated communities comes from the "greatly diminished confidence in the capability of the nation's basic institutions to meet public needs").

47. See DUANY ET AL., *supra* note 25, at 96 (noting the battle over gasoline taxes and funding for transportation).

48. Gun manufacturers have been sued under theories of products liability. See, e.g., *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001) (holding that a state statute prevented a lawsuit for design defects of guns). New York has banned talking on cell phones while driving. See Corey Kilgannon, *Highways: So Far, Tickets Are Scarce for Violators of the Cell Phone Ban*, N.Y. TIMES, Dec. 9, 2001, at 14WC-6. Lawsuits blamed the Ford Motor Company for tire separation accidents. See *First Bridgestone/Firestone Tire Suit Goes to Trial: Crash Had Injured Four*, ST. LOUIS POST-DISPATCH, Aug. 14, 2001, at A9.

49. See *Letting the Citizens Decide on Street Closings*, ENG'G NEWS REC., May 1, 1995, at 20 ("[N]eighbors outside the perimeter [of a gated community] often fear they will become crime targets, even though studies have shown that such displacement doesn't usually occur.").

put their convenience and security ahead of others. The result is growing pressure to regulate these technologies coercively through the state. Much of this regulation itself takes the form of criminal laws, including recent laws against cell phone use by drivers and severe penalties associated with gun possession coupled with crime.⁵⁰

IV. GUNS, CRIME, AND DEMOCRATIC GOVERNANCE

In place of a debate about gun control versus rights, I want to substitute a different kind of debate about the effects of governing American society through crime. Making crime control a central principle for designing American institutions is exacting a heavy cost on the flexibility and ultimately the freedom of Americans. The expansion and intensification of guns, gates, SUVs, and cell phones, indeed the “*habitus*” of high crime society, at least in its present form, poses a real challenge to the larger project of democratic governance. The forms of social life promoted by this *habitus* are prone to conflict and to the proliferation of authoritarian forms of governance. Let me take two examples: the way SUVs lead to more accidents, more lethal accidents, and more regulated urban/suburban spaces, and the way guns lead to incarceration.

A. SUVs

The SUV is promoted as a form of security,⁵¹ but that security, to the extent that it is real, is focused only on the occupants of the SUV. To others on the road, even other SUV drivers, SUVs increase the risk of accident for two reasons. First, they tend to make the driver less able to observe movement around him—especially once the proliferation of SUVs negates any height advantage. Second, they tend to encourage more aggressive driving both in their handling and in the way they are promoted.⁵² When SUVs collide with sedans, the results are more likely to be lethal for those in the other vehicle than if two non-

50. Refer to note 48 *supra* (observing the New York ban on cell phone use while driving); see Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 41–42 (2000) (observing increased penalties for offenders who use a firearm in their crime).

51. See Roberts, *supra* note 33, at 73 (“SUVs are assiduously marketed as safer than ordinary cars, protecting occupants from the full range of threats: bad weather, rough roads, auto collisions, even the criminal element.”).

52. *Cf. id.* (suggesting that the SUV has been marketed to consumers so as to create a mindset of “I am a man of action, a woman of purpose. I go places. I have real, important things to do, and, by God, I may have to drive across your lawn to do them.”).

SUVs collide.⁵³ Even if such deaths are not counted for the moment as crimes in our society, one should not discount the social harm and interpersonal aggression they unleash.⁵⁴ But one should not focus only on accidents. SUV proliferation is adding to the reality of gridlock in many American urban roadway systems. The increased size of SUVs (and non-increase in passengers carried) meaningfully adds to the shear mass of vehicles on the roads at commute hours. As any fluids engineer can tell you, increasing the size of the elements in a streaming medium inevitably slows motion if you hold the size of the channels constant. The “solution,” all too evident in our new edge city suburban neighborhoods, are superwide, superautomated roadways that make walking and even driving without a specific objective in mind hazardous.⁵⁵ To make these kinds of traffic systems work, every intersection must be fully controlled by lights and special lanes, and ultimately by heavy policing.

B. Gun Laws

Because guns must be defended in a governance context marked by violent crime, there has been a strong correlation between support for guns and support for high incarceration penal policies. If you have a public security strategy based on a zero-sum game between violent predators and some combination of vulnerable victims and capable defenders, a high incarceration strategy makes a certain amount of sense. It is the logic of a battle zone. The only way to survive is to incapacitate enough of the enemy. Indeed, fear of gun crime and the effort to rationalize both permissive gun ownership laws and high crime rates have led to a specific focus on crime and guns. New criminal laws, like California's and Florida's “10-20-Life” laws,⁵⁶ and prosecutorial strategies like Richmond's highly touted “Operation Exile,”⁵⁷ operate to make the presence of a gun a huge multiplier in prison sentences. Many states, including Florida and Texas, now encourage gun possession with laws making it easy to carry a

53. See *id.* at 74.

54. According to one study, 28,000 deaths in 1996 were linked to aggressive driving. See DUANY ET AL., *supra* note 25, at 62.

55. *Id.* at 78–80 (deriding such streets as “ready for nuclear attack”).

56. See generally FLA. STAT. ANN. § 775.087 (West 2001) (imposing mandatory sentences for firearm possession during a commission of a crime); CAL. PENAL CODE § 667 (West 2002) (enhancing sentencing for repeat offenders).

57. See Ross MacKenzie, *On VMI, Virginia's Democrats, Richmond's Crime, & Gochland's Sewage*, RICH. TIMES DISPATCH, Jan. 11, 1998, at F7 (stating that under Operation Exile, “local law enforcement officials move selected criminal cases from state-to federal-court jurisdiction”).

concealed weapon and then raise the stakes enormously on committing a crime while in possession of a gun.⁵⁸ As a result, even as the overall crime rate has dropped, prison populations have held steady due to the inflation of sentences for ubiquitously armed offenders.⁵⁹

The other side of this strategy is the huge impact of nearly a million people a year coming out of prison into American cities for the foreseeable future. Places like Miami-Dade County, Florida, and Harris County, Texas, are the home addresses for thousands of them.⁶⁰ Few today would bother denying the likely externalities of imprisonment. Since we have generally abandoned the program of normalization and rehabilitation, even prison supporters expect the subjects who leave prison to be people who will have even more difficulty living conflict-free in society.⁶¹ The cost of this in terms of governance will be distributed quite unevenly across the metropolitan landscape. Many of us, including consumers of urban amenities like the University of Miami⁶² and the University of Houston, will increasingly find ourselves forced to invest more heavily in policing and ultimately more and longer imprisonments.

V. CONCLUSION: BAN THE SUV

Gun control advocates share with gun rights advocates a commitment to lethal violence as the defining problem of American governance. They differ as to the policies and technologies they choose to embrace in addressing this problem. Within the walls of that debate, I can understand both positions. Suzanna Hupp's parents might be alive if she had been able to return fire during the Luby's massacre.⁶³ Teenagers in Columbine

58. See TEX. GOV'T CODE ANN. § 411.172 (Vernon 1998 & Supp. 2001) (permitting licensees to carry a concealed firearm); FLA. STAT. ANN. § 493.6115 (West 2001) (same). Refer to note 56 *supra* (noting Florida's statute that increases penalties for crimes committed while in possession of a firearm).

59. See Michael Hedges, *U.S. Crime Rates Going Down, but Prison Population is Rising*, THE PLAIN DEALER, Jan. 19, 1998, at 8A.

60. See *id.* (noting that at the time of the article, Houston's Harris County held over 8000 prisoners, while Miami's Dade County held over 7000).

61. See Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS L.J. 299, 300-01, 305 (2000) (noting that the "dominant paradigm" of sentencing during most of the twentieth century was rehabilitative, but that "[i]n the 1970s and 1980s, the rehabilitative model of sentencing fell into disfavor . . . for a variety of reasons, including rising crime [and] mounting evidence that prisoners were not being rehabilitated").

62. The main campus of the University of Miami is located close to several high crime areas and must battle crime fear in recruiting students. As a result the campus has taken steps to tighten access and increase the presence of security forces.

63. Refer to notes 5-8 *supra* and accompanying text.

High School in Colorado might be alive if tighter gun control enforcement had prevented other teenagers from arming themselves with assault weapons.

I would like to imagine a different kind of politics, one that would protest not simply guns but the whole panoply of social technologies and practices that sacrifice civic virtue in the name of personal security against lethal violence. Repressing violence is a task of first order for governance of all sorts, but we must reverse the perception that violence frees its potential victims of all responsibilities for the well-beings of others or the burdens of collective survival. Moreover, politics must remind people of the securities that emerge from social solidarity.⁶⁴

This new politics might indeed take up direct resistance to practices of personal security against lethal violence that endanger collective security, but guns might not be the primary thrust. With around a quarter billion guns in circulation,⁶⁵ politically realistic gun control laws will have minimal effects on violent crime rates for years to come, and thus on the whole constellation of cultural adjustments to the sense of threat by lethal violence in America.

In the alternative, one might imagine movements against gated communities, cell phones, or supersized SUVs. There is no Second Amendment analog for any of these. Like snowmobiles and cigarettes, they enjoy only that minimal protection of general liberties sheltered (if at all) by the Due Process Clause of the Fourteenth Amendment or the Ninth Amendment.⁶⁶ Moreover, guns have an obvious moral ambiguity to them, a visible dark side that these other practices do not. As a result, gun owners understand that their capacity to act reasonably in controlling gun violence is very much in question, and a possible subject of coercive regulation. Most people you see driving supersized SUVs down the road do not view themselves as endangering other people or subverting their collective security. Thus an effective politics against these practices might never need to accomplish much in legislation at all if it succeeded in creating a cascade of private norm changes.

64. A renewed recognition of this seems to be at least one factor behind the outpouring of support for police officers and fire fighters after the spectacle of hundreds of them dying while rescuing people in the World Trade Center on September 11, 2001.

65. See *Guns in America: What Must Be Done*, NEWSWEEK, Aug. 23, 1999, at 22 (stating that 200 million guns are in circulation in the United States).

66. As the Supreme Court is fond of reminding us, motor vehicles are pervasively regulated spaces in which minimal Fourth Amendment rights apply. See *South Dakota v. Opperman*, 428 U.S. 364, 367-78 (1976) ("Automobiles, unlike homes, are subject to pervasive and continuing governmental regulations and controls . . .").