
REVIEW

The Political Economies of Criminal Justice

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*Governing through Crime: How the War on Crime Transformed
American Democracy and Created a Culture of Fear*

Jonathan Simon. Oxford, 2007. Pp vii, 330.

INTRODUCTION

Etched into the public mindset is a familiar bundle of ideas about criminal law. At its core is the premise that criminal sanctions are exceptional punishments, categorically distinguishable in application from civil penalties and used primarily against people harming society by causing violence or severe injury to identifiable victims.¹ Although this model is astonishingly persistent, nearly every aspect of it is open to question. Casting aside distinctions that pivot on the presence of identifiable victims or harms rather than risks, the American regulatory state is heavily dependent on—if not addicted to—criminal enforcement. As its economy, population, and bureaucratic capacity have grown over two centuries, the United States has achieved the largest

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¹ See, for example, Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J Natl Sec L & Policy 5, 9 (2005) (“The criminal law typically defines as a substantive offense conduct that involves the direct commission of a harm.”); Lawrence M. Friedman, *Crime and Punishment in American History* 3 (Basic 1993) (“In a criminal case, in theory at least, society is the victim, *along with the ‘real’ victim*—the person robbed or assaulted or cheated.”) (emphasis added); John C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done about It*, 101 Yale L J 1875, 1884 (1992) (arguing that an important difference between civil and criminal law is that the former prices public harms while the latter prohibits serious harms to specific victims). Simon argues that fear of crimes involving “sudden and terrible violence” is a “major feature of American life” and that, by 1970, “Americans from all walks of life had come to believe that a personal confrontation with armed violence . . . was a distinct possibility” (p 3). He also claims that “[v]ictims of violent crime have formed the public face of the justifications for the war on crime, even as the war has targeted mainly crimes that are not violent and, indeed, that have no specific victims” (p 76).

prison population in human history, with the highest imprisonment rate in the industrialized world.² In the process, the empire of criminal justice in the United States has become as broad in its reach as it has been exceedingly harsh in its effects.

Every year, well over a million people face arrest for drug possession.³ Hundreds of thousands are prosecuted for drug, weapons, and immigration violations.⁴ Mandatory minimums in these contexts sometimes produce striking results. A midlevel drug dealer in Utah recently received fifty-five years in prison for several hundred dollars of marijuana sales to undercover cops while the defendant was in possession of a gun.⁵ Outside the contexts more prosaically associated with criminal justice, political and contractual relations increasingly fall under the purview of criminal law. Depending on what a prosecutor decides, breach of contract can easily become mail or wire fraud.⁶ Mayors or governors making political deals that offer no direct financial benefit to themselves can become targets of bribery prosecutions.⁷ Prosecutors punish crimes of property or violence while also deploying criminal sanctions against transgressions of environmental, occupational safety, and financial regulations.⁸

These conditions reveal an intimate bond between crime and governance. To a considerable degree, Americans today are governed through corresponding patterns of crime definition and enforcement embedded in the work of their public institutions. As a result, choices about how to

² See James Vicini, *Number of U.S. Prisoners Has Biggest Rise in 6 Years*, Reuters 2 (June 27, 2007) (noting that the US has approximately 2.2 million prisoners, China has 1.5 million, and Russia has 900,000); Ronald Fraser, *World's Incarceration Leader: United States' Prison Rate Exceeds Even Nations Led by Dictators*, Mobile Press-Register D1 (June 10, 2007).

³ See DOJ, Bureau of Justice Statistics, *Drugs and Crime Facts: Drug Law Violations, Enforcement* (2006), online at <http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm#arrests> (visited Apr 16, 2008) (indicating there were over 1.8 million state and local drug arrests in 2005).

⁴ See DOJ, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2003* ("DOJ Sourcebook 2003") 388 table 4.1, 4.33 (DOJ 2003) (reporting 1,538,813 drug arrests, 164,446 weapons arrests, and 24,794 immigration arrests).

⁵ See *United States v Angelos*, 433 F3d 738, 753 (10th Cir 2006) (upholding the sentence and citing "Congress's decision to severely punish criminals who repeatedly possess firearms in connection with drug-trafficking crimes").

⁶ See, for example, *People v Norman*, 650 NE2d 1303, 1304 (NY 1995) (upholding convictions of larceny by false pretenses in a case in which defendants were convicted of "taking the customers' money and then failing to deliver promised goods").

⁷ See, for example, *United States v Lopez-Lukis*, 102 F3d 1164, 1168 (11th Cir 1997) (convicting a county commissioner of selling her vote and control of the county board); *United States v Siegelman*, 467 F Supp 2d 1253, 1255-57, 1261 (MD Ala 2006) (convicting Alabama's governor of offering appointment to the State of Alabama Certificate of Need Review Board in exchange for political support).

⁸ See, for example, DOJ Sourcebook 2003 at 388 table 4.33 (cited in note 4) (showing that arrests for regulatory offenses accounted for 0.6 percent of all federal arrests in 2001).

govern in the American system have evolved into dilemmas about the proper uses, abuses, and future prospects of criminal justice.

In *Governing through Crime*, Jonathan Simon provides an illuminating new study training attention on those dilemmas through an analysis of the enormous breadth and harshness of the modern American criminal justice system. In the process, Simon also endeavors to shed light on how an intensely rooted crime control imperative has shaped the architecture of governance in the United States. His analysis deploys the concept of “governing through crime” to capture two specific features of modern American governance. The first is a pervasive tendency of public officials to use the war on crime as a basis for justifying an expansive degree of state power. The second involves the reflexive use of crime control as a metaphor to structure the institutions governing daily life, including residential communities, schools, workplaces, and families. Simon develops these arguments through a richly detailed narration of parallel historical developments in criminal justice as well as governance writ large, drawing on theoretical perspectives from law, sociology, and political science. The result is perhaps the most convincing elucidation yet of how much governance and criminal justice seem to influence each other in the world’s most powerful nation. These characteristics make Simon’s project well worth attention.

Accordingly, this Review presents three arguments in response to Simon’s conception of “governing through crime.” First, it highlights some of the notable contributions of Simon’s project to the study of law in its social context. The author’s lucidly written chapters describe important historical developments in law and society, such as the growing distrust of an expansive judicial role in governance and the apparent success of political strategies built around violent crime control priorities. In particular, Simon deserves credit for calling attention to the relationship between criminal justice, political developments in electoral and legislative arenas, and governance writ large. Simon also offers an interesting (if mostly implicit) theoretical idea about how framing governance problems in terms of crime control can be contagious, spreading from one domain (such as drug control) to another (such as domestic relations or school desegregation).

Second, I argue that Simon’s historical account serves as a near-perfect catalyst for stimulating reflection about the distinct political dynamics capable of affecting the role of criminal justice in society. Ironically, though, the book itself does not engage in nearly enough such reflection. Simon cogently identifies some of the relevant dynamics, focusing primarily on the process through which the crime-fighting imperative tends to spread across substantive domains once the public becomes fearful of violent crime. But one might readily attribute

changes in the relationship between crime and governance to several other political economies beyond the ones that Simon readily identifies. These involve actual changes in crime rates along with politicians' desires to engage in position taking to address resulting public fears, the macropolitics of race and partisanship, principal-agent problems involving law enforcers' role in expanding the scope of criminal liability, the psychological dynamics affecting individual responses to highly salient risks, and the institutional characteristics making criminal enforcement bureaucracies unique as regulatory entities. These dynamics occasionally suggest avenues for reforming criminal justice policy along less punitive lines. They also help resolve some of the puzzles implicit in Simon's account, such as why "governing through crime" has proven so persistent or what political strategies are likely to dislodge some familiar criminal justice policies. Simon's account comes close but ultimately fails to give these different dynamics their due.

Third, my analysis shows how any serious effort to reflect on these multiple political economies ends up raising some questions about what it means, and whether it is desirable, to "govern through crime." Although there is much to admire in Simon's effort, the single-minded focus on a specific political narrative leaves unresolved a host of empirical questions about the enormous empire of criminal justice. In addition, Simon gives less attention to political dynamics that could make it harder to disrupt some of the developments grouped under the rubric of "governing through crime," which relate to the nation-state's quintessential role (at least in theory) of securing its citizens against internal or external threats to their security.

Even if successfully achieved, eviscerating the nexus between crime and governance poses its own problems. Because retributive moral theory is not Simon's concern here, it seems entirely appropriate to consider Simon's argument on the basis of how the world would look if policymakers successfully tamed their impulses to define policy goals in terms of criminal justice goals. In a world where harms are not inherently defined and victims confront subtle risks they cannot perceive, the simple model defining criminal law as targeting severe harm to identifiable victims turns out to provide little, if any, guidance. In fact, environmental regulators, diplomats concerned with genocidal atrocities, food safety inspectors, and traffic officials may all harbor sensible reasons to enlist the machinery of criminal justice in their efforts to regulate risks. Whether those reasons outweigh the drawbacks in terms of excessive coercion, opportunity cost in the allocation of scarce resources, or heightened public adaptation to excessively simplistic narratives of victimhood and blame turns out to be a more complicated question than Simon seems willing to acknowledge.

In contrast, there is nothing complicated about acknowledging that mass imprisonment is, at best, somewhere between an exceptionally costly social policy and a tragedy of epic proportions. The American rate of imprisonment grew by nearly 25 percent in the ten years following 1995, with nearly one in ten black males aged twenty-five to twenty-nine in prison by 2005.⁹ Simon's indictment is more general, however. It encompasses a style of governance that includes (among other things) social programs focused on crime control, regulatory crimes, and efforts to frame counterterrorism as a criminal justice problem. Like mass imprisonment itself, these features of the legal equilibrium arise from multiple causes. Once these are taken into account, it becomes difficult not to wonder whether simply curtailing the features that Simon labels "governance through crime" will have the desired effect or whether alternatives for reforming criminal justice exist that realistically acknowledge the extent to which citizens expect their national governments to provide for (as well as define) their security. In the end, it is only through an understanding of the multiple political economies shaping citizens' expectations about crime and security that one can fully grasp the choices facing advanced industrial democracies in general, and our own highly coercive and incarceration-prone version of American democracy in particular.

I. CRIME, GOVERNANCE, AND THE GOVERNANCE OF CRIME

Governing through Crime defies easy categorization. As the first few pages reveal, Simon's work is not precisely a history. Nor is it exactly a polemic, a doctrinal analysis, or a social science study, though it has elements of all these genres. Instead, it is an "interpretation" of two phenomena that the book takes to be interconnected. First is the modern American criminal justice system, with its staggering reach and mass incarceration properties (p 8). The second phenomenon is the apparent ubiquity of politicians' reliance on criminal justice as a lens to explain the goals of the nation-state, the mechanisms the nation will use to regulate risk, and the choices facing particular public institutions (for example, courts, executive branch agencies, or legislatures) within it (p 8). Thus, the project encompasses careful—almost anthropological—scrutiny of political rhetoric or social practices, application of more conventional social science literature, occasional forays into the realm of criminal law doctrine, and more speculative

⁹ Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics Bulletin 1 (DOJ Nov 2006), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf> (visited Apr 16, 2008). The corresponding rate of imprisonment for white males aged twenty-five to twenty-nine in the same year was about one in one hundred. Id.

arguments about the relationships between different phenomena. These distinct approaches yield a project that delivers interesting details within a larger theoretical context. For the same reasons, readers must sometimes carefully disentangle what claims are intended as assumptions underlying the rest of the analyses, as speculative observations about possible social forces at work, or as more confident assertions of causal relationships.

To evaluate those claims, we must begin by defining the terms of discussion. When Simon refers to the process of “governing through crime,” he appears to be concerned with two interrelated phenomena—the expansive and harsh nature of the American criminal justice system and the political reliance on criminal justice to explain the goals of the nation, the techniques it will use to regulate risks, or the choices faced by institutions within the state (p 4).¹⁰ The reference to a “culture of fear” seems to describe an element of “governing through crime” involving the existence of substantial fear of crime, with the link between such fears and more generalized insecurity (often expressed by reference or analogy to crime) leading to private police forces, gated communities, and increased criminal regulation of society (p 203). Simon’s notion of “governing through crime” also encompasses the reality of mass imprisonment, which is defined by its staggering “scale, its categorical application, and its increasingly warehouse-like or even waste management-like qualities” (p 141). My references below to a “bleak equilibrium” are meant to capture these macrolevel criminal justice outcomes, including particularly the mass imprisonment of millions of Americans along with striking racial disparities, such that a staggering fraction of black and Latino babies born today are likely to spend time in prison during their lives (p 141).¹¹

A. Overview of Simon’s Argument

In telling a story that links each of the concepts above, Simon begins by observing that combating crime has become an essential (perhaps even quintessential) activity for organized governments (p 5). County agencies, schools, and regulatory inspectors all reflect, Simon argues, a distinct turn towards criminal justice as a symbol of the need

¹⁰ Simon defines “governing through crime” as a model of government where: “First, crime has now become a significant strategic issue. . . . Second, we can expect people to deploy the category of crime to legitimate interventions that have other motivations. . . . Third, the technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions” (p 4). Elsewhere I also use the phrase “obsession with crime control” to describe this cluster of ideas.

¹¹ DOJ, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2002* 500 table 6.27 (DOJ 2002).

for government activity. Controlling crime, more so than promoting health or peace (for example), serves as an organizing metaphor for the work of government. The investiture of crime control with such profound political significance is apparent in the spreading reach of a sprawling criminal justice apparatus, with its bureaucratic tendrils burrowing into family relationships, workplaces, and schools. It is also apparent in the shrill rhetoric about criminal justice emerging at every level of government. Though he identifies this as a particularly acute phenomenon in the United States, the argument hints that similar trends may be underway elsewhere in the world (p 23).

In Simon's view, little can be said to justify the now-entrenched, but fundamentally ersatz, nexus of crime and governance. Nor was the descent into a world of constant "governance through crime"—toward a reflexive deployment of the criminal justice system, of analogies associated with crime fighting, and of justifications for governance through stoking fears of crime—a teleological, inexorable trend. The trend may have built on itself through path dependence or similar dynamics (more on this later), but it gathered speed because of specific choices made by politicians with distinct goals. There is no question, Simon acknowledges, that popular concern about crime proved to be fertile ground for those politicians who recognized and exploited them (p 91).¹² But there is also some empirical evidence that public concerns about crime rose as politicians deliberately chose to focus on the issue (p 22).¹³

If political mobilization fueled concern about crime, then presumably the modern obsession with crime has a discrete beginning. To find it, Simon emphasizes the political craftiness of President Franklin D. Roosevelt when initially mining the crime issue (pp 46–49). Roosevelt's successors found out how a focus on crime could help keep together a naturally fraying, inherently unstable New Deal coalition of Southern (racist) Democrats and urban populations (pp 91–94). We further experienced a turn toward "governing through crime" because the major

¹² Simon suggests that such anxieties were fueled by an "apparent rise in violent street crime" (p 91). Yet available statistics indicate that the rate of FBI index crimes involving violence (including homicide and rape) nearly doubled between 1960 and 1968, rising from 161 per hundred thousand to 298 per hundred thousand. See Ann L. Pastore and Kathleen Maguire, eds, *Sourcebook of Criminal Justice Statistics Online* ("DOJ Online Sourcebook") table 3.106.2005 (DOJ 2005), online at <http://www.albany.edu/sourcebook/pdf/t31062005.pdf> (visited Apr 16, 2008).

¹³ Simon's historical examples suggest the possibility that politicians sometimes drew attention to criminal justice policy before voters were concerned about the issue. The significance of those examples ultimately turns on the interesting question of how to ascribe responsibility between politicians and the public when politicians make strategic choices predicated on the correct intuition that latent characteristics of the mass public are likely to generate rewards from those political choices.

alternative model that had sought to legitimize broad government power—the New Deal-era enthusiasm for expertise—was dealt a crushing blow by a succession of government failures (ranging, in Simon’s account, from the assassination of President John F. Kennedy to the failure of the Vietnam War to economic dislocation) (pp 51–53).¹⁴

And just as President Lyndon B. Johnson sought to use the crime issue to avoid the complete erosion of an increasingly frayed New Deal coalition, so too did President Richard Nixon seek to use the crime issue to wedge apart that coalition (pp 44, 99–100).¹⁵ Today, Nixon is perhaps the president historical observers most associate with the crime issue. While Simon carefully makes the case that Nixon was not really a pioneer in this domain, he also recognizes that Nixon skillfully promoted a public focus on criminal justice. The result was to strengthen the dynamic through which governance became “governing through crime.” For this Nixon reaped political rewards (pp 54, 73).

But perhaps he also paid a price. As governance increasingly became “governing through crime” (one presumes, following Simon’s argument), then subjecting presidential power to reasonable limits increasingly became associated with subjecting the president and his staff to criminal investigation and criminal liability. Though Simon does not dwell much on Watergate, the dynamics associated with this historical episode might serve as an example of how “governing through crime” builds on itself. Nixon built up the importance of the crime issue among the mass public and then used individuals and bureaucratic structures associated with criminal justice (retired law enforcement and intelligence officials, the White House “Domestic Council”) to illegally engage in practices reminiscent of new investigative techniques (for example, bugging) legitimized by the Omnibus Crime Control and Safe Streets Act of 1968.¹⁶ When things went wrong, he was vigorously investigated and prosecuted by an increasingly vast and independent cadre of prosecutors and investigators. When the smoke cleared, the Watergate incident not only catalyzed Nixon’s downfall but also served as a compelling justification for even

¹⁴ Commenting on the possible impact of Kennedy’s assassination, Simon notes that “President Kennedy’s assassination dealt a complex blow to [the] model of the New Deal leader. As a catastrophic failure of an executive branch whose central purpose had become to protect us from other . . . catastrophes, the assassination left the nation doubly deprived of comfort” (p 53).

¹⁵ Compare generally Stuart A. Scheingold, *The Politics of Street Crime: Criminal Process and Cultural Obsession* (Temple 1991) (arguing that national political leaders have “strong incentives to politicize street crime” because “it provides a unifying theme and thus a valence issue”).

¹⁶ Pub L No 90-351, 82 Stat 197. For an account of the Watergate scandal and Nixon’s ensuing downfall, see generally Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (Knopf 1990). Although it fits with the thrust of his argument, Simon does not explicitly note the irony of Nixon’s exploitation of—and ultimate unmaking by—the crime issue.

greater criminal justice resources—along with greater independence (at least for a time, under the Independent Counsel Act)—focused on the potential crimes of public officials.¹⁷

Simon then traces the history of the apparent American obsession with crime control in the years following the Nixon Presidency. The idea that social problems could be resolved by controlling crime gained increasing popularity. And a public focus on criminal justice problems was associated with constant political reminders about the crime problem, and about the role of government in fighting crime. The result engendered systemic effects in society, ratcheting up and then reifying public fears about crime. The process of “governing through crime” spirals further through the use of the “victim” as the iconic subject of government (pp 75–110). Government policies become easier to justify as a means of protecting the concerns of a vulnerable and morally blameless victim—one that can even include law enforcement officials (p 76).

Simon sees serious normative problems with this state of affairs. “Governing through crime” has yielded a criminal justice apparatus with exceedingly high economic costs.¹⁸ Perhaps more importantly (from Simon’s perspective), it has engendered a culture of fear that makes Americans distrustful of each other, increases social tensions, and distracts attention from more worthwhile endeavors—such as a more sustained “war on cancer” (pp 20–21, 40–43, 260–61, 280–81). Finally, (this is mostly implicit, though it becomes a bit more explicit near the very end of the book) “governing through crime” is a model of law and politics poorly suited to imposing reasonable limits on the state’s power (p 279). Even in light of what Simon takes to be the enormous (path-dependent) staying power of “governing through crime,” presumably a better recognition of the connections between that model and potentially excessive government power has the potential to destabilize some of the political coalitions that have long supported a vigorous (especially federal) government role in criminal

¹⁷ See Ethics in Government Act of 1978 § 601 (“Independent Counsel Act”), Pub L No 95-521, 92 Stat 1824, 1867–73, codified at 28 USC §§ 591–99 (2000). When the Supreme Court adjudicated the constitutionality of the Act, its analysis turned more on abstract questions about the structural Constitution than on a deliberate accounting of values and virtues associated with lodging such prosecutorial discretion in an independent official. See *Morrison v Olson*, 487 US 654, 659–60 (1988) (upholding the Independent Counsel Act). For an interesting discussion of separation of powers dilemmas within the context of criminal law, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan L Rev 989, 993 (2006) (arguing that the separation of powers doctrine is relaxed in the criminal context in the name of expediency and calling this the “worst possible approach” to the problem).

¹⁸ James J. Stephan, *State Prison Expenditures, 2001*, Bureau of Justice Statistics Special Report 1 (DOJ 2004) (showing that in just fifteen years, between 1986 and 2001, state correctional expenditures increased nearly 150 percent).

justice. Human freedom, in the end, seems (for Simon) the most potentially significant casualty in a world of “governing through crime.”¹⁹

For the most part, Simon proves to be a lucid guide to those events. In many cases, as when discussing the impact of heightened concern about criminal justice on schools (pp 207–31), the argument persuasively links developments in the politics of crime control to broader social trends. Simon has a keen eye for quintessential “law and society” details that appear to be connected to concern over crime control in the last few decades, such as the attacks on judicial governance (pp 111–40) and the instrumental problems associated with schemes such as the strict gun-related enforcement pursued through Project Exile in judicial districts around the country (pp 141–76). Chapters run the gamut from detailed explanations of the role of criminal law in family relations (pp 177–206) to more wide-ranging depictions of criminal lawmaking over much of the twentieth century (pp 75–110). In the process, Simon delivers an insightful descriptive account of an important domain of law in its social context, even when some of his descriptions raise basic questions (such as how the crime-fighting paradigm spreads across contexts) that are not engaged with the same level of detail as the descriptions that give rise to them. Not all works resolve the questions that they raise, however, so it is eminently possible to read Simon’s book largely as a critical description of government policymaking in general, and criminal justice policy in particular, over the last seven or eight decades.

But Simon intends the project to serve a more ambitious function. His goal is to turn a critical lens onto the trends described, subjecting them to careful analysis, explanation, and normative evaluation (p 6). To evaluate these aspirations, we might begin by distinguishing two versions of Simon’s central claims, both of which can be harmonized with much of the narrative. A weaker version might be understood to make claims along the following lines: (1) Criminal justice policy has spillover effects (in regulation generally, in the distribution of political power, in the perceptions created among the public, and in the responses of organizations and social groups) (pp 4–7, 8–9).²⁰ (2) The connections are particularly strong between criminal justice and the

¹⁹ Simon argues that “values like freedom and equality have been revised in ways that would have been shocking . . . all in the name of repressing seemingly endless waves of violent crime” (p 3), that “crime risks rule our lives” (p 282), and that “[g]overning through crime is making America less democratic” (p 6).

²⁰ Borrowing from Foucault, Simon describes “governing through crime” as a means of structuring a “field of action” to “constitute a kind of rationality of government,” which then serves to “interpret and frame even social action seemingly far away from any real examples of crime” (p 17).

regulatory state. (Criminal and regulatory control are substitutes to some extent, but they are also complements—especially as the acceptance of one mode of social control can act as a “wedge” for the other.) (pp 21–22). (3) The roles of criminal justice, criminal law, public perceptions, and political activity associated with crime are all part of a troubling equilibrium in modern American society—one that is too brutally coercive, costing too much in both humanitarian and financial terms (p 6). (4) The coterie of existing crime control policies does not just affect racial minorities and the poor (though it certainly has the potential to brutally affect these groups); it has pervasive effects across society (pp 18–20).

The stronger version adds bolder claims to these basic contentions. These become particularly important when Simon approaches the end of the project and shifts into a more prescriptive mode: (5) The “crime victim” has become the paradigmatic representation of the ordinary citizen, which has resulted in strong, indeed “overweening,” government intervention in social life (pp 105–06). (6) Nation-states depend on dominant models of “governmental rationality” to justify their interventions in society, and crime control has become the dominant organizing principle of governance in America.²¹ (7) The notion of “security” (as in social/economic security or national security) as a focus for the state is relatively new and dangerous—it legitimizes a tremendous degree of state encroachment in social life. This focus has powerfully (though perhaps not inevitably) catalyzed a world of fearful “governing through crime” (p 260). (8) Fear of crime followed, rather than preceded, political interest in crime control (pp 22–23). As one might anticipate, some of these claims end up being more difficult to sustain. Questions about these contentions, in turn, could render some of Simon’s further descriptive claims and prescriptive conclusions more difficult to accept.

B. “Modeling” Government

Consider a case in point. Embedded into the larger picture Simon paints is the assumption that the business of the nation-state depends on a prevailing “model” or rationale for governance, offering the pub-

²¹ Simon makes this point repeatedly: “[C]rime risks *rule our lives*” (pp 282–83) (emphasis added); “Americans have *built a new civil and political order structured around the problem of violent crime*” (p 3) (emphasis added); “[A]lone among the major social problems haunting America in the 1970s and 1980s, crime offered *the least political or legal resistance* to government action” (p 31) (emphasis added); “For more than three decades, the making of crime laws has offered itself rather explicitly as *the most important subject* for expressing the common interest of the American people” (p 109) (emphasis added).

lic an intelligible rationale for accepting state intervention (pp 29–30).²² The “model of governance” is among several ideas vital to Simon’s story. If one casts aside the notion that lawmakers and executive officials succeed in pulling the levers of national power only when seized of a common framework for justifying government action, then it becomes inevitable to question whether criminal justice and the legal machinery of “governance” are linked in precisely the way Simon implies.

It is true enough that crime control has invaded the argot of education policy, industrial organization, urban design, and risk regulation policy. But why expect only a single, predominant “model of governance,” either in terms of explaining the degree of interest in crime control or of explaining policies bearing no obvious relationship to crime? Instead of a single “model of governance,” one might imagine a considerably more dynamic, if not chaotic, process of political competition over justifications for government action. Politicians could have a range of different agendas reflecting distinct constituencies, different positions within a system of institutional constraints, and different techniques for advancing their agendas.²³ Whether a particular rhetorical justification, principled argument, or legal analogy helps politicians achieve that agenda is likely to depend on the circumstances, as well as the political audiences involved.

Simon’s account does not dwell on such distinctions. Instead his argument posits that interest in criminal justice sufficiently cuts across society to serve as a preeminent basis for justifying government interventions (pp 4, 7). But the extent of the variation in the public’s allocation of scarce cognitive attention suggests otherwise. People who watch *Ricki Lake* or *Jerry Springer*, for instance, report pronounced interest in crime at much higher rates (58.4 percent) than people who

²² Although Simon repeatedly suggests that crime control dominates as an approach to governing (pp 7, 31, 110), he uses somewhat different terms to describe the concept associated with a belief in the existence of a dominant approach to justifying government action (an ambiguity that perhaps suggests some of the unresolved questions the concept raises in the first place). The description of Simon’s argument on the book jacket talks about how the “collapse of the New Deal approach to governing . . . sent political leaders searching for new models of governance.” Simon’s discussion suggests that policymakers need a particular “rationality of government” to justify state action (pp 16–17), and later he claims that “crime,” alone among alternative models of government available in the 1970s and 1980s, offered “the least political or legal resistance to government action” (p 31). Later he uses slightly different language, describing how laws depend on an “underlying legislative logic or rationality, a way of imagining subjects who will be responding to the law and the purposes of intervening among them” (p 78). He then describes a historical progression in which the dominant legislative subject morphs from the landowning farmer (p 79) to the vulnerable consumer (p 86) to the crime victim (p 89).

²³ See, for example, John Kingdon, *Agendas, Alternatives, and Public Policies* 46–53, 57–61, 94–100 (HarperCollins College 2d ed 1995) (describing the convergence of policy shocks, interest group agendas, and media attention that helps generate policy change).

listen to National Public Radio (27 percent).²⁴ Lawmakers represent districts likely to differ sharply in the extent of generalized public concern about crime control. Such heterogeneity of politically relevant audiences raises questions about whether crime-related policy would be driven by a predominant “model of governance.” A more plausible scenario would assign greater weight to quite distinct constituencies and motivations explaining the last century’s prodigious output of new substantive crimes, swelling budgets for federal and state criminal justice functions, crossborder initiatives to regulate illicit activity, and international criminal tribunals deploying legal doctrines in an effort to confront the horror of society-wide historical atrocities.

History itself raises further questions about the notion of a predominant, recently arisen “model of governance” targeting crime control. Long before a crime-focused “model of governance” had arisen, policymakers had begun using the criminal justice system to serve a host of different instrumental goals. An example: Simon cogently describes the historical role of criminal law in creating “a disciplined workforce capable of being profitably employed on the basis of compensation for time worked” (p 233). Although he takes this as an example of how “the instruments and metaphors of criminal law play into the cauldron of conflicts of the workplace” (p 234), one could draw precisely the opposite conclusion, seeing the move to “redefin[e] as criminal some aspects of traditional forms of non-wage compensation for employment” (p 233) as an instance of *workplace conflicts* driving “the instruments . . . of criminal law” (p 234). This interpretation is rendered especially plausible given Simon’s acknowledgement that the rise of the war on crime as a “model of governance” did not fully occur until the 1960s, while the role of criminal law in regulating the workplace goes back to the dawn of modern police departments in the nineteenth century.²⁵ One should not dismiss the possibility of reciprocal influences between policies using criminal justice institutions to achieve economic goals and more generalized concerns about crime. Nonetheless, absent further explanation, it seems at least as plausible to think that conflicts about risk regulation, labor, or prop-

²⁴ James T. Hamilton, *All the News That’s Fit to Sell* 79 (Princeton 2004).

²⁵ It may be tempting to explain Simon’s discussion of labor issues by emphasizing the extent to which, despite the aforementioned language, his overall narrative allows for class or interest group conflict to drive criminal justice policy. It is certainly true that Simon’s approach seems to contemplate politicians attaching their particular causes or concerns to the fast-advancing criminal justice train. “We can expect,” he admits, “people to deploy the category of crime to legitimate interventions that have other motivations” (p 4). On the other hand, when the language above is read in conjunction with the claim that the “war on crime . . . altered the way political authority of all sorts and at all levels has been exercised” (p 260), the implication seems to be that the war on crime as a “model of government” is driving labor policy, and not the other way around.

erty occasionally spill into the domain of criminal law as it does to think that overarching public concerns about crime control are driving developments in all of these domains.

Simon is probably right that policymakers need to legitimize government action. He may be right about the power of “crime fighting” as a social imperative capable of rendering legal changes and policy programs more acceptable to the public.²⁶ Indeed, he may be more correct than he knows about the extent to which a nation-state’s work is influenced by public perceptions of whether its institutions keep the public safe. Still, the “models of governance” idea is in many ways less developed than it first appears, making it difficult to judge both the arguments’ conclusions as well as its applications to other contexts.

C. Revisiting History

In part because of the narrative’s foundational assumptions about the presumed role of a predominant “model of governance,” *Governing through Crime* does not fully acknowledge the extent to which some of the historical account is open to competing interpretations. For instance, some readers will find it hard to accept Simon’s claims about the ineluctable centrality of crime as a policy and political issue, particularly if one considers concrete indicators such as public opinion surveys describing the issues Americans are most concerned about or measures of government spending. True, criminal justice expenditures have skyrocketed since 1982, increasing from about \$35 billion in 1982 to over \$180 billion in 2003.²⁷ But these expenditures are relatively small compared to what the nation spends on national defense. Even after considering the massive increases in criminal justice expenditures in recent years, the total amounts to substantially less than 50 percent of what the country separately spends on national defense, without even considering expenditure categories now grouped under the rubric of homeland security.²⁸

Money may not tell the whole story. Perhaps crime control serves as an easily recognized narrative “frame” through which public officials render complicated policy problems easier for the public to un-

²⁶ See, for example, Scott L. Feld and Bernard Grofman, *Putting a Spin on It: Geometric Insights into How Candidates with Seemingly Losing Positions Can Still Win* 4 (unpublished manuscript, 2005) (emphasizing the existence of a “spin” a losing candidate can use to modify his stances and strengthen his position).

²⁷ See DOJ Online Sourcebook at table 1.2.2003 (cited in note 12), online at <http://www.albany.edu/sourcebook/pdf/t112003.pdf> (visited Apr 16, 2008).

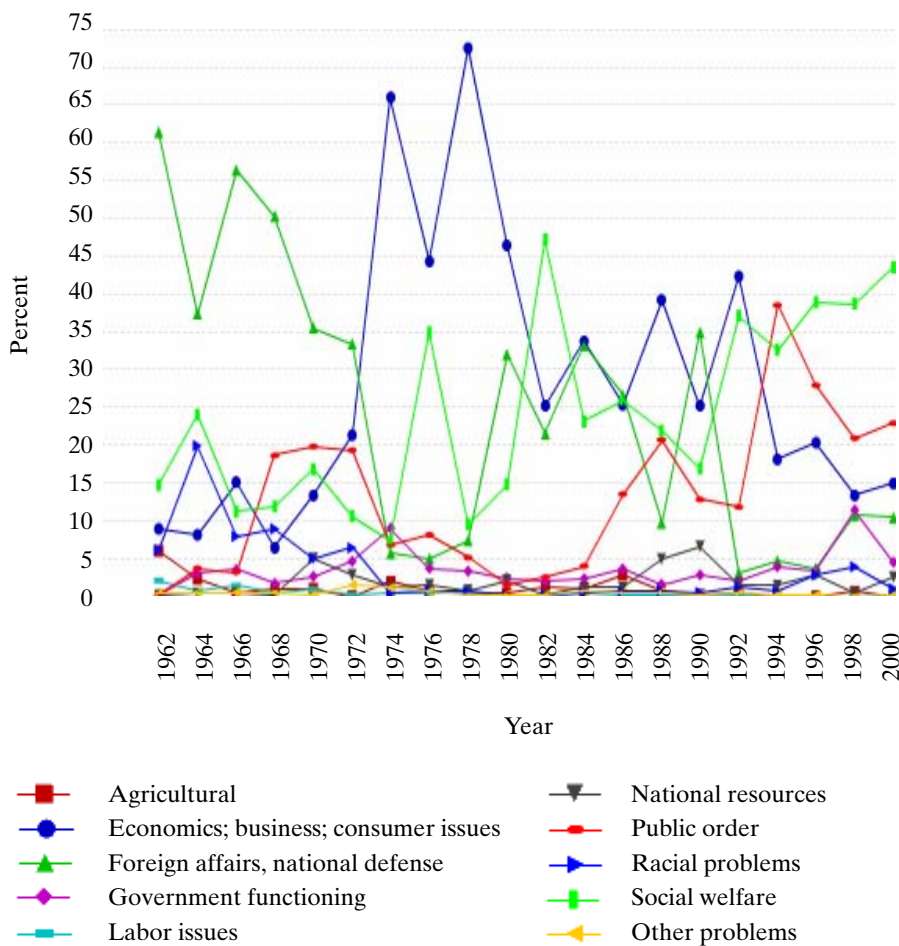
²⁸ See the national defense budget in *Budget of the United States Government: Historical Tables Fiscal Year 2007* table 3.1, online at <http://www.gpoaccess.gov/usbudget/fy07/hist.html> (visited Apr 16, 2008).

derstand. This is persuasive to some extent, particularly given some vivid examples Simon offers of how policies analogous to crime control found their way into areas such as family law (pp 177–206) and schools (pp 207–31). On the other hand, largely missing from the narrative is any attention to other issues capable of spawning competing “models of government” or affecting the evolution of public institutions. At a minimum, Simon’s thesis brings up the question of Americans’ explicit views about the importance of criminal justice over time. As Figure 1 below indicates, between 1960 and 2000, respondents to the American National Election Studies biennial survey considered “public order” to be the most important national issue only once, in 1994.²⁹ Economic issues, foreign affairs and national defense, and health and welfare issues were far more common responses. Moreover, between 1965 and 2006, the proportion of Americans who reported that they fear walking alone at night fluctuated between a high of 48 percent in 1982 and a low of 30 percent in 2001—fluctuations that (absent contrary evidence) seem to belie the notion of a one-way ratchet in fear of crime over the last four decades.³⁰ Voters’ intense concern about issues other than crime seems a bit odd juxtaposed against the stronger form of Simon’s narrative—which seems to emphasize not only the political resonance of crime control appeals but the political primacy of “governing through crime” in relation to the alternatives.

²⁹ American National Election Studies, *American National Election Studies 1948–2004 Cumulative Data File* (2005), online at <http://sda.berkeley.edu/cgi-bin32/hsda?harcsda+nes2004c> (visited Apr 16, 2008). Entering VCF0875 in the “row” box and VCF0004 in the “column” box, then choosing “line chart” in the “type of chart” drop-down box will produce Figure 1 below.

³⁰ See DOJ Online Sourcebook at table 2.37.2006 (cited in note 12), online at <http://www.albany.edu/sourcebook/pdf/t2372006.pdf> (visited Apr 16, 2008).

FIGURE 1
 ISSUE CHOSEN AS “MOST IMPORTANT NATIONAL PROBLEM”
 BY RESPONDENTS TO THE AMERICAN NATIONAL ELECTION
 STUDY SURVEY, 1960–2000³¹



One alternative receiving scant attention is the Cold War. Yet few issues loomed larger in the gamut of twentieth century American politics. Reflecting on his years in office, President Harry S. Truman speculated that “history will remember my term in office as the years when the ‘cold war’ began to overshadow our lives. I have had hardly a day in office that has not been dominated by this all-embracing struggle.”³² These views find support in the larger canvas of twentieth century

³¹ See note 29.

³² Quoted in Melvin P. Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* 495 (Stanford 1992).

American history. Not only has spending on national defense plainly dwarfed almost any other category of the budget for all of recent American history, but the national security state has permeated American life over the course of the twentieth century.³³ The constitutive logic of national security is associated with major episodes in recent American history that seem to fit poorly with Simon's contention about the preeminent centrality of crime-related framing, such as McCarthyism; the construction of the national highway system; the growth of an elaborate American research and development infrastructure on national security grounds; and Roosevelt's efforts to blur the line between social security, health and safety regulation, and national defense.³⁴

Simon's effort to shoehorn national security issues into his "governing through crime" framework proves particularly unconvincing when he discusses counterterrorism in the post-September 11 era. Simon sees the "war on terror" as an outgrowth of the "war on crime." He decries this trend, coupling the denunciation with a discussion of the pitfalls associated with certain enforcement schemes such as racial or national origin profiling (pp 272–76). For the most part, though, the discussion glosses over two realities that seem at least as central to debates about countering terrorism in the United States. First, there is no discussion of "homeland security" as an alternative to the "war on crime" as an organizing principle in counterterrorism, despite the fact that the preeminent bureaucratic authority in this domain is no longer the Justice Department but a Department of Homeland Security that (for better or worse) organizes along lines far broader than a "war on crime."³⁵ Critical infrastructure regulation, emergency response, and

³³ For an illuminating account of the impact of the Cold War on the American nation-state after World War II, see generally *id.* For an ingenious empirical analysis emphasizing the connection between domestic politics and national security, see generally Kevin Narizny, *Both Guns and Butter, or Neither: Class Interests in the Political Economy of Rearmament*, 97 *Am Polit Sci Rev* 203 (2003).

³⁴ See generally Mariano-Florentino Cuéllar, "Securing" the Bureaucracy: *The Federal Security Agency and the Political Design of Legal Mandates, 1939–1953* (Stanford Public Law Working Paper No 943084, 2006); Mary L. Dudziak, *Desegregation as Cold War Imperative*, 41 *Stan L Rev* 61 (1988) (emphasizing the enormous capacity of Cold War national security imperatives to shape American domestic policy, even in contexts as divisive as race relations). In contrast, social welfare and national defense exist in equipoise in Simon's (limited) treatment of these issues. Representing the more traditional guns-or-butter perspective, Simon treats Roosevelt's political success as marking the "emergence of two independent models of executive authority, one emphasizing social welfare and the other global military dominance" (p 71). Yet Roosevelt's own eagerness to link both social welfare and national defense policies to the imperative of providing security shows the potential resonance of the security theme in the public's expectations of their government.

³⁵ See generally Mariano-Florentino Cuéllar, *Running Aground: The Hidden Environmental and Regulatory Implications of Homeland Security*, ACS Issue Brief (May 2007), online at <http://www.acslaw.org/node/4919> (visited Apr 16, 2008) (examining the connections between

intelligence are as important to that agency's work as criminal enforcement. If the billions currently being spent on homeland security—understood to encompass regulation of chemical plants, emergency response, critical infrastructure protection, and hardening targets—are somehow still part of “governing through crime,” Simon needs to do considerably more explaining. But there is almost nothing in Simon's account regarding this latest iteration of the national security trope, just as there is little assessing the historical legacy of national security policymaking in this country.

The nation's policymakers, moreover, often contest the role of criminal enforcement in counterterrorism. Simon's descriptive insistence on the existence of a link between the “war on terror” and the “war on crime,” as well as his prescriptive rejection of that link, seems odd in light of how many policymakers seem eager to sideline criminal enforcement in battling terrorist adversaries.³⁶ A closer analysis of developments in this context might lead one to appreciate an important point that sometimes gets lost in the larger historical scope of Simon's narrative: crime control may seem like a particularly coercive way of organizing government activity in some contexts, but in fact the extent of its harshness is best judged by comparing it to the alternatives. Responsible counterterrorism policy may call for public diplomacy, changes in economic relations, and a host of other reactions. It would be difficult, though, to argue that no role should be assigned to apprehending individuals who seek to engage in terrorist activity.

Nor does *Governing through Crime* say much about the potential benefits of criminal enforcement in this domain. When it comes to such apprehension, criminal enforcement offers marginally greater restraints on arbitrary action. Holding constant political demands for enforcement, the pertinent alternative involves the militarized realm of executive detention and targeted use of force.³⁷ The procedural distinctions are likely to matter even in a world of relatively open-ended criminal jurisdiction, in part because the incentives and organizational cultures of the bureaucracies involved are quite distinct (more on this

national security and domestic policy in the context of the Department of Homeland Security); Dara K. Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 *Stan L Rev* 673 (2006) (discussing the creation of the Department of Homeland Security and exploring the political dimensions of bureaucratic reorganization).

³⁶ Compare Mariano-Florentino Cuéllar, *The Institutional Foundations of Preventive Criminal Enforcement* 26 (Stanford Law School Public Law & Legal Theory Working Paper, 2007) (emphasizing the institutional design advantages of criminal justice approaches to national security problems), with Michael B. Mukasey, *Jose Padilla Makes Bad Law*, *Wall St J A15* (Aug 22, 2007) (arguing that traditional criminal justice approaches are inadequate in terrorism and national security cases).

³⁷ See Cuéllar, *Institutional Foundations* at 40 (cited in note 36).

below). Whatever one thinks of Simon's other claims, it seems implausible not to draw a principled distinction between the legal machinery of criminal justice and the often extralegal machinery of the war on terror, which includes techniques like targeted killings. It seems even more implausible to suggest, if only implicitly, that techniques treated as central American counterterrorism policy by policymakers, such as targeted killing—with all its attendant legal as well as moral dilemmas—somehow grow out of the war on crime.³⁸

A larger point emerges from scrutinizing the occasionally awkward fit between Simon's argument and developments in counterterrorism. Although Simon is convincing that the crime control paradigm seems to have spread beyond its original domains, important questions lurking in the background remain unresolved given the relatively limited discussion of national security as an alternative "interpretation" for much of the state's activity over the last few decades. Simon may be right that the Vietnam War eroded the technocratic legitimacy of the American national security state (p 72). Nonetheless, even before the September 11 attacks, the traditional domains of national security—including both geostrategic military power as well as the newer conceptions of building resilience through homeland security—appeared to retain enormous primacy in the American system.

That influence might still be consistent with Simon's weaker argument, which could be understood to focus on the powerful influence of ideas about crime control without suggesting this is the only or even the most powerful influence on governance. Still, Simon's determination to explain so much of governance in terms of crime control raises a deeper question. To the extent Simon is right about the intensity of public concern about crime control, perhaps its wellspring lies at the very heart of the modern nation-state's need to legitimize itself by providing for the security of its citizens. If one is going to use the interpretive method that Simon deploys, one might even draw connections to the size of entitlement spending in the United States (and the more developed welfare states in the rest of the world), the aforementioned scope of national security activities, and what Simon takes to be a public obsession with crime control. Roosevelt found considerable political resonance when drawing those connections, deftly moving from discussing the notion of security in the context of crime control,

³⁸ For an interesting discussion of the legality and morality of targeted killings, see Chris Downes, "Targeted Killings" in *An Age of Terror: The Legality of the Yemen Strike*, 9 J Conflict & Sec L 277, 294 (2004) (arguing that targeted killing "remains, for the time being, an illegal and unacceptable option"); Daniel Statman, *Targeted Killing*, 5 Theoretical Inquiries in L 179, 180 (2004) ("[A]cceptance of the killing and destruction in a conventional war necessarily entails accepting the legitimacy of targeted killings in the war against terror.").

national defense, and social welfare. The political value that Roosevelt mined from marketing the state as provider of security may even highlight the difficulty of expecting a nation-state to turn decisively away from crime control in a world where its citizens already fear crime.

The political importance of security does not mean crime control must depend on the same mix of coercive prosecutorial or carceral ingredients across time. Just as Roosevelt sought to rebrand social welfare programs in terms of their defense-related functions, Johnson seemed determined to channel fear of crime into support for prevention-focused, programmatic social spending (a move Simon credits with catalyzing the reach of “governing through crime”). Regardless of how much channeling can be achieved, however, the attention to crime control, national defense, and social security characteristic of the New Deal period and subsequent developments in advanced industrialized countries may share common roots. Their origin may lie in the decisions of political actors to steer the modern nation-state towards activities that ostensibly bestow security on its citizens.

Simon has a different take on the New Deal. Instead of treating this period as reflective of the deep-seated tendency of policymakers to persuade citizens that the government is meeting their most salient needs, *Governing through Crime* portrays the New Deal and its accompanying strategies as the beginning of a trend that resulted in an obsession with crime control and mass imprisonment.³⁹ As Simon puts it:

The epic battle between the Roosevelt administration and the Supreme Court over economic recovery legislation made constitutional law, and law in general, a major issue for the executive branch, as issues long part of the attorney general’s role now came to the fore. By focusing on the criminal law matters within the jurisdiction of the Department of Justice and its FBI, the Roosevelt administration could bolster the department’s popular legitimacy against a long, hard battle with the Supreme Court, while simultaneously projecting in popular form a model of federal government power. The same period saw considerable growth in the criminal role of the federal government, as Prohibition crime, largely prosecuted at the state level, gave way to a new federal interest in “big crime” (p 47).⁴⁰

Indeed, Roosevelt may have pioneered an explicit focus on crime control policy for the federal government. The New Deal itself almost

³⁹ Compare generally Cuéllar, “*Securing*” the *Bureaucracy* (cited in note 34) (describing the impact of the New Deal on the public’s perceptions of government’s role in providing security).

⁴⁰ Why the public would assign more legitimacy to the DOJ as a result of its crime-related focus is not something Simon discusses in more detail. The issue is addressed in Part III.

certainly heightened, as well, the public's expectations that expert government agencies would play a major role in managing the nation's direction. But it is risky to build a causal story about the link between the New Deal and more recent obsessions with crime control on such foundations. At least one plausible account (suggested above) would link the New Deal and crime control to a common third factor, rooted in the tendency of policymakers to present the nation-state as a source of security. Even assuming some path-dependent effect of the New Deal, a range of intervening variables, ranging from rising crime rates to partisan politics, surely affected any connection between the bleak equilibrium and the New Deal.

Disentangling causation is also a problem elsewhere in the narrative. Prison spending swelled, but subtle variations almost certainly suggest that the trend was driven by multiple political forces rather than merely by acceptance of a particular "model of governance." The discussion of how California Governor George Deukmejian came to focus so intensely on prison construction, for instance, could have devoted more attention to changes in crime rates, the political power of prison guard unions, and other external factors capable of affecting Deukmejian's decisions on prison construction (pp 157–58).⁴¹ Almost certainly, political leadership matters in setting priorities. But political leaders make decisions in a world constrained by institutions and responses from the larger public. It is not at all clear that changing political leaders would have greatly altered some trends that seem largely rooted in public expectations that the government will engage in vigorous, often harsh, crime control policies. A number of other smaller details, too, are sometimes less than convincing, such as how to interpret an apparent preference for executives in presidential elections (pp 62–70) and how much importance to ascribe to the Johnson-era Safe Streets Act as a precursor to the ratcheting up of the war on crime (pp 90–101).⁴² In any event, it is to Simon's credit that he acknowledges the extent of interpretive judgment undergirding his argument (p 5).

While those historical judgments sometimes bear careful attention, two theoretical questions connected to Simon's argument bear even closer scrutiny. If it is true that the concern with crime control has spread across time and policy domains, exactly how does such contagion work? And how should one place this contagion dynamic that is so central to the story of *Governing through Crime* into the larger

⁴¹ Simon attributes Deukmejian's policies to a "logic of imprisonment in the post-New Deal order" that conceived of prisons as a "public good and benefit" (p 157).

⁴² Simon argues, for example, that the Safe Streets Act "shaped, in defining ways, the logic of representation that exists today across the political spectrum, at both the federal and the state levels" (p 100).

constellation of political pressures operating on criminal justice? Both of these matters turn out to be critical ingredients to any defensible understanding of crime, governance, and the governance of crime.

II. THE MECHANICS OF “CONTAGIOUS FRAMING”

Why exactly, or when, does crime control beget more interest in crime control? In Simon’s account, politicians began relying in earnest on the organizing principle of crime control for several reasons. The threat of crime ostensibly provides an expedient means of justifying government intervention in public life. Fighting crime provides both reason and method for regulating a social risk. Eventually, crime fighting furnishes a metaphor for understanding some of the problems society faces. Among Simon’s central claims is that such political use of crime control as a guide for policymaking has developed its own momentum, spreading to far-flung domains of government action. An example:

[I]t is not a great jump to go from (a) concerns about juvenile crime through (b) measures in schools that treat students primarily as potential criminals or victims, and, (c) later still, to attacks on academic failure as a kind of crime *someone* must be held accountable for, whether it be the student (no more “social passing”), teachers (pay tied to test scores), or whole schools (closure as a result of failing test scores) (p 5).

Later, Simon suggests that the progression continues to encompass organizational practices such as detention in schools (p 173) and even private (or semiprivate) relations among groups or individuals (pp 203–04).

Several ideas are embedded in this description. First, concern about crime among the public, in general, is taken to grow over time. The example implies that burgeoning concerns are not a function of actual changes in crime rates, but instead of earlier policies that ultimately develop something of a grip on the future. Second, new substantive offenses might be criminalized or punished more severely than they were formerly, such as gun possession in school zones. Third, the policy metaphors of blameworthy perpetrators and (relatively) blameless victims are associated with criminal justice. Ultimately, Simon argues, these references to crime control became so ubiquitous, and so ingrained, that governance effectively became “governing through crime,” redefining ordinary citizens as vulnerable crime victims in need of government protection. In effect, Simon implies that the use of a crime control paradigm to frame public policy choices was contagious. This notion, which one might describe as “contagious framing,” is both perceptive and interesting. It can also be more clearly specified.

To build on Simon’s ideas, one might begin with a more precise definition. Contagious framing could be a two-step process. At the

outset, politicians focus on fear of crime as a rationale for government action, criminal justice as a potential solution for regulating social risks, and crime as the arena in which questions of government power will be decided. Subsequently, the initial focus on the criminal justice problems associated with a particular context (say, urban neighborhoods) spreads to other contexts (say, suburban schools). The focus also spreads even beyond contexts that directly implicate the ever more sprawling criminal justice system (for example, diagnosing problems associated with failing schools) to include organizational practices and increasingly distrustful relations among private individuals.

Contagious framing is featured in Simon's narrative for a reason. In fact, it is difficult to make sense of Simon's argument without some version of it. Because he claims that politicians helped create demand for crime control policies rather than simply following public concerns (an interpretation that might be questioned by some observers), the full extent of "governing through crime" is not (in Simon's account) driven by public perceptions. In fact, Simon goes to great lengths to suggest that "governing through crime" has burdened if not corroded some defensible version of democracy, not only in direct ways by disenfranchising felons but in subtler ways by making the public more fearful (pp 6–7). Neither does Simon's account paint the ascent of "governing through crime" purely as a set of deliberate choices made by politicians. Instead, politicians are sometimes depicted as being in the grip of a larger phenomenon, one that had a distinct beginning and is still driven partly by deliberate choices but is no longer entirely of anyone's own making. Some version of contagious framing, where politicians and the public become more habituated to particular policy responses over time, helps answer the underlying question of how Simon's scenario (assuming one accepts it) spread through the crevices of government and public life.

On the other hand, contagious framing raises as many questions as it answers. For instance, the existence of contagious framing might be anticipated by some politicians otherwise eager to support extensive criminal enforcement, thereby changing their willingness to engage in certain policymaking activities in response to what they expect will happen as a result of the contagion. Should we expect to see strategic responses of politicians to the possibility of contagious framing (such that *some* strategic politicians might resist "governing through crime" because of the consequences, unless of course we decide the bad consequences would be too far off in the future—perhaps because they discount)? Can the contagion parameter be changed? Is it possible for some domains to be relatively exempt from the allure of the contagious, crime-related framing that Simon decries? Simon's account is particu-

larly intriguing for its capacity to pose these questions, even if much of the narrative seems to leave them beyond the scope of discussion.

Which leaves for future work perhaps the most interesting question: what precise theoretical foundations underlie the contagion function. Perhaps contagion is a simple matter of rational information transmission, with politicians in different contexts gradually learning that crime sells.⁴³ Politicians might learn that a focus on criminal justice succeeds in raising public concerns about policy problems that would otherwise lack public attention, such as mine safety or telemarketing fraud. Civil society groups discover their capacity to focus greater attention on human rights atrocities or environmental problems by framing them as criminal transgressions.⁴⁴ Leaving aside the question of whether it is prescriptively valuable for political actors to learn about its effectiveness, the apparent success of “criminalizing” a discussion of public policy in one domain can breed interest among politicians with different agendas who desire a share of that success. Moreover, in specific contexts, lawmakers may find that the previously achieved existence of a criminal enforcement structure (say, an Office of Criminal Investigations in the FDA, or a Public Integrity Section in the DOJ) lowers the cost of adding new responsibilities to those bureaucracies.⁴⁵ And if adding those functions (for example, enforcement of a ban on partial birth abortion) fits with interested parties’ policy agendas, then they will press for new criminal enforcement activity.

A separate possibility involves priming, which operates on individual members of the public somewhere below conscious rationality within the realm of individual human cognition. Leaving aside the question of why politicians initially focus on crime control (to which I return below), people who become exposed to particular messages are more likely to find messages with a similar logical or rhetorical structure more persuasive.⁴⁶ The question would then be whether it works better when *crime* is in the rhetorical mix. Simon’s overall argument seems to imply that the answer is *yes* (otherwise, why has “governing

⁴³ This scenario leaves aside the question of why politicians get so much mileage from framing a risk regulation problem as a criminal justice problem to begin with, a question addressed in Part III. The focus here is on why, after some initial interest in crime from politicians, that interest would tend to grow over time.

⁴⁴ See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals* 310 (Princeton 2000) (“A well-run legalistic process is superior, both practically and morally, to apathy or vengeance.”).

⁴⁵ For a theoretical explanation of how this might work, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv L Rev 1026, 1039–48 (2003).

⁴⁶ See Keith Clayton, Ali Habibi, and Michael S. Bendele, *Recognition Priming Effects Following Serial Learning: Implications for Episodic Priming Effects*, 108 Am J Psych 547, 551, 554–55 (1995) (documenting priming effects even in low-level tasks).

through crime” spread as the preeminent model of governance rather than, for example, the Cold War?).

If in fact the electorate had more latent potential to be *primed* with the crime issue than others, then it becomes harder to evaluate the claim that politicians led rather than followed as they expanded the scope of criminal justice. After all, politicians such as Roosevelt, Johnson, or Nixon—who all exploited the crime issue—might have had keen enough instincts to understand that the public had latent concerns about crime (concerns that could later cause the crime issue to prime expectations for additional policy developments in this area). The policies associated with “governing through crime” in such a scenario are not just the result of politicians’ opportunistic behavior. They are also the result of voters’ latent interest, combined with an increasing degree of adaptation to a culture making it more familiar to evaluate policies on the basis of their impact on criminal justice, or perhaps even on the basis of how easily the solutions offered can be analogized to familiar policy interventions associated with victims and blameworthy perpetrators. The resulting priming dynamic is comparable to the persistence of organizational culture, where individual participants in an organization resist changing familiar analytical approaches, routines, and institutional rules.⁴⁷

Group dynamics involving social conformity and cascades could almost certainly play an additional role. Spikes in the crime rate are capable of generating a greater level of public concern about crime.⁴⁸ (Although Simon plays down the connection between crime rates and political responses, his framework is not incompatible with the notion that the politics of crime are affected by changes in actual levels of crime.) In response, changes in criminal activity have the potential to increase the political focus on crime in the short term. As congressional hearings, new criminal laws covering carjacking or gun possession in school zones, and budget resources focused on crime all increase, it should come as no surprise that the changes are likely to please voters who are already concerned about crime in general (or about particular criminal justice issues they believe are likely to be affected by the new policies). More interesting is the impact of the

⁴⁷ For an interesting formal application, see Juan D. Carrillo and Denis Gromb, *Cultural Inertia and Uniformity in Organizations*, 23 *J L, Econ, & Org* 743, 744–46 (2007) (exploring cultural inertia in organizations, and arguing that older and more uniform organizations are particularly prone to such inertia).

⁴⁸ See generally Elisabeth Noelle-Neumann, *The Spiral of Silence: Public Opinion, Our Others Skin* (Chicago 1993) (offering an affective theory of individuals’ desire to conform to others’ opinions); Sushil Bikhchandani, David Hirshleifer, and Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 *J Polit Econ* 992 (1992) (focusing on the rational transmission and acceptance of information in informational cascades).

policy changes on the subset of voters who are *not* particularly concerned about crime, yet whose own conception of their priorities responds to the existing policy agenda. These voters might update their own perceptions of what constitutes a major national problem in response to the policies currently receiving attention. Moreover, the spreading interest in criminal justice policies, once achieved, could decay in these voters more slowly than it was acquired (as a result, for instance, of a disconfirming bias). Couple this with the existence of still other voters whose responses are driven by what they observe among the rest of the public, and the result is further cascades of interest among voters, even if the politicians who initially responded to the spike in crime shift attention to other issues.

Still other theories could explain contagious framing. The point is that the study of contagious framing in this context could go in several directions with distinct implications about the strategies that can alter existing criminal justice policies. While Simon has made an important contribution, the entire concept needs to be developed further in order to address deeper questions such as the viability of Simon's notion of a "model of government." As it stands, one is left to wonder about the theoretical mechanism through which "governing through crime" is supposed to spread across time and across domains of law. Once the concept is fleshed out further, its potential applications—as well as its limits—can be more fully realized.⁴⁹ To the extent that contagious framing works to spread policy innovations quite distinct from control, such as emissions trading markets, one might further question the uniqueness of criminal justice as an exclusively dominant "model of government."

III. THE POLITICAL ECONOMIES OF CRIMINAL JUSTICE

Simon provides a rich framework for thinking about developments in criminal justice—and in the architecture of law more generally—over the last eight decades. That framework, however, is conspicuous as much for what it leaves out as for what it includes. Perhaps one reason why the contagious framing idea remains a little buried in the argument amidst the broader claims about "governing through crime" is that the narrative does not always delve into alternative dynamics—conceptually distinct from "governing through crime"—that

⁴⁹ Some of those applications reach well beyond the realm of criminal justice. Regulatory policy innovations, like emissions trading in the environmental context, may constitute examples of contagious framing as well. See, for example, Lisa Heinzerling, *Selling Pollution, Forcing Democracy*, 14 *Stan Envir L J* 300, 305–15 (1995). On the reflexive, social acceptance of ideas despite the absence of a rational basis for them, see John W. Meyer, et al, *World Society and the Nation-state*, 103 *Am J Sociol* 144, 144–45 (1997) (arguing that nation-states are organized based on world models, even though those models do not always fit local conditions).

might account for some of the developments Simon describes. Because the historical account is so sweeping, Simon's work ironically has the potential to serve as a catalyst for analyzing the fuller range of political forces shaping criminal justice and its relationship to governance.

Governing through Crime does not assign those forces equal billing. So we begin by reviewing the ones he seems to consider most important, the first of which could be called "relevance creation." What New Deal policymakers, state governors, local prosecutors, and mayors all have in common (in Simon's account) is a desire to legitimize their interventions through the use of some "model of governance" (pp 34–37). To understand how such goals play out in the context of criminal justice, it is useful to make explicit some assumptions about politicians' motivations. These stay in the background during most of Simon's analysis. Presumably, politicians want to achieve some mix of maintaining access to political power and achieving policy goals that involve control of law and policy (otherwise, there would be little point in being a politician). Politicians then seek what Simon would describe as "models of governance" to explain public actions to the public (others have described these as "policy metaphors"⁵⁰). These facilitate the enactment and public acceptance of policies. Without such models, presumably it becomes harder to justify government action. With them, policy proposals become easier to see and implement because they are understood to be part of a coherent whole, involving the achievement of some important public goal. Thus, student loans become easier to justify in the context of a broad national strategy to create an educated citizenry, or (at a higher level of generality) to promote national security.

But time may not be kind to a particular justification for government action. The problem, suggests Simon, comes when historical circumstances disrupt the viability of particular "models of governance." Hence, Simon's riff about how politicians, in the midst of Vietnam-era social chaos and military failure, had delegitimized the expertise ideal that was once so central to the logic of the New Deal state (pp 22–31). At this point, politicians seek new ways of justifying the state's relevance in order to better enact policies about which they care. Occasionally, this idea might blend with the "position taking" idea explained below. But in Simon's description, politicians deploying a new model of government play an important role in shaping public preferences (or at least the perceived relationship between public prefer-

⁵⁰ For an introduction to the idea of policy metaphors, see Mark Schlesinger and Richard R. Lau, *The Meaning and Measure of Policy Metaphors*, 94 *Am Polit Sci Rev* 611, 611–14 (2000) (arguing that people understand complex policy issues by comparing them with more readily understood social institutions and calling this process "reasoning by policy metaphor").

ences and particular intermediate policy regimes, such as “crime control”). It remains a separate question—not given quite as much attention as it merits in the narrative—*why* a particular “model of government” would work.⁵¹ It is clear enough from Simon’s account that politicians would *want* a new “model of government” if the one they were using becomes useless. What is a bit less clear is exactly why such a move would naturally resonate with the public. One might conjecture that this has something to do with the fact that, during much of the period that Simon chronicles, crime rates were rising quite sharply⁵² while members of the public carried powerful, long-term expectations about government’s role in protecting them from threats.

As lawmakers join executive officials in using crime to compete for scarce public attention, the relevance creation dynamic can engender some contagious framing effects. While politicians seeking relevance might initiate a rush towards focusing on crime control, something along the lines of contagious framing would help explain some of the other developments that Simon finds so important, such as the spread of crime control from the world of urban policy to areas such as family law and schools. The idea that crime control would become more of a public concern over time—even an obsession—potentially sheds light on a lot of moving parts in Simon’s story, such as why politicians initially uninterested in crime control shifted their attention to crime issues, and how public discussions of policymaking in safety regulation, education, and family law swelled with the rhetoric of victims, perpetrators, and blame. Although deeply ingrained ideas about the importance of crime control need not translate into unquestioning support for punitive policies, they tend to establish a recognizable backdrop against which discussions of public policy unfold. In a second-best world, where public concern about criminal justice has already become profoundly entrenched, advocates can better promote defensible policies such as felon reintegration programs when they highlight the potential contribution to reducing crime.

The cluster of dynamics associated with relevance creation and contagious framing provide some traction in understanding the relationship between criminal justice and governance. Juxtaposing the breadth of Simon’s narrative against the larger backdrop of research in this domain, however, it becomes strange to see relatively little discussion of a host of other dynamics likely to animate the relationship

⁵¹ This question is distinct from the one discussed in the section on contagious framing. The problem here is understanding why politicians would begin focusing on criminal justice issues, whereas contagious framing is about whether (or how) that focus would spread.

⁵² See DOJ Online Sourcebook at table 3.106.2005 (cited in note 12), online at <http://www.albany.edu/sourcebook/pdf/t31062005.pdf> (visited Apr 16, 2008).

between crime and governance. In some cases, these dynamics provide alternative explanations for the phenomena that Simon chronicles, such as the emergence of possession, money laundering, material support, workplace-focused, and family-related crimes epitomizing the swelling scope of substantive criminal law. In other instances, alternative political dynamics driving the development of criminal justice help explain features of the historical progression to which Simon devotes comparatively little attention, such as rising and falling levels of public attention to crime issues even after the advent of “governing through crime.”

Take, for instance, the macropolitics of party and race. Although Simon acknowledges the connection between criminal justice issues and racial politics in the United States, he plays down the relative significance of that connection (p 20). By the same token, partisan competition makes an occasional cameo appearance in the narrative. Yet it seems difficult to fully explain developments involving criminal justice policy without thinking about the role partisan competition played in galvanizing Johnson’s interest in the crime issue as a way of holding together an eroding New Deal Democratic coalition, or Nixon’s interest in undermining that coalition by adroitly playing to concerns about race and criminal justice. Simon tells some of the story in his narrative (pp 89–96) but wraps it up in the context of the idea that politicians sought a particular model of governance in light of how technocratic government had been undermined in the wake of government failures such as the Kennedy assassination and the Vietnam War (pp 53, 66). While the distinction may seem like a subtle one, a greater focus on race and partisanship might lead one to question whether a criminal justice bidding war would have still ensued (particularly amidst rising crime rates) even if technocratic governance retained much of its legitimacy.⁵³

Which brings us to an even simpler dynamic. In systems that are nominally democratic, politicians are routinely driven by the earnest desire to engage in position-taking behavior in response to actual or potential public concerns.⁵⁴ Simon rightly emphasizes the capacity of politicians to shape public perceptions, a theme I take up in other work.⁵⁵ He also cites some empirical work on criminal justice suggest-

⁵³ For at least one version of an argument drawing closer connections between a political taste for punitiveness in certain jurisdictions and racial animus, see generally Glenn C. Loury, *Why Are So Many Americans in Prison?*, 32 *Boston Rev* 7 (2007).

⁵⁴ See David Mayhew, *Congress: The Electoral Connection* 61–73 (Yale 1974) (defining position-taking behavior as “the public enunciation of a judgmental statement” and describing such behavior among members of Congress).

⁵⁵ See generally Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 *Stan L Rev* 1597, 1627–30 (2003).

ing that politicians galvanized public fears about crime before they materialized (pp 22–23). Such findings, along with other research, do suggest the possibility of a lag between changes in crime rates and public responses.⁵⁶ But it turns out to be far harder to interpret this evidence than is commonly acknowledged, particularly if the goal is to make the case that politicians had a preeminent causal role in drumming up public fears. Politicians have incentives to focus on issues where they expect the public to respond, which suggests the public had a substantial latent concern about crime even if it had yet to be realized. Catalyzing political reactions and public concerns is the likely presence of a third variable, namely changing crime rates. The fact that politicians might react to those before the public does (and, indeed, that politicians might fan even somewhat stronger responses than those that would have developed otherwise) does not manifestly absolve the American public from a substantial measure of responsibility for criminal justice policy.

Still other political dynamics not discussed in detail by Simon have less to do with the American public, and more to do with their agents. As William Stuntz has noted, law enforcement officials have strong bureaucratic interests in expanding the scope of legal discretion by expanding the scope of criminal liability—particularly (though not exclusively) at the federal level.⁵⁷ Combined with politicians' interest in position taking, the special role of law enforcement officials in shaping enforcement policy can contribute to a substantial expansion in the empire of criminal law. It is possible that this principal-agent dynamic might interact with contagious framing to gradually increase the power of law enforcement officials in domains where they might have once had little power, such as education policy. With the exception of prosecutors and (occasionally) the attorney general, however, the bureaucratic complex of investigators, police officers, law enforcement unions, FBI assistant directors, and assistant United States attorneys play a relatively limited role in Simon's narrative. Yet historical episodes such as the development of provisions in the Patriot Act following the September 11 attacks or the growth in the anti-money-laundering system show that these officials play a critical role.⁵⁸ Ratch-

⁵⁶ See, for example, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505, 536 (2001) (arguing that crime rate increases generating “public demand for more law enforcement . . . took time” to affect institutional priorities and responses); Allen E. Liska, Mitchell B. Chamlin, and Mark D. Reed, *Testing the Economic Production and Conflict Models of Crime Control*, 64 Soc Forces 119, 124 (1985) (discussing the “time lag involved in budget decisions” based on “information (reported crime rates)” for previous years).

⁵⁷ See generally Stuntz, 100 Mich L Rev 505 (cited in note 56).

⁵⁸ See Mariano-Florentino Cuéllar, *The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J Crim L & Criminol 311, 336–74 (2003).

eting up the scope and severity of the criminal justice system is one legacy of that role, but not the only one. When political agendas, individual goals, or bureaucratic interests can motivate these actors, their leverage is capable of galvanizing campaigns to reshape social norms about drunk driving, acquaintance rape, or occupational safety. And given the right mix of budget constraints and political circumstances, law enforcement officials can even make powerful (if rare) allies in efforts to reform excessively punitive sentences. Indeed, ratcheting down the harshness or scope of criminal penalties is particularly difficult without some measure of support from law enforcement officials.

The influence of those officials is likely heightened by certain features of human cognition. The typical person's mind tends to make graphic, easily retrieved information more influential in shaping public reactions.⁵⁹ This dynamic could also operate in conjunction with contagious framing, or it could work independently. The extent to which the criminal justice system channels attention to particular individuals or actions might distort the public's responses to different risk regulation challenges, making it harder for them to consider the potential costs of the bleak equilibrium of mass imprisonment and coercion that criminal justice policy has created. Then again, the fact that depicting some action as a *crime* (literally or figuratively) has such intense potential to focus public attention can prove to be a tremendous asset for policymakers and civil society groups trying to achieve difficult social goals. The human mind's potential responses to specific, graphic information about victims and perpetrators helps explain the potential value that some activists ascribe to international criminal law.⁶⁰ Experiments consistently reveal that anodyne statistics fail to convey the extent of a staggering tragedy, even one of genocidal proportions.⁶¹ Individual stories playing out in the context of a prosecution for crimes against humanity leave more lasting impressions, mobilizing a more vigorous constituency against international atrocities. In any event, given the distinctive architecture of human cognition, members of the public might become ever more interested in criminal justice issues because they are rooted in representations of blame, re-

⁵⁹ See generally, for example, Valerie S. Folkes, *The Availability Heuristic and Perceived Risk*, 15 J Consumer Rsrch 13 (1988) (arguing that the ability to call an example to mind influences consumers' perceptions of the safety of various products).

⁶⁰ See, for example, Bass, *Stay the Hand of Vengeance* at 31 (cited in note 44) (surveying the history of war crimes tribunals and arguing that public "outrage is a necessary . . . condition for supporting a war crimes tribunal").

⁶¹ See generally George Loewenstein, Deborah Small, and Jeff Strnad, *Statistical, Identifiable and Iconic Victims and Perpetrators* (Stanford Law and Economics Olin Working Paper No 301, Mar 2005) (examining studies that show that identifiable victims garner more public sympathy than statistical victims).

sponsibility, and individual consequences rather than in abstractions about risks, impersonal benefits, and dispersed costs. By the same token, advocates, diplomats, and scholars interested in confronting mass atrocity through the argot and institutions of criminal justice may be best understood not as being committed to a series of implausible assumptions about the mechanics of deterrence, but as seeking to adapt legal institutions to the particular characteristics of human cognition that help generate and sustain political attention over time.

Finally, criminal justice bureaucracies tend to be shaped by their legal and institutional context. Their personnel, organizational cultures, missions, and constraints have forged these agencies to be distinct from other bureaus, both in the capacities they possess for tasks such as investigation and adjudication and in their ability to remain relatively insulated from some of the quotidian interest group influence affecting typical domestic regulatory agencies.⁶² Couple these characteristics with the potential impact of criminal sanctions on deterrence and social norms, and it becomes possible to see that lawmakers and executive branch officials might have pragmatic, policy-oriented reasons to support a significant role for law enforcement in a host of risk regulation domains.

Such complexities are mostly left out of Simon's account. Perhaps there is some value in Simon's decision to direct readers' attention to a particular slice of the politics of crime. By focusing on relevance creation along with contagious framing, Simon reminds us that sometimes politicians can support policies that foment their own demand. He also emphasizes how a particular approach to policymaking can prove to be "sticky" in a given context and contagious across domains. If his theoretical intuitions about contagious framing are right, then Simon's focus on certain aspects of the politics of crime yields a provocative (if incomplete) cautionary message. Principled lawyers and policymakers tempted to use the institutions and language of criminal justice would do well to consider the potentially pernicious, or at least unintended, consequences of reinforcing the perception that most problems of governance (and, indeed, even of mass atrocity) ultimately collapse into questions of crime control.

Yet the narrative is also diminished by its singular focus on a subset of political dynamics associated with crime control. The limited attention to alternative political explanations fits poorly with the author's apparent intellectual ambition to provide a more comprehensive account of the link between crime control, political developments, and governance. It becomes harder to disentangle competing causal stories for a lot of the phenomena that Simon seeks to explain (or

⁶² See Cuéllar, *Institutional Foundations* at 26, 33 (cited in note 36).

even to interpret). Developments such as aggressive drug enforcement, Deukmejian's focus on building prisons in California, Nixon's skillful use of crime to advance distinctly partisan political goals (rather than to achieve government-wide aggrandizement), and even the deployment of criminal justice strategies in environmental or occupational safety regulatory contexts can all be explained in part by alternative political stories based on a plausible mix of assumptions and historical experience.

In contrast, Simon's project offers an enlightening historical mosaic of iterations on the criminal justice theme, but disappoints by failing to subject to close analytical scrutiny the competing explanations for the phenomena described. Without having a better sense of the full range of political forces shaping criminal justice as well as its connection to other aspects of governance, it becomes harder to evaluate reform strategies or their consequences. After all, even if Simon is right about the potential perils of contagious framing, we can hardly judge whether the potentially problematic side effects of criminal justice strategies are prohibitive until we know something more about the overarching goals, as well as the instrumental impact of crime control approaches on those goals. As a result, once we accept a somewhat richer account of the crime-governance nexus, it becomes considerably more difficult to accept the sum of prescriptive conclusions that Simon ultimately reaches.

IV. RISK, SECURITY, AND NATIONAL GOVERNANCE

Thus far our analysis of the "governing through crime" thesis has revealed a complicated picture. The arc of public policy over the twentieth century shows a powerful nexus between crime and governance, with often-troubling results. The multiple political dynamics affecting crime control and crime definition, however, complicate simple judgments about the role of crime control in administering the modern regulatory state. Even if one does not accept every aspect of Simon's historical narrative, criminal enforcement unquestionably engenders an carceral machinery of staggering scope. Yet it also engenders bureaucracies with distinctive capacities to achieve defensible social goals. Moreover, the institutional features that seem to be identified with "governing through crime"—including the prominent role of prosecutors and attorneys general, the use of expansive criminal statutes to manage risks, and social programs justified on the basis of crime prevention—draw political support from multiple sources, not all problematic. A more nuanced view of the politics of crime makes it harder to generalize about the crime-governance nexus but provides a more descriptively convincing account of criminal law's role in the advanced, industrialized nation-state.

Simon offers a starker conclusion. His rhetorical energies focus on condemning the war on crime—which presumably includes the bleak equilibrium of harsh sentences and mass imprisonment—the use of the criminal justice system broadly to regulate social risks, and the decision of politicians to focus on crime control as a major element of domestic policy. He decries the war on crime as corrosive to democracy, calling instead for a renewed focus on “social movements . . . ready to break the hold of crime on American governance and animated by the conviction that the American people are being exposed to risks that are largely ignored by institutions laboring under a burdensome set of formal and informal mandates to manage crime and its risks” (p 282). Closer scrutiny of these prescriptive conclusions in the context of the institutional realities of the modern regulatory state reveals some of the stakes involved in understanding crime’s politics.

In a sense, Simon’s prescriptive impulse underscores an important point about risk regulation. Principled observers would be hard pressed to disagree that society should periodically reexamine what risks it is actually regulating—whether they involve crime, container security, or contaminated food. As then-Judge Breyer observed over a decade ago, there is good reason to think that both policymakers and the public distort their responses to risk depending on whether a threat is particularly salient.⁶³ Ultimately, developing a precise normative metric defensibly allocating scarce resources in risk regulation is more difficult than generally acknowledged.⁶⁴ Nonetheless, if he is right that contagious framing has contributed to the spread of an obsession with crime control that galvanizes public fear, then it is quite possible that both the governed and their government overweigh concerns about crime in comparison to other matters.

Taking the next few steps in the prescriptive argument turns out to be a lot more complicated than *Governing through Crime* lets on. In part because criminal justice is driven by multiple political dynamics, there is no easy way to decide on the policy implications of this useful (but rather general) point about potential distortions in risk regulation. The concept of crime does not refer to a set category of specific harms. It is a legal designation—deployed by lawmakers with

⁶³ See Stephen Breyer, *Breaking the Vicious Circle* 33–39 (Harvard 1993) (noting that “the public’s evaluation of risk problems differs radically from any consensus of experts in the field” and discussing several factors that lead to distortions in individual risk responses).

⁶⁴ Compare Cass Sunstein, et al, *Predictably Incoherent Judgments*, 54 *Stan L Rev* 1153, 1154–55 (2004) (arguing that people make decisions based on categories and that this category-bound thinking may lead to decisions that are sensible individually but incoherent when taken as a whole), with Mark Kelman, *Problematic Perhaps, but Not Irrational*, 54 *Stan L Rev* 1273, 1274–75 (2004) (arguing that category-based and context-specific decisions are not irrational).

a host of competing goals—capable of triggering a distinct set of institutional responses. Careful design of risk regulation strategies may be a reason for concern about a headlong rush to “govern through crime.” At the same time, the continued use of criminal justice in some risk regulation contexts may have important justifications in terms of aggregate social welfare that Simon does not address. Food and drug safety regulators may depend on severe penalties to meet public expectations in a world of scarce resources.⁶⁵ Criminal justice bureaucracies have special competence in analyzing facts, developing cases, and responding to meaningful procedural constraints when compared to ordinary regulatory bureaucracies or even national security agencies.⁶⁶ By the same token, criminal justice bureaucracies often display a greater degree of bureaucratic autonomy compared to ordinary regulatory agencies, making them potentially capable of resisting interference from organized interest groups that could overwhelm other agencies. These characteristics may furnish independent reasons to involve (within sensible limits) criminal justice bureaucracies in risk regulation, quite apart from the more commonly appreciated instrumental implications of deterring certain conduct through the use of harsher sanctions or shaping public perceptions about what constitutes harmful conduct. If this is the case, then it becomes strikingly difficult to accept blanket generalizations judging the merits of criminal enforcement in risk regulation. The question would turn on difficult-to-estimate parameters such as the extent of bureaucratic autonomy necessary to achieve optimal regulatory policies, the amount of contagious framing that one might expect from deploying criminal justice bureaucracies in a particular context, and the more conventionally appreciated deterrence and social norm–related impacts of putting criminal sanctions on the table. Overcriminalization is unquestionably capable of submerging human well-being under a flood of

⁶⁵ See *United States v Dotterweich*, 320 US 277, 280–81 (1943); Peter Barton Hutt, *Turning Points in FDA History*, in Arthur Daemrich and Joanna Radin, eds, *Perspectives on Risk Regulation: The FDA at 100* 14, 19–20 (Chemical Heritage 2007). The impact of strict liability also underscores the importance of distinguishing concerns about excessive harshness in the imposition of criminal liability from concerns about the volume of punishments and incarceration actually imposed. Although Simon seems intent on disparaging both the harshness and frequency of punishments across contexts, as an empirical matter the relationship between punishment severity and punishment imposition depends heavily on the dynamic responses one expects among the target audience. One can plausibly expect corporate executives to respond quite differently to elevated probabilities of criminal punishment compared to violent criminals with severely discounted long-term time horizons. In fact, as strict criminal liability replaced a much more uncertain negligence regime in the food and drug safety context, the number of FDA investigations leading to criminal prosecution plummeted from between 500 and 1,000 during the 1920s to a current average of approximately 20 a year. See *id.* at 19.

⁶⁶ See Cuellar, *Institutional Foundations* at 26, 37–38 (cited in note 36).

discretionary punishments. Yet undercriminalization, too, is capable of delivering suboptimal policy outcomes.

Nor is it clear whether all the components of “governing through crime” are equally responsible for the bleak equilibrium of mass imprisonment that is a major part of American life today. Given the role of drug offenses in filling American prisons, it seems particularly important to unpack the origins of public anxieties about narcotics use. There is little to shed light on this question in Simon’s account aside from a brief reference that the war on drugs was “launched by President Nixon in 1971” (p 30).⁶⁷ It may be literally true that Nixon first formulated narcotics enforcement as a “war,” but it is less convincing to argue that Nixon was particularly responsible for galvanizing public fear of drug use. More generally, both theoretical and empirical studies (the latter relying heavily on a range of econometric techniques) suggest that mass imprisonment has a number of causes, including some (for example, crime definition, rates of criminal offending, and availability of incarceration space) that interact in complicated ways.⁶⁸

Perhaps Simon is most persuasive when suggesting that the ubiquity of “governing through crime” makes it harder for some members of the public to question the full implications of harsh sentences and mass imprisonment. Curiously, Simon seems relatively uninterested in shifting the balance of criminal justice policy towards social programs with crime control objectives, dismissing these efforts as further examples of the troubling slide towards a world pervasively governed

⁶⁷ Given the level of detail characterizing the narrative, it is somewhat striking how little Simon turns his critical scrutiny on drug enforcement. Drug enforcement plays a preeminent role in generating the existing amount of incarceration as well as other outcomes that Simon decries. Existing research offers a number of different explanations for the apparent intensity of the American commitment to aggressive criminal enforcement of antidrug laws in particular. Distinct approaches to explaining the fervor of the drug war focus on (among other things) racial animus, bureaucratic politics, and deep-seated moral disapproval. Simon’s narrative engages only occasionally (and in quite general terms) with this literature. For an interesting survey of the literature, see generally Ellen Benoit, *Not Just a Matter of Criminal Justice: States, Institutions, and North American Drug Policy*, 18 *Social F* 269 (2003).

⁶⁸ See generally, for example, Alfred Blumstein and Allen J. Beck, *Population Growth in US Prisons, 1980–1996*, 26 *Crime and Justice* 17 (1999) (changes in drug arrest rates and commitment rates per offense); David Jacobs and Ronald E. Helms, *Toward a Political Model of Incarceration: A Time-series Examination of Multiple Explanations for Prison Admission Rates*, 102 *Am J Sociology* 323 (1996) (income inequality and the strength of the Republican party); Patrick A. Langan, *America’s Soaring Prison Population*, 251 *Science* 1568 (1991) (sharp increases in the probability of prison time for sentenced offenders across crime categories). See also Friedman, *Crime and Punishment* at 460 (cited in note 1) (identifying “stiff laws” such as crime definition as factors in imprisonment). For additional historical observations, see generally Loury, *Why Are So Many Americans in Prison?* (cited in note 53) (offering an explanation of empirical work claiming that racially inspired responses to the civil rights movement drove trends in the criminal justice system associated with imprisonment).

through crime.⁶⁹ One is left to wonder, however, just how much of this would change if society achieved a ramp-down in crime control rhetoric, or in “governing through crime” in schools or domestic relations, or in the use of social programs administered by prosecutors, or in the use of criminal justice bureaucracies to manage risks outside the traditional, common law domains of criminal justice.

And those traditional domains hold only the most limited lessons. If anything, the flexible structure of criminal law compounds the potentially thorny problem of drawing instrumental distinctions about the scope of criminal enforcement. This is not immediately acknowledged by a number of otherwise thoughtful scholars. Simon contends that there is a legitimate sphere to which criminal justice should properly extend and a less legitimate sphere where deploying the criminal justice system constitutes a distortion. There is a “category of crime,” he notes, deployed “to legitimate interventions that have other motivations” (p 4). Moreover, Simon recognizes responses involving criminal justice to be less problematic (for example, instances of “*governing* crime” rather than “*governing through* crime”) when they are “proximate and proportionate to the crime threat experienced” (p 5). This is an intuitively appealing statement, but it handily casts aside the (perhaps tragically intractable) analogous dilemmas associated with Eighth Amendment proportionality jurisprudence.⁷⁰ And “American democracy is . . . threatened by the emergence of crime victims as a dominant model of the citizen as representative of the common person whose needs and capacities define the mission of representative government” (p 7).

But what counts as the “crime threat experienced”? The definitional problem becomes especially murky given that the point of the

⁶⁹ The precise extent to which social interventions successfully mitigate crime is a complicated empirical question. Nonetheless, the existing body of econometric, theoretical, and qualitative research strongly suggests both that (a) social interventions can serve as substitutes for imprisonment to some extent and that (b) imprisonment and policing hardly exhaust the full range of policy mechanisms through which communities can impact criminogenesis. For a helpful applied survey of the relevant literature, see generally Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime* (Vera Institute of Justice, Jan 2007), online at http://www.vera.org/publication_pdf/379_727.pdf (visited Apr 16, 2008). Support of such social interventions may do little to disrupt a powerfully rooted social consensus about the importance of combating crime (while potentially upsetting prevailing views about *how* to pursue that goal). Still, Simon’s apparent readiness to lump social interventions focused on crime control into the larger milieu of problematic “governing through crime” strategies, such as “weed and seed” and other grant programs (p 41), runs the risk of understating the potential impact of coaxing the larger public to appreciate that ambitious criminal justice goals can be achieved through alternatives to the existing bleak equilibrium of mass imprisonment and harsh punishments.

⁷⁰ See generally Pamela S. Karlan, *Pricking the Lines: The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 Minn L Rev 880 (2004) (arguing that any proportionality standard is necessarily subjective and examining divergent proportionality jurisprudence in the areas of criminal sentencing and punitive damages).

narrative is that criminal law itself (the means through which we define “crime”) defines offenses that are out of proportion to the crime threat experienced. Plainly, it is possible to draw instrumental distinctions between criminal offenses that meet some defensible threshold of justification (say, drunk driving laws) and others that fail to meet that threshold (say, federal carjacking laws). Drawing those distinctions takes some justification, however, such as a discussion of the potential problems associated with federal duplication of offenses that are either appropriately criminalized and enforced by local authorities or already covered by other aspects of the federal criminal code itself.⁷¹ More generally, scholars and observers decrying the breadth of criminal law’s empire may be tempted to suggest a distinction in the legitimacy of criminal law on the basis of whether someone has actually *caused* a harm or whether she has merely created a risk (a distinction that largely—though not entirely—tracks the so-called *malum in se/malum prohibitum* line). Yet neither the structure of criminal law, nor its history, provides much support for making that distinction. Well before Roosevelt started working his political feats in favor of expanding the scope of national responsibilities (a development which Simon considers significant in the path towards “governing through crime”), American criminal law had a doctrinal structure profoundly concerned with regulating risk. Although *ex ante* risks of harm might be punished less severely than *ex post* harms already caused, both have long been part of criminal law’s domain. Inchoate crimes such as conspiracy, attempt, and complicity were only the starkest examples. Others include a host of crimes associated with customs, taxation, immigration, and business activity.

In short, the “crime threat experienced” depends crucially on what is defined as a crime in the first place. To make reasonable headway on how to answer that question, one needs a more defensible theory of social regulation than many critics of broad criminal liability tend to provide. Given Simon’s concern with better addressing “risks that are largely ignored” by Americans, it would seem strange to answer the question of criminal law’s scope by simply emphasizing that the public’s deepest, most salient concerns are about violent crime—and the empire of criminal law should shrink accordingly.⁷²

⁷¹ See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L J* 1135, 1165 (1995) (advocating a return to state control of most criminal law and arguing that the federalization of criminal law is overburdening the federal court system).

⁷² Yet Simon comes close to suggesting this by emphasizing that criminal law responses would be appropriate when citizens “suffer threats to their persons or property” (p 5). One can define such “threats” to encompass environmental degradation or similar risks, but one suspects

These observations are not meant to legitimize the existing breadth of criminal law or the staggering amount of imprisonment resulting from its application. Budget constraints, the pressing need to address challenges such as global warming, and the impact of incarceration on marginalized communities are among the many reasons why Americans should rethink critical features of their war on crime. Nor do the preceding observations imply any particular theory of how offenses should be sanctioned. Instead the point is to distinguish arguments about the proper scope of criminal law from those about the problems associated with the bleak equilibrium of mass imprisonment—discussions that should properly involve arguments about institutional design, social cost, ethics, and debates about legitimate social goals. These problems bear some relationship to each other, but they are not the same. One might decide that the costs of governing drug use through existing criminal laws has become prohibitive without concluding that all or even most risk regulation offenses—involving, for example, environmental or food safety enforcement—should be removed from criminal law’s purview. Once the difficulty of defining what is a “real” crime is acknowledged, it takes a bit more explaining to determine what the real “crime threat experienced” is for purposes of deciding on an appropriate response.

Which brings us to a final observation relating to the role of crime control in the modern nation-state. Simon sometimes seems to argue that “governing through crime” gained a stubborn measure of path-dependent inertia over time (pp 278–79). Yet he also frames the existing focus on crime control as a path chosen by politicians, and ratified by (at least some of) the public. In the narrative, it would have been possible for Americans to choose a different path that was far less concerned with crime control and more concerned with a range of challenges from declaring war on cancer to redesigning urban neighborhoods on a more human scale. To the extent that “governing through crime” is problematic, though, its roots may run deeper than Simon acknowledges, to the very nature of the modern nation-state. Although some politicians have proven more adept at the politics of security than others, presidents from Roosevelt to Bush have played the security theme in the course of advancing their agendas. In other nation-states, political strategies claiming to secure a nation’s population against risks resulted in the growth of the welfare state. These developments suggest a powerful connection between the success of a

Simon’s point here is a plea to avoid such open-ended definitions, and instead to urge for a more measured response proportionate to “actual” or “genuine” threats to persons or property.

modern nation-state and its ability to meet public expectations of security against social risks.

Nations tend to differ across time and space in their responses to risk. Their citizens sometimes prioritize different risk reduction goals. Distinct institutions affect what resources the state can deploy to manage those risks, what limits on state authority can be enforced, and who has authority to veto particular policies. The question remains, however, whether one can expect national governments to ignore public concerns about crime for very long given plausible assumptions about competitive political pressures, preexisting (if latent) public expectations that government would engage in order-maintenance activities, and at least some connection between public fears and actual criminal activity. In 1987, for example, the homicide rate in the United States was more than seven times that of Canada or Finland, twenty times that of Germany, and forty times that of Japan.⁷³ Given these realities, one suspects that choices about “governing through crime” both past and future are likely to be ones of degree, reflecting the social context, rather than categorical ones. One may rightly desire a society that is less fearful, less reliant on criminal justice to stem drug abuse, and less willing to let mandatory minimums eliminate sensible pockets of judicial discretion. Reformers can expect to make incremental, politically feasible changes, particularly when they seek to enact policies that are framed as elements of a strategy to achieve desired social goals. But unless one contemplates more radical changes in the nature of the modern nation-state, one should seriously question scenarios premised on the idea that politicians are capable of blithely relinquishing the impulse to engage in some version of “governing through crime.”

CONCLUSION

In the late 1970s, as interest in crime control was growing across the United States, political scientist William Muir completed a multi-year study of officers in a nearby police department. Like Simon, Muir was a distinguished scholar at the University of California, Berkeley, fascinated by the intersection of governance and crime control. He was particularly drawn to police officers’ combination of discretion and authority to dispense physical force, analogizing them to political decisionmakers forced to make difficult, coercive choices that could never entirely satisfy all parties involved. Coining the phrase “street-corner politicians” to describe cops, Muir noted that “policemen and

⁷³ See Friedman, *Crime and Punishment* at 451 (cited in note 1).

politicians [alike] engage in getting others to submit to events under coercion and do so recurrently.”⁷⁴ What he found is that effective cops tended to have a “tragic” perspective about the difficulty of disentangling the vices from the virtues of coercive power, in the tradition of Machiavelli:

A policeman becomes a good policeman to the extent that he develops two virtues. Intellectually, he has to grasp the nature of human suffering. Morally, he has to resolve the contradiction of achieving just ends with coercive means. A patrolman who develops this tragic sense and moral equanimity tends to grow in the job, increasing in confidence, skill, sensitivity, and awareness.⁷⁵

Muir’s specific concern was the micropolitics of governance and crime. Perhaps a similarly tragic perspective fits the macropolitics of crime control, particularly once observers recognize the full extent of political forces involved. The connection between governance of a modern nation-state and criminal justice is plainly manifest in how advanced industrialized countries define acceptable social behavior through crime, empower bureaucratic organizations to regulate economic and social activity, and (increasingly) use crime as a symbol for a broad range of social ills from which the nation-state is supposed to protect society. At the same time, a bleaker side of that connection is apparent in the extent to which American society is epitomized by an equilibrium of mass incarceration, harsh punishments, and considerable fear of violent crime.

Americans should be troubled, as Simon is, by the ultimate costs of that equilibrium. They live in a world of scarce resources. Whether they realize it, they live with the impact of actual or perceived racial disparities in the criminal justice system. They inhabit a society where some citizens harbor distorted views of particular criminal justice threats. Americans cannot afford to ignore indefinitely the costs of mass imprisonment, the consequences of living amidst an overly fearful public, and the often brutal operation of their criminal justice system. Simon succeeds in identifying serious problems that arise from over-reliance on crime control to address a range of social concerns, such as domestic relations. He cautions that a politics of victims, perpetrators, and blame can run riot if policymakers continually succumb

⁷⁴ William Ker Muir, Jr., *Police: Streetcorner Politicians* 271 (Chicago 1977):

[Politicians and police officers are also alike in that] they are victims of coercion and have to define defenses against it. If there is any important difference between them, it derives from the fact that policemen use, and are subject to, threats more directly than politicians. The offices of patrolmen are on the curbside instead of off corridors. They are streetcorner politicians.

⁷⁵ *Id.* at 3–4.

to the temptation of governance by crime control measure. Simon is right to raise these concerns.

Yet the story of crime and governance has other chapters, too. Criminal enforcement bureaucracies possess characteristics that make them potentially useful in unique circumstances involving social regulation—as when the FBI engaged in civil rights enforcement in the segregated South or when the FDA’s criminal enforcement office ferrets out particularly damaging violations of pharmaceutical or food safety laws. The macropolitics of race and partisanship heavily colored how politicians adapted the more pervasive war on crime to their agendas, making Johnson different from Nixon, and President Bill Clinton different from President Ronald Reagan. Policies associated with mitigating crime or its causes arguably suffered not only from too much attention but, at times, from neglect amidst a tangle of competing concerns ranging from the Cold War to environmental protection. And criminal enforcement regimes governing firearms, financial institutions, and other domains of regulation were powerfully affected by the subtle relationships between lawmakers, regulatory goals, and law enforcement officials, and not just by public support for the war on crime.

Even if one treats public concern about crime as a recurring theme flowing through the different political economies of criminal justice, the existing architecture of national governance makes it far from obvious how to turn off that spigot. Concerns about criminal justice seem deeply rooted in what citizens of advanced industrialized states expect from their national governments. As Lawrence Friedman put it, “The crime problem . . . cannot be solved in the sense of wiping out crime entirely. What people really want is some way to contain crime; to reduce crime, especially violent crime, to more manageable proportions.”⁷⁶ Little wonder that someone in Johnson’s position, living through the Vietnam War, social upheaval, and rising crime rates, desperately clutched at his eroding New Deal coalition with a crime bill.

Johnson’s crime bill matured in an American political environment of growing violence, racial tensions, and public controversy uniquely fertile to such legislation. Johnson’s predicament, however, is not entirely unique—or even uniquely American. If the political viability of the nation-state is intimately linked to the provision of domestic security and the waging of war, then politicians can only hold off for so long before declaring war on the forces generating threats to society.⁷⁷ Perhaps instinctively recognizing this state of affairs, Simon is

⁷⁶ Friedman, *Crime and Punishment* at 463 (cited in note 1).

⁷⁷ See, for example, Martin Van Creveld, *The Rise and Decline of the State* 189–91, 336–37 (1999); Charles Tilly, *Coercion, Capital, and European States, AD 990–1992* 183 (Blackwell 1992).

ultimately doubtful about the possibility of entirely halting politicians' tendency to declare (literal or metaphoric) war (p 259). He would instead prefer a different kind of war, focusing on cancer rather than crime. "Governing through a renewed war on the sources of cancer," he writes, "offers more promising material for restructuring governance than does crime" (p 280). The resulting vision is one where future iterations of Johnson's predicament are transformed into a simple choice between two overarching social goals. The goals are taken to exist in equipoise, with either a war on crime or against cancer capable of generating a persuasive map of the relationship between state and citizen.

But just as the concept of crime itself often spawns an oversimplified narrative of harm against identifiable victims, so too does the preceding vision of a stark choice between a war on crime and a war on cancer. It would be a less complicated world if one could readily equate an indictment of a particular criminal justice system with a basis for rejecting the political imperative to control crime. The devil is in the details. Whether to retire the war on crime becomes an exceedingly thorny question, for example, if one recognizes that the nation-state's ability to wage a war on cancer—to collect taxes, to fund health insurance for the elderly, to spend money on medical research, to run a public health infrastructure, and to keep together a fragile political coalition in support of these goals—is perhaps powerfully linked to its capacity for earning public legitimacy by waging a war on crime.

This reality does not entirely constrain the content of a war on crime. It does, however, hint at why Johnson poured his frenetic energy into the politics of crime. He did so at the same time he was engineering legislative passage of Medicare and disrupting the largely race-obsessed Democratic political coalition in the South by supporting landmark civil rights statutes. In effect, the American state's complicated relationship to criminal justice in domains ranging from social insurance to food safety to national security reflects not only political choices about how to enforce policies, but how to legitimize them. Which is why principled observers may ultimately find that governing *without* crime carries a steeper price than Simon admits, and why aspiring reformers may do well to invest their energies in reshaping the war on crime along a far less draconian mold rather than merely declaring war on the war.