

# Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives

Allegra M. McLeod\*

*[M]ost prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk. They do not organize force against being dragged because they know that if they wage this kind of battle they will lose—very possibly lose their lives. The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.<sup>1</sup>*

*I have gradually acquired the belief that the alternative lies in the unfinished, in the sketch, in what is not yet fully existing. The “finished alternative” is “finished” in the double sense of the word.<sup>2</sup>*

## INTRODUCTION

Confronting criminal law's violence calls for an openness to unfinished alternatives—a willingness to engage in partial, in process, incomplete reformist efforts that seek to displace conventional criminal law administration as a primary mechanism for social order maintenance.<sup>3</sup> The entrenched harms entailed by invoking criminal law as a widespread social regulatory framework include at least these: Approximately two million persons in the United States live on any given day caged behind bars, the largest population in the world under criminal supervision.<sup>4</sup>

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\*Associate Professor, Georgetown University Law Center. For generative discussion, insight, and inspiration, I owe thanks to Paul Butler, Sara Sun Beale, David Cole, Angela Harris, Issa Kohler-Hausmann, David Luban, Derin McLeod, Naomi Mezey, Alyson Nelson, Eloise Pasachoff, Nina Pillard, Alicia Plerhoples, Judith Resnik, Alvaro Santos, Louis Michael Seidman, Joshua Teitelbaum, Philomila Tsoukala, Robin West, the editors of *Unbound*, and especially Yxta Murray.

<sup>1</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607 (1986).

<sup>2</sup> THOMAS MATHIESEN, *THE POLITICS OF ABOLITION: ESSAYS IN POLITICAL ACTION THEORY* 13 (1974).

<sup>3</sup> See also Cover, *supra* note 1, at 1601 (“Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”).

<sup>4</sup> See, e.g., Carol S. Steiker, *Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1, 1 (2011); see also LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATION IN THE UNITED STATES*, 2010, at 1 (2011); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER, Jan. 30, 2012, at 72 (“The scale and brutality of our prisons are the moral scandal of American life.”). The United States is an outlier relative to other countries in both its incarceration rates and public safety outcomes, particularly with regard to gun violence and recidivism. See, e.g., NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY*

Conditions of confinement in U.S. prisons and jails are often brutal, as the following images from the record accompanying the U.S. Supreme Court's 2011 opinion in *Brown v. Plata* reflect:



Mentally ill inmates in holding cages in California prison system.<sup>5</sup>



California Institution for Men, August 7, 2006.<sup>6</sup>

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DEMOCRACIES (2008); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/us/23prison.html>; see also Kieran Healy, *America is a Violent Country*, (Jul. 12, 2012), <http://www.kieranhealy.org/blog/archives/2012/07/20/america-is-a-violent-country/> (demonstrating that the United States is more violent than other OECD countries (except possibly Estonia and Mexico)); PEW CENTER ON THE STATES, STATE OF RECIDIVISM (2011).

<sup>5</sup> See Dave Gilson, *Slideshow: California's Jam-Packed Prisons*, MOTHER JONES, (May 23, 2011), <http://www.motherjones.com/slideshows/2011/05/california-prison-overcrowding-photos/holding-cages> (describing and displaying images from the record in *Brown v. Plata* not incorporated in the Court's opinion).

Millions more are routinely subject to humiliating, racially and class-skewed policing practices, to the looming threat of immediate incarceration, and to the stigma of arrest, criminal conviction, probation, and parole.<sup>7</sup> These intrusions visit long-lasting physical, psychic and social-structural injuries upon those subject to them.<sup>8</sup> What is more, these practices collectively ingrain an over-simplification of complex social problems—mental illness, addiction, homelessness, and violence—reducing these problems to binary conceptualizations involving criminal wrongdoers and innocent aggrieved victims, and in turn foreclosing more careful, institutionally or context-sensitive regulatory interventions.<sup>9</sup> All of this carries exorbitant costs: spending on prisons outpaces investments in education, early childhood programs, and public health; and family ties are routinely ruptured by criminal law's

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<sup>6</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1950 app. A. (2011).

<sup>7</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999). There are various prevalent forms of sub-felony penal control beyond conventional criminal case processing, including in the misdemeanor and community supervision contexts. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. (forthcoming 2013); Michelle Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51 (2013).

<sup>8</sup> See, e.g., BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); see also Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in *LAW AS PUNISHMENT/LAW AS REGULATION* 155 (Austin Sarat et al. eds.) (2011) (“[S]tops and frisks cause injuries similar to those of illegal forms of tortures . . .”); Andrew Gelman et al., *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007).

<sup>9</sup> See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002) (exploring how crime and punishment policies are linked to fundamental problems of governing contemporary societies); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2010) (examining how faith in “free markets” has severely distorted U.S. punishment practices); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons From the Deinstitutionalization of Mental Hospitals in the 1960s* (John M. Olin Law & Economics Working paper No. 542) available at [http://www.law.uchicago.edu/files/file/542-335-bh-incarceration\\_0.pdf](http://www.law.uchicago.edu/files/file/542-335-bh-incarceration_0.pdf). (tracing the relationship between deinstitutionalization and the rise of mass incarceration and arguing that the deinstitutionalization of mental hospitals in the 1960s offers important lessons to those who seek to reduce the incarcerated population in the United States in the twenty-first century); Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934–2001*, 40 J. LEGAL STUD. 39, 41 (2011) (“[P]atterns of mental hospitalization versus incarceration are practically inverted over the 20th and 21st centuries.”).

intervention in ways that contribute to inter-generational cycles of poverty, underemployment, and disadvantage.<sup>10</sup>

Simultaneously, the over-reliance on criminal law to manage an array of social concerns frequently fails to fulfill other socially valuable ends for which criminal law is supposedly intended: honoring the interests of victims, and preventing assault, theft and related misconduct.<sup>11</sup> In fact, criminal proceedings routinely re-traumatize victims of serious crime through a prosecutorial process that fails to provide promised closure or emotional repair to aggrieved persons.<sup>12</sup> Moreover, both common sense and substantial empirical evidence suggest that the vast size of the population under criminal control, the excessive length of sentences, the absence of rehabilitative opportunities for the convicted, and the degree of over-criminalization are such that deterrence goals are not advanced and may even be undermined.<sup>13</sup>

Despite all of these indications that the status quo in U.S. criminal law administration is profoundly dysfunctional—an institutional manifestation of the deepest pathologies in our society—contemporary criminal law reform efforts and scholarship focus almost exclusively on relatively limited modifications to the status

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<sup>10</sup> See, e.g., John Schmitt et al., CENTER FOR ECONOMIC AND SOCIAL POLICY, THE HIGH BUDGETARY COST OF INCARCERATION (2010).

<sup>11</sup> See, e.g., Gerald T. Hotaling & Eve S. Buzawa, *Forgoing Criminal Justice Assistance: The Non-Reporting of New Incidents of Abuse in a Court Sample of Domestic Violence Victims*, (January, 2003) (unpublished manuscript) available at <https://www.ncjrs.gov/pdffiles1/nij/grants/195667.pdf>. (finding victims of domestic violence who initially turn to the criminal justice system for intervention may be so dissatisfied with the outcome that they do not call the police the next time they need help); Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CAL. L. REV. 1631, 1659 (2012) (“Thousands of women submit rape kits to the police and wait, only to have them stowed or thrown away.”); Editorial, *Evidence of Rape Ignored*, N.Y. TIMES, Jan. 20, 2013 (citing as many as 400,000 untested stowed away rape kits in the United States).

<sup>12</sup> See, e.g., Patrice Yancey Martin & R. Marlene Powell, *Accounting for the “Second Assault”:* *Legal Organizations’ Framing of Rape Victims*, 19 LAW & SOC. INQUIRY 853, 856 (1994) (“[W]omen whose cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress.”).

<sup>13</sup> See, e.g., A. Mitchell Polinsky & Steven Shavell, *On the Disutility & Discounting of Imprisonment & the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999) (considering diminishing returns in terms of deterrence of increasing sentence lengths); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2002) (“[E]ven if a deterrence distribution has a net immediate crime-control benefit over a justice distribution, over time that benefit may be outweighed by the slowly building criminogenic effect that results when citizens come to hold their criminal justice system in contempt.”); see also Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 1 (2002) (demonstrating in the context of statutes of limitations that delayed sentencing for a crime for more than five years after its commission is likely inefficient from a deterrence perspective).

quo.<sup>14</sup> These modifications may well render criminal law administration more humane, but fail to substitute alternative institutions or approaches to realize social order maintenance goals.<sup>15</sup> In particular, these reformist efforts continue to rely on conventional criminal regulatory approaches to a wide array of social concerns, with all of their associated violence: on criminalization, policing, arrest, prosecution, incarceration, probation, and parole. Thus, even as these reformist approaches may offer substantial benefits, they remain wed to institutions that perpetrate criminal law's violence and to limited temporal and imaginative horizons.

By contrast, this essay explores a series of criminal law reform alternatives that offer more fundamental substitutes for criminal law administration. More specifically, this essay focuses on the possibilities of alternatives to criminal case processing that substitute for the order-maintaining functions currently attempted through criminal law enforcement. These alternatives hold the potential to draw into service separate institutions and mechanisms from those typically associated with criminal law administration. Further, these alternatives enlist on more equal footing and invite feedback and input from persons subject to criminal law enforcement.

Importantly, this latter subset of reform alternatives is decidedly *unfinished*, partial, in process. I will argue that this unfinished quality ought not to be denied as an embarrassment or flaw, but instead should be embraced as a source of critical strength and possibility. In this dimension, this essay is a preliminary call for more attention on the part of legal scholars and criminal law reform advocates to unfinished partial substitutes for the order-maintaining work performed by criminal law administration—a call to attend further to as yet incomplete reformist alternatives that may portend less violent and more self-determined ways of achieving some measure of social order and collective peace. I begin to develop this argument by drawing, in particular, on the work of the Norwegian social theorist and prison abolitionist Thomas Mathiesen.

The essay proceeds in three parts. Part One introduces several influential contemporary criminal law reformist approaches and argues that whatever their considerable promise, they are limited as alternatives to social order maintenance through conventional criminal law enforcement because of their fundamental attachment to the status quo in U.S. criminal law administration, with all of its associated violence. Part Two begins to examine the contours and theoretical

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<sup>14</sup> See DAVID M. KENNEDY, *DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP AND THE END OF VIOLENCE IN INNER-CITY AMERICA* (2011) (proposing offering second chances coupled with credible threats of harsh consequences to drug and gun offenders); Mark A.R. Kleiman & Kelsey Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO STATE J. CRIM. L. 89, 92 (2011) (proposing issuing credible threats to subset of offenders to reduce violations and incarcerations); FRANKLIN ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2011) (examining likely beneficial impacts in New York City associated with some combination of "hot spot" policing, stop and frisk, and increased numbers of police and accountability mechanisms within police departments).

<sup>15</sup> See KENNEDY, *supra* note 14; Kleiman & Hollander, *supra* note 14; ZIMRING *supra* note 14.

promise of “unfinished alternatives.” Part Three introduces five specific examples of unfinished alternatives in the criminal law context. The “unfinished” quality of each of these five alternatives—their partial, aspirational, in-process character—is crucial to their potential to usher in new ways of thinking and speaking about criminal law, and perhaps ultimately a reformed social order that involves less violence than the status quo in criminally-oriented social order maintenance.

### *I. Landscapes of Contemporary U.S. Criminal Law Reform and Scholarship*

This Part explores several influential contemporary criminal law reform accounts, each of which takes both practically applied and scholarly forms. I argue in this Part that despite holding substantial advantages over the status quo in U.S. criminal law administration, each of these reformist projects is significantly limited in that each relies fundamentally on maintaining a primary and central role for existing policing, prosecution, or incarceration-focused mechanisms of social order maintenance. In this respect, each falls short in enabling new institutional and conceptual means of managing the problems currently predominately addressed through criminal law enforcement. This ought to be of at least some concern to those interested in confronting criminal law’s violence given the perhaps inevitable indignities and harms associated with “stop and frisk” practices, hot spot policing, arrest, jail confinement, and other forms of criminal supervision.<sup>16</sup>

#### *A. “Flash Incarceration” and Project HOPE*

With far-reaching impact, Mark A. R. Kleiman, professor of Public Policy at the UCLA School of Public Affairs, has argued powerfully for a reform program of flash incarceration-backed intensive probation. In *When Brute Force Fails: How to Have Less Crime and Less Punishment*, Kleiman proposes eliminating randomized severity in criminal sentencing and concentrating on the swiftness and certainty of individually-tailored intensive probation supervision backed by the threat of immediate short-term jail-based punishment.<sup>17</sup> According to Kleiman and his collaborators, a program of large-scale flash incarceration-backed intensive probation would reduce dramatically both crime and incarceration. Kleiman maintains that this would decrease overall rates of offending through more efficacious and targeted deterrence and would permit

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<sup>16</sup> See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2164-2166 (2002) (“Stops, frisks, arrests, detentions, questioning—these things are generally unpleasant and can be seriously harmful ... Anytime the government does something that has concentrated costs but diffused benefits, there is a danger that it will do too much ... [P]olitical checks will not do the job, given politicians’ natural tendency to worry too little about those who bear the nonmonetary cost of police work ...”); see also Butler, *supra* note 8 (noting the parallels between “stop and frisk,” torture, and sexual harassment).

<sup>17</sup> See MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* (2009).

more persons to be released on intensively supervised probation, markedly shrinking the size of incarcerated populations in prison (as opposed to jail).<sup>18</sup>

Kleiman's proposals were first enthusiastically (and in important regards successfully) embraced by Judge Steven Alm in his Project HOPE probation program in Honolulu, Hawaii.<sup>19</sup> Project HOPE deploys Kleiman's 5 C formula for effective deterrence, which stresses *Concentration* of the probation department's attention on a subset of the caseload that permits the supervising program to *Communicate* a *Credible* warning of high-*Certainty*, high-*Celerity* sanction to each probationer.<sup>20</sup> Through Project HOPE, Judge Alm supervises a group of high-risk drug-involved offenders; he requires unusually intensive supervision and reporting; he warns that violation (primarily failed or "dirty" drug testing) will result in an immediate hearing and revocation, but he reduces the typical sanction to short two-day stays in jail as opposed to many weeks, months, or years in prison.<sup>21</sup> Project HOPE probationers are required to call a number every morning to learn if they will be randomly drug tested. They are warned by Judge Alm before being assigned to Project HOPE that violation of the terms of their probation, including failure to phone in, will lead to immediate jail sanctions in contrast to the conventional supervisory regime in which individuals are often permitted numerous lapses with less stringent supervision prior to having their probation revoked and being sentenced to prison. Project HOPE probationers are often randomly drug tested after phoning in, approximately six times per month. If they test positive they are immediately sent to jail for a relatively short stay.<sup>22</sup>

In a randomized controlled trial HOPE probationers had lowered violation rates despite being more strictly supervised. Arrests for new felonies were also far less frequent in the experimental group with days in prison reduced by over half.<sup>23</sup> Jail time, however, was roughly equivalent for the two groups. Similar programs are now being implemented in Alaska, California and Delaware, among other states, and the Bureau of Justice Assistance will fund four replication programs, which contractors for the National Institute of Justice will evaluate.<sup>24</sup>

Notwithstanding the notable cost-savings associated with reduced imprisonment and reduced recidivism, the Project HOPE approach is still a criminal law reform strategy that fundamentally relies on incarceration (and may result in equivalent use of jail-based sentencing) even if it does in important respects (and this is hugely significant) appear to reduce prison sentence lengths. Simply put, jail time is equivalent for both groups in the HOPE study even if prison time is reduced.

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<sup>18</sup> *See id.*

<sup>19</sup> *See* Kleiman & Hollander, *supra* note 14, at 102.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

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

<sup>23</sup> *Id.* at 103.

<sup>24</sup> *Id.* at 103.

Further, even short stays in jail may significantly disrupt a person's employment, family life, and have other significant deleterious consequences.

It may also be the case that the prison-reducing, cost-reducing results in the Project HOPE study have something to do with the charismatic personality and persuasive capacity of Judge Alm, who is extraordinarily thoughtful and committed to his program.<sup>25</sup> The results produced by Judge Alm may therefore not be replicable. Moreover, it is too early to tell whether the warning regime and more effective probation officer engagement in the Hawaii program *or* the monitoring structure and flash incarceration are the more critical causal variables.

Finally, and most significantly, though, are the baselines according to which "success" is determined and the limited normative vision for change in criminal law of Project HOPE and Kleiman's 5Cs deterrence model, as compared to an alternative that would more fundamentally confront criminal law's violence. Project HOPE's success is demonstrated by comparison to an utterly broken baseline—the status quo in criminal law administration and underfunded and poorly orchestrated probation and parole systems—characterized by extraordinarily high recidivism and prison readmission, by gross racial and class disproportion, wasted lives and resources, and minimal deterrent or other meaningful enforcement for the populations most often targeted.<sup>26</sup> So although Kleiman's proposed intensive monitoring and flash incarceration regime may be a very significant improvement on that status quo, that by itself does not make it a desirable (let alone optimal) reformist alternative to conventional criminal law-oriented social order maintenance. It is not an alternative means of social order maintenance but simply a limited, if still significant, modification of the most dysfunctional aspects of the status quo regime. And it is a modification that relies on the same instrumentalities—arrest, policing, jailing, and probation or parole—that entail much of criminal law's violence, even if to a lesser degree and extent than the currently predominant approaches to supervised release.

### B. "Don't Shoot" and Operation Ceasefire

David Kennedy, professor of Criminal Justice at John Jay College of Criminal Justice, writes about, studies, and organizes "Operation Ceasefire" programming. Kennedy helped spearhead this deterrence-focused criminal law reform initiative beginning in Boston in the late 1990s.<sup>27</sup> Like Kleiman's work and Judge Alm's Project HOPE probation program, Kennedy's "Ceasefire" interventions are also "focused deterrence" efforts, which offer social support to offenders if they abstain from violent behavior but threaten harsh enforcement in the instance of any

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<sup>25</sup> See Hon. Steven S. Alm, *Triage: A New Medical Model for Sentencing and Probation*, PERSPECTIVES: AM. PROBATION & PAROLE ASS'N. 42 (Winter 2012).

<sup>26</sup> See PEW CENTER ON THE STATES, STATE OF RECIDIVISM 12 (2011) (finding that between 8 to 50% of new prison admissions arise from violation of terms of probation or parole, often for technical infractions not constituting new crimes).

<sup>27</sup> See KENNEDY, *supra* note 14.



violation.<sup>28</sup> The “Ceasefire” interventions generally unfold as follows: Police identify well-known offenders in a given community, establish cases against those individuals, but in lieu of prosecuting invite those persons to a meeting where they are warned that unless the shooting or drug dealing stops, they face immediate arrest, conviction, and a lengthy prison term. The identified individuals are also provided with information about social service programming.<sup>29</sup> According to Kennedy, homicides have fallen in multiple cities as a result of “Ceasefire” programming. However, none of these results are necessarily attributable to Kennedy’s interventions as it is hard to disaggregate the effects of “Ceasefire” programming from other factors that may have contributed to declining crime in those jurisdictions.<sup>30</sup>

Kennedy’s project, like Kleiman’s, ultimately relies on the threat of lengthy prison sentences, police presence, and looming prosecutions as a means of achieving focused deterrence. Kennedy’s account too, then, fails to present a fundamental alternative to social order maintenance organized around policing, prosecution, and prison-based sentencing. Though it provides an important improvement over the status quo where it reduces violence and incarceration, “Ceasefire” programming similarly modifies minimally the operation of existing crime-governance arrangements without departing from them.<sup>31</sup> Again, the central institutions that are enlisted as drivers of reform are threatened prosecution and incarceration, with all of the violence those institutions entail. And though the deterrence message may be delivered in part by community members and not just by police and prosecutors, the approach to order maintenance is not substantially more self-determined than conventional criminal law administration. This is not to say, of course, that “Ceasefire” programming may not promise substantial benefits, but that it offers a limited temporal and institutional account of alternative means of responding to the complex social concerns currently regulated all too often through criminal law enforcement.

### C. “Hot Spot” Policing, Stop and Frisk, and the City That Became Safe

In *The City That Became Safe: New York’s Lessons For Urban Crime and Its Control*, Franklin Zimring, a law professor and criminologist at UC Berkeley, sets out to understand how New York City managed to reduce by 80 percent rates of homicide, robbery, and burglary at the same time as the incarceration rate in New York State decreased by 28 percent between 1990 and 2008.<sup>32</sup> The decrease in both crime and incarceration in New York is particularly striking given that over the same period the national incarceration rate increased by 65 percent and crime fell by only 40 percent.<sup>33</sup> Zimring considers a series of possible explanations and concludes,

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<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See SIMON, *supra* note 9 (exploring crime-governance and its impact on U.S. carceral practices).

<sup>32</sup> See ZIMRING, *supra* note 14.

<sup>33</sup> See *id.*

effectively by process of elimination, that this additional crime decline is attributable to some combination of “hot spot” policing (where police focus on crime “hot spots”), stop and frisk, increased numbers of police, and increased policing accountability mechanisms such as Compstat.<sup>34</sup> Although it is explanatory rather than prescriptive, Zimring’s account, like Kleiman’s and Kennedy’s, has received a great deal of attention from criminal justice policy-makers and has been embraced by some as a way to envision a criminal law reform program organized around “smart policing” that would simultaneously reduce crime and incarceration.<sup>35</sup>

Even as there are clear benefits associated with the reductions in violent crime and rates of incarceration suggested by Zimring’s analysis, the methods of hot spot policing, diversion of public resources for increased policing capacity, and stop and frisk themselves produce social harms.<sup>36</sup> For instance, “smart policing,” though undoubtedly an improvement in terms of cost-savings and improved welfare over larger-scale incarceration, continues to locate social order maintenance in conventional criminal law enforcement institutions and in policing tactics that entail not insubstantial indignities and painful intrusions.<sup>37</sup> These approaches similarly fail to transform the ethos of the relevant institutions so that they might perpetuate less violence. Accordingly, Zimring’s account and the New York City policing reforms fail to depart from the central institutions, approaches, and power relationships that contribute to perpetuating criminal law’s core harms. Whatever other promise those reforms hold, they are thus limited as violence-reducing alternative approaches to social order maintenance through criminal law administration.

#### *D. Cross-Cutting Imaginative and Institutional Limitations: Revisiting the “Trolley Problem”*

The famous “trolley problem” may help to capture more broadly and metaphorically some of the crucial limitations that cut across these and various other contemporary criminal law reform accounts.<sup>38</sup> The trolley problem is a moral paradox or hypothetical first posed by the philosopher Philippa Foot in her 1967 paper, “Abortion and the Doctrine of Double Effect.”<sup>39</sup> The most common iteration of the problem relates to a trolley on a track. The trolley is careening toward a group

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<sup>34</sup> See *id.*

<sup>35</sup> See, e.g., Gopnik, *supra* note 4; Heather MacDonald, *It’s the Cops, Stupid!*, NEW REPUBLIC (Feb. 2, 2012), <http://www.newrepublic.com/book/review/franklin-zimring-new-york-urban-crime-control-city-safe#>.

<sup>36</sup> See, e.g., Butler, *supra* note 8; Gelman, *supra* note 8.

<sup>37</sup> See Butler, *supra* note 8; Gelman, *supra* note 8.

<sup>38</sup> See, e.g., Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395-1415 (1985).

<sup>39</sup> Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect* in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY (Oxford: Basil Blackwell, 1978) (originally appeared in the *Oxford Review*, No. 5, 1967).

of persons who face certain death if they are hit. One is asked to imagine oneself as the conductor and to choose whether to divert the trolley from the course where it will kill many more people (by flipping a switch) to a course where it will kill only one. The choice is effectively between sitting passively by as a larger group of persons is killed or flipping the switch to prevent those persons' deaths but actively contributing to the death of one innocent person.

The original formulation of the problem by Foot is closer to the subject of criminal law's violence:

Suppose that a judge or magistrate is faced with rioters demanding that a culprit be found for a certain crime and threatening otherwise to take their own bloody revenge on a particular section of the community. The real culprit being unknown, the judge sees himself as able to prevent the bloodshed only by framing some innocent person and having him executed.<sup>40</sup>

This is a difficult and painful choice that confronts the judge (or the trolley conductor) and the problem is used, among other purposes, to test our moral intuitions about consequentialism.

The argument in the foregoing and following sections, however, is that we ought to resist the hypothetical in some measure. The trolley problem may be resisted because it presents a choice created out of a *false sense of necessity*. And in our criminal law and policy we are often acting out of a similar sense of false necessity.

The judge in Foot's formulation of the problem may turn to other institutions, may act to bring about changes in the governing regime, in legal institutional design, in political design, in ways that refuse the rioters their claim to harm others and refuse to frame an innocent person. Likewise, in confronting criminal law's violence, an important response may be to recognize that we have too readily accepted at the outset a bad set of political and institutional design choices. These choices could be rejected, with the insistence instead that it ought to be possible to manage drastically fewer problems relating to mental illness and addiction, among other complex social concerns, through criminal law administration. In other words, other social institutional and political design choices might obviate the trolley problem that faces us in some significant measure.

## II. *The Alternative as Unfinished*

This Part will begin to explore how it might be both important and necessary to undertake criminal law reform initiatives that are less comprehensive, less complete in their proposed modifications to the status quo in criminal law administration *and* less reliant on the institutions of policing, prosecution and prison or jail-based punishment. The unfinished alternatives explored in this and the following Part seek to confront criminal law's violence by substituting *alternative mechanisms* of social order maintenance and by enlisting in the project of reform other social entities and persons subject to enforcement regimes themselves. Accordingly, these alternatives may

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<sup>40</sup> *Id.* at 23.

enable other social institutional and political design choices, other less violent means of achieving some semblance of social order or collective peace.

What more precisely is an “unfinished alternative” or the “alternative as unfinished”? An unfinished alternative is a “sketch,” a beginning, an attempt to change the existing state of affairs through an intervention that is partial, incomplete and in process. In his book *The Politics of Abolition*, Norwegian social theorist and prison abolitionist Thomas Mathiesen explains some of the promise of unfinished alternatives as follows:

“[A]ny attempt to change the existing order into something completely finished, a fully formed entity, is destined to fail . . . .”<sup>41</sup> An “alternative is ‘alternative’ in so far as it is not based on the premises of the old system, but on its own premises.”<sup>42</sup>

Any viable alternative approach must *contradict* at least certain premises of the old system and at the same time *compete* with the system to be replaced.<sup>43</sup> In other words, for an alternative to be truly distinct from the existing state of affairs, it must in some significant manner be dissimilar from things as they are (it must contradict); though, to be plausible as an alternative, any proposal for change must not be so contradictory as to be unrecognizable and unfathomable in light of the world as it is (it must compete).<sup>44</sup>

When a truly contradictory alternative is fully formed, that is “finished,” in the context of the existing system it will likely be rejected out of hand because it is so foreign to the existing system as to be unrecognizable as a viable state of affairs. It is thus contradictory but non-competing: such fully formed contradictions will “be disregarded as permanently ‘outside’ and thereby be set aside.”<sup>45</sup>

Mathiesen clarifies that “the concept of competition takes, as its point of departure, the subjective standpoint of the satisfied system-member being confronted with an opposition. The political task is that of exposing to such a member the insufficiency of being satisfied with the system as it is. When this is exposed, the opposition competes.”<sup>46</sup>

Therefore, any meaningful workable alternative must be articulable in terms that are recognizable and conceivable to someone embedded in the existing state of affairs. However, such an alternative must retain in significant measure its inconsistent features, so as to remain distinct from the status quo. Another problem confronted by

<sup>41</sup> See MATHIESEN, *supra* note 2, at 13.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 14.

<sup>44</sup> See *id.*

(“An arrangement which does not compete with the old system, an arrangement which is not relevant for the members of the old system . . . is no alternative. The main problem, then, is that of obtaining the combination of the contradicting and the competing; the main problem is that of avoiding that your contradiction becomes non-competing and that your competition becomes agreement. The main aim is that of attaining the competing contradiction.”)

<sup>45</sup> *Id.* at 14–15.

<sup>46</sup> *Id.* at 14.

“finished” (i.e. complete, fully formed) alternatives is that in order to remain conceivable they cease to be truly alternative, that is, distinct from and oppositional to the status quo.

The unfinished alternative is what permits the competing contradiction, because an alternative that seeks to express a different and distinct arrangement but in a partial manner that does not entirely displace or re-make the status quo (i.e. is unfinished) can remain both *unlike* existing arrangements and *legible* within them. Put otherwise, the unfinished alternative presents the possibility of sustained competition and contradiction within the existing system because although it is truly alternative in the sense of promising something different, it is decidedly not fully formed, and so can be envisioned as coming into being incrementally within the bounds of the existing system, even as, at some later point, the alternative itself may usher in a new state of affairs that will displace the existing state of affairs.

This partial or suggested quality is necessary too because it is not possible to generate an alternative that is truly and utterly distinct from the status quo as our imaginations are constrained by our existing social arrangements. The unfinished alternative emerges when we refuse “to remain silent concerning that which we cannot talk about.”<sup>47</sup>

Of course, it is an immense challenge to maintain a sketch as a sketch in political life. As Mathiesen recognizes: “An enormous political pressure exists in the direction of completing the sketch into a finished drawing, and thereby ending the growth of the product.”<sup>48</sup> But in our grasping attempts to fashion a competing, contradictory, and in that sense new state of affairs, we “express the unfinished.”<sup>49</sup>

The following table captures some of the limits and possibilities associated with unfinished alternatives reform proposals that aim both to compete with and contradict the status quo.<sup>50</sup>

<i>The proposal is</i>	<b>Foreign</b>	<b>Integrated</b>
<b>Suggested</b>	Competing contradiction (alternative)	Competing agreement
<b>Fully Formed</b>	Non-competing contradiction	Non-competing agreement

Mathiesen offers several examples of “unfinished” alternatives. These include love and the “treatment experiment” in Scandinavian criminal justice policy that unfolded in concert with the advocacy work of a prison reform organization KRUM (the Norwegian Association for Penal Reform).

Love is unfinished for “love is boundless.”<sup>51</sup> Love’s precise beginnings and endings are uncertain: “We do not know where it will lead us, we do not know where it will

<sup>47</sup> *Id.* at 16 (interpreting Wittgenstein).

<sup>48</sup> *Id.* at 13.

<sup>49</sup> *Id.* at 16.

<sup>50</sup> Lightly adapted from *id.* at 17.

stop. . . . It ceases, is finished, when it is tried out and when its boundaries are clarified and determined—finally drawn. It represents an alternative to ‘the existing state of things:’ to existence in resigned loneliness or routinized marriage.”<sup>52</sup>

In a somewhat more concrete manner, Mathiesen notes the Scandinavian prisoners’ welfare movement organization KRUM and the associated “treatment experiment” existed in “an unfinished state [during their development] . . . .”<sup>53</sup> The modern Scandinavian prison reform movement, Mathiesen explains, began with an unprecedented gathering in the late 1960s of a “Parliament of Thieves” from Denmark, Norway, and Sweden who convened in large numbers and told the public and the press what life in prison was like.<sup>54</sup> Continuing to the present, convicted offenders may obtain furloughs from prison to participate in the organizations’ meetings and conferences.

Numerous reforms in treatment of prisoners and in criminal justice policy have occurred over the period of time in which KRUM and associated organizations have been active. The very unfolding of this experiment—the radical inclusion and collaboration of prisoners, state administrators, and criminal justice policy experts to uncertain ends—presented an alternative to the established state of things, for example to traditional hierarchically-structured hospitals and prisons.<sup>55</sup> Over time, Norway’s prison movement, through KRUM and related organizations, brought about a radical shift in criminal law and prison administration in the region. Minor offending conduct was effectively decriminalized and more serious conduct is punishable by a maximum of twenty-one years incarceration.<sup>56</sup> On Norway’s Bastoy Prison Island, which houses serious violent offenders, including persons who have committed murder, the “governor” of the prison is a clinical psychologist, training to become a prison guard is a three year course, and the goal of the imprisonment experience is for serious offenders to take responsibility for their acts removed from a context where they would pose a threat to others, and to obtain release with the ability to function without violence.<sup>57</sup> Prisoners grow their own food, they live in humane conditions with access to education, work and skills training, and the recidivism rate is 16%, the lowest in Europe and far below that of any U.S. jurisdiction.<sup>58</sup> Conditions in Bastoy, depicted in the image below where an inmate sunbathes on the deck of his bungalow, seek to mimic and improve upon in significant respects conditions to which prisoners might otherwise return upon their release.<sup>59</sup>

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<sup>51</sup> *Id.* at 16–17.

<sup>52</sup> *Id.*

<sup>53</sup> See Thomas Mathiesen, *About Krom – Past – Present – Future* (January 2000), [http://www.krom.no/hva\\_er\\_krom\\_more.php?id=89\\_0\\_26\\_0\\_C](http://www.krom.no/hva_er_krom_more.php?id=89_0_26_0_C).

<sup>54</sup> See *id.*

<sup>55</sup> See MATHIESEN, *supra* note 2, at 17.

<sup>56</sup> See Erwin James, *The Norwegian Prison Where Inmates Are Treated Like People*, *GUARDIAN*, Feb. 24, 2013, G2 at 9.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*



Mathiesen points out, though, that the treatment experiment in the Scandinavian context ceased to be unfinished, when “wondering” withered and “boundaries were drawn,” when the treatment project was incorporated into the establishment, and became integrated with criminalization and punishment or medicalization.<sup>61</sup> Nonetheless, the marked confrontation and contradicting perspectives presented by the reformist coalitions forged through KRUM contributed to substantial shifts in what was conceivable as a response to social disorder.

Crucially, the organization’s efforts reached their greatest potential not in their ultimate, fixed realization but as they came to impact and reshape perspectives on how social order (and criminal law) might be administered. KRUM’s potential inhered in an often grasping, incremental attempt to fashion a social imaginary around a shared set of problems, with unclear temporal horizons, and flexible, in-process organizational or institutional parameters.<sup>62</sup>

“What is strange,” Mathiesen notes, “is that we rarely act in line with this. We rarely view the ‘pioneering stage’ as life itself; rather we tend to view it as ‘only a beginning.’”<sup>63</sup> What Mathiesen’s work offers to contemporary criminal law reformist scholarship and advocacy is a framework within which to engage seriously and learn from unfinished, in-process, and, in that regard, potentially truly alternative initiatives. In contrast to many contemporary criminal law reformist projects, this framework and associated initiatives may promise new and substantially less violent conceptual and institutional approaches to social order maintenance.

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<sup>60</sup> Photograph: Marco Di Lauro.

<sup>61</sup> MATHIESEN, *supra* note 2, at 17.

<sup>62</sup> *See id.*

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

### *III. Unfinished Criminal Law Reformist Alternatives*

This Part begins to consider five criminal law reform innovations which represent unfinished efforts to re-shape criminal law enforcement and social order maintenance practices in a fundamental, thoroughgoing, structural and yet still partial direction. Each of these reformist projects enlists institutions and persons apart from conventional criminal law administrative entities—decriminalization boards, agricultural and infrastructural developers, former narco-cultivators, violence interrupters or community member mediators, and a range of social service providers aligned with certain specialized diversionary courts. Some of these efforts also enlist persons previously subject to criminal law enforcement in the formulation and execution of relevant policies. This expansion in the range of institutions and perspectives brought to bear on the problems of achieving social order promises to improve the self-determining character of resulting policies, and perhaps in so doing to improve perceived legitimacy and compliance, as well as to reduce violence.

#### *A. Decriminalization*

Decriminalization, particularly decriminalization of narcotics-related conduct, may be an important component of confronting criminal law's violence. In the United States, large numbers of persons are arrested for marijuana-related violations, including simple possession, when there is little if any evidence that marijuana causes substantial harm.<sup>64</sup> By some accounts, there were 50,000 arrests in New York City in 2011 for minor possession of marijuana.<sup>65</sup>

Responding to public sentiment that marijuana criminalization in particular is misguided, numerous U.S. jurisdictions have partially decriminalized marijuana possession, including Alaska, California, Colorado, Connecticut, Massachusetts, Minnesota, Oregon, and Washington, among other states.<sup>66</sup> This gradual decriminalization reform will reduce the human and economic costs of large-scale arrest and incarceration of persons for marijuana-related offenses.

Some jurisdictions have gone substantially farther, decriminalizing a greater range of controlled substances and shifting to a public health model for addressing the problem of addiction. In 2001, Portugal, for example, became the first European country to officially abolish all criminal penalties for personal possession of narcotics, including marijuana, cocaine, heroin, and methamphetamine.<sup>67</sup> Individuals found to possess small amounts of these narcotics are sent to a panel composed of a psychologist, social worker, and legal counselor for appropriate treatment. The

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<sup>64</sup> See, e.g., *The Marijuana Arrest Problem, Continued*, N.Y. TIMES, Jul. 4, 2012.

<sup>65</sup> See *id.*

<sup>66</sup> See NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML), STATES THAT HAVE DECRIMINALIZED, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Apr. 24, 2013).

<sup>67</sup> See GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009).



treatment may be refused without criminal punishment and there is no looming threat of jail.<sup>68</sup> A 2009 study by the Cato Institute found that in the five years after personal possession was decriminalized, illegal drug use among teens in Portugal decreased, rates of new HIV infections through sharing of dirty needles declined, and the number of people seeking treatment for drug addiction more than doubled.<sup>69</sup> Following decriminalization, Portugal had lower rates of drug use than other European countries and substantially lower drug use rates than the United States.<sup>70</sup>

Decriminalization undoubtedly raises a host of questions unaddressed in this necessarily preliminary exploration. How far decriminalization could extend and to what categories of drug-related and other conduct is uncertain. It is even unclear whether or how decriminalization would take hold in particular locales subject to pervasive and damaging drug law enforcement. The prospects for decriminalization and its desirability in any given jurisdiction likely depend significantly on local political and other circumstances pertaining to drug markets, patterns of addiction, and broader patterns of interpersonal conflict and harm. But decriminalization is a criminal law reform alternative that may serve to substantially reduce criminal law's violence and to shift resources and attention to other institutions as sites for managing addiction and other forms of social disorder. It is an unfinished alternative that ought to occupy a more prominent place than it currently does in criminal law reformist discourse, both in the narcotics context and in other currently criminalized contexts.

### *B. Alternative Development*

Alternative Development Programming, championed by the United Nations in the criminal law and development context, involves subsidies to narco-cultivators to introduce non-narcotic crops—such as oil palm, which can be used as bio fuel or to make other consumer products—and technical assistance with accessing international markets until the licit alternative becomes self-sustaining.<sup>71</sup> Participation in alternative development programming is often voluntary, not subject to threat of criminal or other legal sanction. Studies of the effects of alternative development programming show that on a local scale many narco-cultivators elect to switch entirely to the licit alternative if it allows them to better provide for their families and enables an improved quality of life.<sup>72</sup> Areas that transition from narco-cultivation to other crops may also experience a significant reduction in the violence associated with narco-trafficking.<sup>73</sup>

One alternative development client, a coffee-growing cooperative in the Cuzco Province of Peru, the Central Cooperativas de la Convención y Lares, increased its

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<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See, e.g.*, U.N. Office on Drugs & Crime, *Alternative Development: A Global Thematic Evaluation: Final Synthesis Report*, at v–vi, 12–13 (Mar. 1, 2005).

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

exports from 3,000 tons in 1997 to 8,000 tons in 2003.<sup>74</sup> Since 1997, the cooperative has exported directly rather than through middlemen, and in 2001 ceased relying on foreign development assistance.<sup>75</sup>

In Colombia's southern Cauca Province, in 1993, where both coca bush and poppy are grown, the U.N. Office on Drugs and Crime helped to support the formation of the Empresa Cooperativa del Sur del Cauca to organize 19 small-farmer producer groups.<sup>76</sup> Along the same lines as the Peruvian coffee growing cooperative, the Colombian organization makes it possible for 1,500 families, many Amerindian, to sell fair trade organic coffee (at twice the farm-gate price of regular coffee) to Europe.<sup>77</sup> Though alternative development programming is not without its problems, limitations, and critics, this particular project has increased the wealth of these farmers through a transition to crops that are more lucrative and secure than their previous livelihoods.<sup>78</sup>

In the coca producing region of the Huallaga Valley in Peru, a producers' association and a processing plant, with initial financial assistance from the United Nations Office on Drugs and Crime shifted to producing palm oil.<sup>79</sup> Palm oil is derived from the fruit of small tropical palm trees and can be used to produce edible vegetable oil, soap, and as an ingredient in bio-fuels.<sup>80</sup> The association and processing plant have assumed a hybrid institutional form, as both cooperative and firm, in which both the association and individual farmers hold shares.

In these programs too the farmers are not forced to participate. Rather, the farmers join the program on a voluntary basis and may transition gradually to the licit crops.<sup>81</sup>

Some Latin American states are also now buying coca crops from narcocultivators to make toothpaste, soap and other consumer products. This is occurring at the same time as certain of the United States-promoted criminally-focused counternarcotics policies are being reconsidered.<sup>82</sup>

Tying social order maintenance to development programming or government buy-outs of narco-crops as an alternative to conventional criminal law intervention is a partial, unfinished alternative in that it is unclear how it would be scaled up and out,

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<sup>74</sup> *Id.* at 5.

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

<sup>76</sup> *Id.* at 6.

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

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 5.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at vii.

<sup>82</sup> *See* Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 *YALE L. & POL'Y REV.* 83, 161 (2010); Jean Friedman-Rudovsky, *Bolivian Buzz: Coca Farmers Switch to Coffee Beans*, *TIME*, Feb. 29, 2012, <http://www.time.com/time/world/article/0,8599,2107750,00.html>; *Evo Morales Launches 'Coca Colla'*, *TELEGRAPH*, Jan. 10, 2010, <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/6962746/Evo-Morales-launches-Coca-Colla.html>.

or how it would interact with campaigns for decriminalization of certain conduct. It is possible to imagine how social order maintenance could be tied to development programming without changes to substantive criminal law, but simply in the face of different discretionary enforcement decision-making, or to imagine alternative development programming as a complement to decriminalization programs.

Unlike some of the influential criminal law reformist approaches examined in Part I, alternative development is not introduced as a model that may be uniformly adopted in other locations or without adjustment outside the narco-cultivation context. And of course, it is important to note that alternative development programming carries its own costs and is not a panacea for the harms of the narcotics trade or narcotics addiction.

For present purposes, it is most significant that alternative livelihoods programs both enlist separate institutions in order maintenance (development organizations, agricultural consultants, exporters, and related actors), in a partial and incremental manner, *and* enable the formation of associations of former narco-cultivators to *self-determine* how best to structure their businesses and maintain security in their respective regions. Additionally, due to this unfinished, context-dependent, incremental approach, alternative development programs may be defined gradually, with experiential and rigorous empirical input over time, in ways that might enable both conceptually and institutionally alternative, and less violent, forms of response to social disorder and unauthorized economic activity.

In these respects, alternative development programming may serve as a model for intervention in domestic narcotics markets in the United States or in other currently criminalized markets. For example, alternative livelihoods could be subsidized for persons involved in selling narcotics in U.S. neighborhoods until licit or preferred alternatives become self-sustaining. More broadly, this model offers a manner of imagining institutional and structural social order maintenance alternatives to predominant reliance on criminal law administrative apparatuses to achieve desired objectives. Small business development assistance operating similarly to the assistance that facilitates alternative livelihoods for narco-cultivators in rural contexts may serve as a means of envisioning less violent incremental intervention in various domains of criminalized conduct, particularly where participation in the licit alternative is voluntary rather than induced through the threat of incarceration.

### *C. Infrastructural Reform*

A movement in criminal justice policy toward “problem-oriented” social order maintenance commends infrastructural and design improvements as a means of crime reduction. Improvements along these lines include investments such as improved street lighting, store design, product design, and facility design.<sup>83</sup> These design

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<sup>83</sup> See, e.g., Ronald V. Clarke & Patricia M. Harris, *Auto Theft and Its Prevention*, 16 CRIME & JUST. 1, 37 (1992) (reviewing how simple design interventions may substantially reduce auto theft); Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 966 (exploring how sprinkler systems may dispel outdoor, open-air drug markets); McLeod, *supra*

reforms may go a considerable distance toward reducing risks of interpersonal violence, including robbery and rape, if places where such offenses occur are better lighted and more secure. The degree to which design—design of physical spaces, cars, windows and the like—could inhibit theft and other interpersonal harm is uncertain, but it is a mode of thinking about social order maintenance and crime prevention that moves toward a focus on space and opportunities to offend rather than on conventional policing, prosecution, and punishment.<sup>84</sup> Further, it is an incremental, partial, in-process approach increasingly embraced by development agencies and progressive law enforcement organizations.<sup>85</sup> The following table reflects how both design modifications and other opportunity and incentive-shaping policy choices may be conceptualized as operating to maintain social order outside the framework of conventional criminal law enforcement, even as these interventions may generate other under-appreciated costs.<sup>86</sup>

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note 82 at 160 (discussing how infrastructure development—including public transportation networks and street lighting projects—may serve as a means of improving citizens' security).

<sup>84</sup> See, e.g., Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

<sup>85</sup> See, e.g., VERA LUCÍA VECENTINI ET AL., INTER-AMERICAN DEV. BANK, PERU: METROPOLITAN LIMA URBAN TRANSPORTATION PROGRAM (PTUL)—NORTH-SOUTH SUBSYSTEM: LOAN PROPOSAL 5, 13, 38 (2004) (proposing that improvements to public safety will be associated with improving public transport and street lighting); see also Clarke, *supra* note 83.

<sup>86</sup> Adapted from CTR. FOR PROBLEM-ORIENTED POLICING, TWENTY-FIVE TECHNIQUES OF SITUATIONAL CRIME PREVENTION (2012), <http://www.popcenter.org/25techniques>.

<i>Increase Effort</i>	<i>Increase Risk</i>	<i>Reduce Rewards</i>	<i>Reduce Provocation</i>	<i>Encourage Pro-Social Behavior</i>
<u>Target harden</u> -steering column locks -anti-robbery screens	<u>Extend guardianship</u> -leave signs of occupancy -neighborhood watch	<u>Conceal targets</u> -unmarked bullion trucks -off-street parking	<u>Reduce frustrations and stress</u> -muted lights -expand seating	<u>Set rules</u> -harassment codes -rental agreements -hotel registration
<u>Control access</u> -electronic card access -entry phones	<u>Assist natural surveillance</u> -improved street lighting -defensible space design	<u>Remove targets</u> -increase women's shelters/refuges -removable car stereo	<u>Avoid disputes</u> -fixed cab fares	<u>Post instructions</u> -"private property" -"no parking" -"extinguish camp fires"
<u>Screen exits</u> -electronic merchandise tags	<u>Reduce anonymity</u> -taxi driver IDs -school uniforms	<u>Identify property</u> -property marking	<u>Reduce emotional arousal</u> -prohibit/ discourage racial invective	<u>Alert conscience</u> -roadside speed display boards -signatures for customs declar.
<u>Deflect Offenders</u> -street closures	<u>Utilize place managers</u> -CCTV -at least two clerks in stores	<u>Disrupt markets</u> -monitor pawn shops	<u>Neutralize peer pressure</u> -public health messaging	<u>Assist compliance</u> -make available garbage cans -public restrooms
<u>Control tools/weapons</u> -disable stolen cell phones -gun control	<u>Strengthen formal surveillance</u> -burglar alarms	<u>Deny benefits</u> -graffiti cleaning -speed humps -ink merchandise tags	<u>Discourage imitation</u> -rapid repair of vandalism	<u>Control drugs and alcohol</u> -breathalyzers in bars -permit server intervention

Again, what is significant is the move to achieve some substantial measure of social order through institutions and interventions separate from conventional criminal law enforcement entities, without the potential for harm associated with hands-on policing tactics and jailing, and in ways that allow for potential offenders to be relatively self-governing. This problem-oriented approach is gradual, context-specific, and incremental—*unfinished*—and aims to deploy infrastructure and design to achieve social order maintenance objectives.

#### *D. Decarceration Courts*

Certain specialized criminal courts operating as what I have referred to elsewhere as “Decarceration Courts”—for example, mental health courts and drug courts—may serve as diversionary conduits funneling substantial numbers of cases out of

conventional criminal sentencing and toward alternative social service institutions.<sup>87</sup> The work of these courts is often empirically monitored to provide evidence that for a whole range of cases incarceration (and perhaps criminal intervention more generally) is unnecessary.<sup>88</sup> Ultimately, a decarceration model of specialized criminal court case processing aims to identify those limited number of crimes for which criminal law intervention is most fitting, simultaneously contributing to the de facto decriminalization of certain other categories of conduct, and facilitating non-carceral responses to a range of other social ills.<sup>89</sup>

It must be noted that there is enormous variation among specialized criminal courts and some such courts operate on a model decidedly at odds with an agenda of reduced criminal law enforcement and decarceration.<sup>90</sup> But other specialized criminal courts are engaged in a social change agenda oriented towards fundamentally shifting resources and public understanding to enable less violent means of managing social concerns too often managed through criminal courts and criminal punishment.<sup>91</sup>

This approach to decarceration is necessarily incremental, unfinished: a gradual and aspirational process of reduced reliance on conventional criminal law intervention. Ongoing empirical monitoring of the work of diversionary courts may shape a broader public policy shift away from criminal prosecution and punishment and toward alternative forms of social order maintenance.<sup>92</sup>

### *E. Violence Interrupters*

Violence Interrupters interventions, pioneered by the epidemiologist and infectious disease physician Gary Slutkin, are yet another example of unfinished, in process criminal law reformist efforts that hold considerable promise in part because of the alternative conceptualization of social order maintenance they entail. Slutkin's Violence Interrupters treat urban violence as an epidemic phenomenon and seek to shift the spread of violence as a socially contagious learned system by using community-based mediation outside the criminal process.<sup>93</sup> Slutkin proposes that violence is clustered and spreads in waves like an infectious disease.<sup>94</sup> According to Slutkin, violence may therefore be better addressed not primarily through punitive or other criminal law-related responses, which were also once applied in the context of plague and other infectious diseases, but through forms of detection and interruption that involve community members who themselves previously engaged in violent

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<sup>87</sup> See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 1631.

<sup>93</sup> *See, e.g.,* THE INTERRUPTERS (Kartemquin Films 2011).

<sup>94</sup> *See* WESLEY G. SKOGAN ET AL., EVALUATION OF CEASEFIRE—CHICAGO (2008).

behavior. Community members provide to their neighbors and friends alternative scripts, modes of response, and strategies for deescalating tense situations.<sup>95</sup> In their studies of Violence Interrupters' work in Chicago and Baltimore, social scientists at Northwestern and Johns Hopkins Universities demonstrated that homicide rates have decreased in a statistically significant manner, in one neighborhood by over 50 percent.<sup>96</sup>

Responding to violence as an infections epidemic represents an as yet underspecified small-scale framework for some measure of social order maintenance, one that entails a conceptual and institutional shift in focus towards a public health model to containing violence. In this regard, Violence Interrupters interventions present the beginnings of a workable and possibly effective alternative to over-reliance on policing, prosecution, and incarceration as responses to interpersonal harm. This approach also enlists persons previously engaged in violence in community self-governance and in policy formulation outside the conventional criminal process, in ways similar to the engagement of former narco-cultivators in the alternative development programming context through growers cooperatives. The Violence Interrupters' epidemiological approach uses these new public health workers to analyze clusters and transmission dynamics of violence, emphasizing social psychology and neurological research.<sup>97</sup> This emergent approach may begin to improve and expand our capacity to speak differently about order maintenance strategies and community dynamics, creating a new public health discourse about violence, crime, and alternative modes of conflict resolution and response, one in which persons formerly perpetrating violence actively and constructively participate.

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Each of these five initiatives—decriminalization campaigns, alternative development programming in the narco-cultivation context in a manner potentially applicable to U.S. narco-markets, infrastructural reform, certain decarceration-focused diversionary court programming, and violence interrupter interventions—is legible within an existing state of affairs (that is, each competes) in that each alternative intervenes in a practical (and at least partially accepted) manner within a particular geographical location on a small yet significant scale. These are alternatives that have been implemented, not ideal, theoretical, purely hypothetical alternatives. Yet, each exercises restraint in refraining from positioning itself as a fully-formed alternative approach applicable to any and all other contexts. Instead, with the minor interventions each alternative makes—in terms of restraining and channeling law enforcement toward potentially more efficacious and less invasive

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<sup>95</sup> See, e.g., Gary Slutkin, *Re-Understanding Violence As We Had to Re-Understand Plague. To Cure It*, HUFFINGTON POST (Apr. 19, 2012, 11:05am), [http://www.huffingtonpost.com/gary-slutkin/reunderstanding-violence-\\_1\\_b\\_1431360.html](http://www.huffingtonpost.com/gary-slutkin/reunderstanding-violence-_1_b_1431360.html)

<sup>96</sup> Daniel W. Webster et al., *Effects of Baltimore's Safe Streets Program on gun violence: a replication of Chicago's CeaseFire program*, J. URB. HEALTH, 27 (2012).

<sup>97</sup> See *id.*

incentive-shaping and opportunity-shaping, and by improving quality of life through re-directing particular unauthorized and undesired markets, and providing comprehensive grassroots services to at-risk populations—it becomes possible to begin to conceive of other more humane ways of achieving social order than through the status quo in our criminal law, policing, prosecutorial programs, probation, jails and prisons.

### *Conclusion*

This framework of the alternative as unfinished opens the space to speak about and imagine different possible organizational arrangements and futures for some of the social order maintenance work currently carried out by criminal law administration, potentially instigating a process of material change in our institutions, as well as in the power relationships that determine who conceptualizes and sets relevant laws and policies. Even as these efforts are spearheaded by the United Nations, scholars and local government bodies, these initiatives place otherwise disenfranchised individuals—peasant farmers in narco-growing regions or former gang members, for example—in co-equal and even leadership positions. Through these and other means, unfinished alternatives may make it feasible for fundamentally distinct approaches to become incrementally conceivable, workable, and enforceable, and for new voices to gain increased visibility—producing an opening first at the level of ideas, then within our institutions, and perhaps ultimately within locations of power and in our criminal law and politics. In these ways, the unfinished reformist interventions this essay explores may begin to help us engage an array of complex social problems differently, and to confront and depart from some of criminal law's most prevalent violence.