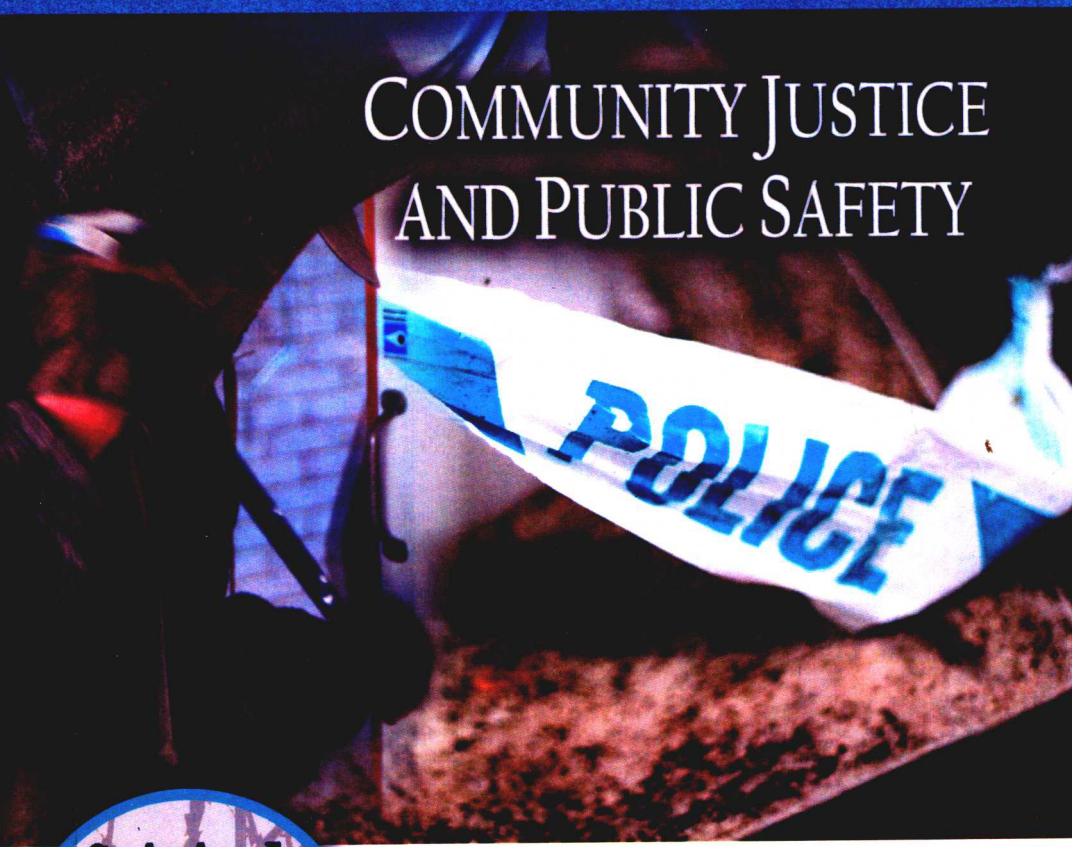


REVISITING THE SOCIAL CONTRACT

COMMUNITY JUSTICE
AND PUBLIC SAFETY



**Criminal
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Kathleen Auerhahn
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CRIMINAL JUSTICE, LAW ENFORCEMENT AND CORRECTIONS SERIES

**REVISITING THE SOCIAL CONTRACT:
COMMUNITY JUSTICE AND
PUBLIC SAFETY**



KATHLEEN QUERHAIN

AND

CAITLIN J. MCGUIRE

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INTRODUCTION

In the criminal justice literature, “community justice” usually refers to a variety of alternative adjudicative strategies and practices. In this work, we suggest an additional conceptual formulation of community justice that emphasizes the role of the criminal justice system in providing *justice to communities*. Since the late twentieth century, the primary promise of the American criminal justice system has been to protect the public from dangerous offenders. This book evaluates contemporary incarceration policy and practice in the United States in light of that premise. The results indicate that criminal sentencing policy and practice have not succeeded in this aim; instead, a variety of evidence is presented that leads to the counterintuitive conclusion that rather than serving to reduce crime, mass incarceration is detrimental to public safety. This occurs as a result of both the failure of the criminal justice system to incapacitate the most dangerous offenders, and of the impacts on communities heavily impacted by incarceration policy. We conclude with a discussion of the meaning that these trends have for the concept of community justice, and suggestions for how consideration of the obligations of the social contract can and should improve outcomes in the criminal justice system and the communities affected by it.

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Chapter 1

CRIMINAL JUSTICE AND THE SOCIAL CONTRACT

The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.

Jean-Jacques Rousseau, 1762 [1968]

INTRODUCTION

Rousseau's classic depiction of the social contract recognized that individuals must sometimes surrender individual liberties in exchange for security provided by the government. In most modern democracies, individuals are willing to surrender liberties in exchange for the justice system's protection from crime. An implicit assumption of the social contract is that if an individual enters into such a contract with the justice system, he or she will be (at least to a reasonable extent) protected from criminal victimization.

Community justice models have powerfully altered this classic vision of the social contract. Instead of simply surrendering individual liberties in exchange for protection, community justice models require individuals to play a more direct role in the provision of their own safety. Community residents must express their priorities regarding protection and directly assist the justice system in creating safe communities by practicing informal social control. Under a community justice model, residents do not passively surrender individual liberties and automatically receive protection from victimization. Despite expectations for

greater involvement from community residents, the community justice ideal still requires the formal criminal justice system to hold up their end of the bargain by delivering on residents' demands for public safety.

This book explores some of the ways in which the criminal justice system has failed to meet their obligations of the social contract. As one specific example, Californians have used referendum voting to express their desire to incapacitate the most dangerous criminal offenders. However, as the analyses in chapter 2 will demonstrate, the criminal justice system in California has not successfully carried out this mandate. In fact, these failed attempts at selective incapacitation have resulted in negative consequences both within the criminal justice system and within neighborhood social systems. At the state level, within the criminal justice system, the average level of dangerousness of individuals supervised in community settings has increased while the average dangerousness of the incarcerated population has declined. Additionally, we propose that the failures to meet the obligations of the social contract function at multiple levels of aggregation and perhaps even across levels. The failures of state-level sentencing policy and practice have had damaging effects at the neighborhood level. The extremely high rates of incarceration and reentry caused by state-level policies and practices have resulted in the disruption of neighborhood social networks, the inhibition of informal social control mechanisms, and a subsequent decline in collective efficacy in neighborhoods plagued by concentrated mass incarceration.⁴

In this chapter, we will first review traditional conceptualizations of community justice and then argue for a reconceptualization of community justice that emphasizes the *obligations of the criminal justice system to communities*. In chapter 2, we examine some of the ways in which state-level policy and practice has not yielded the levels of public safety desired by community residents. The criminal justice system's failed efforts to incapacitate dangerous offenders have also translated into negative consequences for communities. In chapter 3, we will show that these failures have impacts on public safety at both the state level of the criminal justice system as well as at the neighborhood level. An understanding of these consequences will serve to supplement traditional models of community justice.

Traditional Conceptualizations of Community Justice

Although the interpretation of the community justice paradigm can be a source of disagreement among academics and practitioners, most community justice advocates agree that the term "community justice" can refer to a wide

variety of ideals and practices (Clear 2007; Gilbert and Settles 2007; Clear and Karp 1998, 1999). Generally, community justice models emphasize the importance of making communities pleasant places to live, work and raise children (Clear 2007). The main focus of community justice programs is to enhance the quality of life for community residents (Clear and Karp 1999). It is important to point out that “quality of life” refers to a wide range of issues, including, but certainly not limited to, public safety (Smith 2001). Quality of life also includes how residents feel about their community and their willingness to contribute to community improvement endeavors.

Early conceptualizations by Clear and Karp (1999, 1998), pioneers of the community justice paradigm, emphasized four elements of community justice. First, Clear and Karp stressed the local nature of “community,” maintaining that community justice functions at the neighborhood level. Local institutions and social relationships within a “place-based community” create the setting for community justice programs (Clear and Karp 1998: 14). Second, community justice embraces a problem-solving approach by relying on a proactive response to crime and social disorder in communities. As opposed to a “war on crime,” crime is viewed as a societal problem that can be solved by tapping the resources of those directly affected by crime: offenders, victims, and community residents. By working together in a collaborative environment, strategies for preventing crime and social disorder can be developed. Third, community justice “decentralizes authority and accountability” (18). Clear and Karp provided the following examples of how community justice breaks down traditional hierarchies of power:

new line authority in community policing often enables the cop on the beat to do much more than exercise enforcement powers. He or she is often able to organize community anticrime campaigns, mediate ongoing disputes, and coordinate the solution to problems by collaborating with workers from other agencies. Whether a social worker places an at-risk youth in a drug treatment program or a transportation planner alters traffic flow patterns through a highly visible drug market or “bazaar,” the solution to any particular public safety problem will nearly always require inter-organizational integration (20).

Fourth, community justice models are characterized by the direct involvement of community residents. Citizen involvement is important not just for responding to crime, but also for building collective efficacy and reducing the potential for future crime. Strengthening collective efficacy will allow informal social controls in the community to “gradually share or even replace much of the formal justice

apparatus” (Clear and Karp 1998: 15). Under community justice models, community residents must take responsibility for working collaboratively with law enforcement to address crime and social disorder problems.

Recently, researchers have attempted to more formally define community justice by identifying the key components of community justice initiatives. Most recently, Clear (2007) has highlighted three main characteristics of community justice. First, there must be an emphasis on *restoration*. Victims’ property loss, sense of comfort and sense of control need to be restored through the community justice initiative. If offenders make amends for their offenses, their place (and status) in the community can also be reestablished. Additionally, it is important that a sense of “justice being done” exists in the community. Community members should feel like the harms caused by the crime have been sufficiently mended by any community justice process. Second, community justice models should emphasize the retention of offenders in the community as opposed to the removal of offenders through incarceration. Whenever possible, keeping offenders in the community will preserve existing social networks, which are of paramount importance to the development of collective efficacy, and the subsequent creation of conditions conducive to crime prevention. Third, sanctions which have an “ameliorative” or healing nature (such as community service, counseling sessions or substance abuse treatment) should be preferred over primarily punitive sanctions (such as incarceration).

Most importantly, in all conceptualizations of community justice, the relationship between community residents and the formal criminal justice system is key. Community justice requires a partnership between residents and justice system professionals. Particularly in neighborhoods with a history of distrust between residents and police, establishing such a partnership and maintaining the social contract has often proven quite difficult. Over a decade ago, Clear and Karp (1998) recognized that community involvement in the justice process and community cooperation with the formal justice system creates complex challenges for community justice. They noted that agencies are currently “experimenting” with different strategies to “formalize” the relationship between community members and the criminal justice system (19).

Clearly, distinctions between informal and formal social control are at the foundation of community justice conceptualizations. Informal social control occurs when an individual’s behavior is regulated through interactions with family members, friends and local community members. Conversely, formal social control is characterized by behavior regulation from larger government bureaucracies, external to the individual such as law enforcement or the court system.

Considering the balance between informal and formal social control, it may be helpful to conceive of the relationship between community-based controls and the criminal justice system as a continuum, with total reliance on informal social control at one end, and complete reliance on the formal system of criminal sanctioning at the other. According to models of community justice which rely primarily on informal social control, community residents are primarily responsible for the prevention of and the response to crime and social disorder. At the opposite end of the continuum, there are community justice models which place greater reliance on the formal social control provided by the justice system.

Our conceptualization of community justice advocates community justice models that fall toward the middle of this conceptual continuum where both informal social control and formal social control play key roles in the prevention of and response to social disorder. Perhaps more importantly, we also recognize that few community justice models have sufficiently explored the *reciprocal* quality of the relationship between agents of informal social control and agents of formal social control. Particularly for community justice models that fall in the middle of the continuum and attempt to balance both informal social control from community members and formal social control from the justice system, it is crucial that both parties fulfill their required obligations. The following reconceptualization of the notion of community justice explores the ways in which the formal justice system fails to hold up their end of the bargain.

A Reconceptualization of Community Justice: The Breach of Contract

In this work, we argue for a reconceptualization and expansion of the notion of “community justice.” While not disputing the importance of local communities in the production of justice and public safety, we argue that this cannot be separated from the context in which community justice processes operate -- i.e., the formal criminal justice system. It is neither possible nor desirable to “bracket” the existence of the criminal justice system from models of community justice. At the same time, it is not possible for the formal justice system to provide public safety without the cooperation of the local community. For this reason, we champion community justice models that occupy a middle ground on the conceptual continuum and seek to achieve the benefits that come from both informal and formal social control mechanisms.

While other conceptualizations of “community justice” have tended to focus on aspects of the criminal justice *process*, we present a formulation that

emphasizes *outcomes* resulting from the operation of the criminal justice system, and the ways in which these relate to concerns of social justice. In the reconceptualization of community justice presented here, justice can be defined in terms of the criminal justice system operating in the manner in which community residents believe and wish it to – namely, by incapacitating dangerous offenders. This conception of “community justice” differs from more conventional uses of the term, which usually refer to alternatives to traditional criminal justice practice, particularly those that emphasize community residents’ participation. These include community-based sanctions (such as intensive probation), community policing, citizens’ watch groups, and sentencing circles (Clear and Karp 1999; Karp 1998). Although community justice models frequently advocate alternatives to incarceration and retaining offenders in community settings, few community justice supporters would dispute the fact that there are some extremely dangerous individuals who pose a significant threat to public safety if kept in the community.

In spirit, the notion of community justice we propose does not differ greatly from the ideas generally associated with it, at least in the sense that both arise out of frustration with the failures of the criminal justice system as it currently operates. This reconceptualization is not intended to replace or displace other usages, but rather to add another dimension to our understanding of the concept of community justice. Primarily, this reconceptualization is intended to draw greater attention to a crucial requirement of successful community justice programs: the need for the formal criminal justice system to fulfill its obligations to constituents, as required by the social contract. Indeed, Clear and Karp maintained that the justice system must be accountable to citizens, and the success of community justice endeavors can be evaluated in terms of citizens’ satisfaction and perception that justice has been done (1998: 20-21).

In addition to emphasizing the formal justice system’s breach of the social contract, our reconceptualization of community justice also advocates an expanded definition of “community.” Existing definitions of community justice have tended to focus on the neighborhood level (Gilbert and Settles 2007, Clear 2007, Clear and Karp 1998). However, we propose that issues related to the partnership between the formal justice system and community residents should also be examined on a larger scale, such as the state level. There are a number of reasons that justify framing community justice within both the neighborhood level of aggregation and at higher levels of aggregation, such as counties, states, and even nations.

Community justice strategies have traditionally focused on neighborhoods because the types of crimes with which community justice has traditionally concerned itself (low-level social disorder problems such as prostitution, drug

possession, public disorder, graffiti, and the like) register their impacts at the neighborhood level. Additionally, community justice strategies have been concerned with the neighborhood level because the social processes related to informal social control function at the neighborhood level. Social networks, an important precursor for the exhibition of informal social control, are fairly localized within communities. Traditional community justice conceptualizations, which heavily rely on informal social control, are focused on the neighborhood level because informal social control mechanisms are rooted in neighborhoods.

We assert that community justice principles can also be applied to the criminal justice response to larger criminal justice issues and serious crimes which are handled at the level of larger geographic units (i.e., counties, states, nations). The failure to incapacitate the most dangerous criminals who pose serious threats to public safety is an important problem that has implications for public safety at several levels of aggregation. Although it has effects on the neighborhood level, the formal criminal justice apparatus operates at the state level, not the neighborhood level. Because criminal justice policies are generally determined by state legislatures, the greatest amount of variation in criminal justice policy occurs between states, not within states. It is thus appropriate to consider larger geographical units as “communities” when considering the obligations of governments to provide safety and security in cooperation with the wishes of residents/constituents.

Although we conceptualize the possibility of community justice principles functioning at both the community level and the state level, it is also important to recognize that the balance between formal and informal social control likely varies depending on the level of aggregation. At the neighborhood level, where community justice typically addresses low-level social disorder problems, community residents play a *direct* role in crime prevention and responses to disorder. At the state level, in which there is greater concern for more serious offenses, residents play a more *indirect* role in crime prevention and responses to crime by communicating with formal agencies about their expectations for safety.

There is some support for our expanded conceptualization of “community” in the community justice literature, despite the traditional emphasis on the neighborhood level. For example, Bazemore (1998) recognized the flexibility of the term “community.” He explained that

[h]ow community is defined in justice decision making affects the nature and extent of citizen involvement and ownership... While each [type of community justice program] claims to increase the level of this involvement and ownership, practical agendas for doing so vary

because conceptualizations of the ‘community’ differ... [T]he community and restorative justice movement has achieved little consensus on this issue. There is a tendency to talk about community in the macro or societal sense for some purposes, while defining community as those who ‘show up’ at a community sanctioning process for others (342).

Following Bazemore, Clear and Karp (1999: 40) noted that community can be conceptualized “without limiting it to geographic spaces.” Rather, they argued that community should be thought of as an “entity” or a “quality of social existence: an indication of solidarity, shared practices and traditions, and emotional connectedness” (60).

In the case of California, discussed in the chapter that follows, it is appropriate to apply principles of community justice (mainly the importance of a partnership between the formal justice system and residents) to a state-level analysis because the social problem (incarcerating dangerous offenders) is one that is addressed at the state level, and, as will be shown, has consequences at the neighborhood level. The analyses presented in chapter 2 will demonstrate that the criminal justice system has not succeeded according to a community justice perspective because residents’ demands for the provision of public safety through the workings of the apparatus of criminal punishment have not been met.

Although little empirical research is available on this point, our conceptualization of community justice also proposes the possibility of cross-level effects. State-level policies influence neighborhood-level incarceration rates. Neighborhood-level incarceration rates have effects on neighborhood-level social processes that relate to crime control. The analyses presented in chapter 2 empirically demonstrate the state-level effects of failed justice system efforts to protect communities. Chapter 3 explores the community-level effects of the justice system’s failed efforts. Although we present these two aspects of the problem separately, we certainly encourage future research that can further assess the relationship between state-level policy, community-level social processes and public safety.

Chapter 2

THE SYSTEM'S FAILURE AT THE STATE LEVEL

CRIMINAL JUSTICE IN THE LATE MODERN ERA

In recent history, the enterprise of criminal justice has been defined by an emphasis on criminal *punishment*. The punishment of criminal offenders is generally justified with respect to four goals: retribution, deterrence, incapacitation, and rehabilitation (see Walker, 1991, for a more lengthy consideration of these purposes). While the sentencing of individual offenders may simultaneously serve several of these goals, it is possible to discern general *paradigms* of criminal sentencing associated with certain historical eras (Auerhahn 2003). The rehabilitative paradigm held sway from the time of the inception of the modern penitentiary in 1776 until the early 1970s. This was expressed across the nation in indeterminate sentencing policies which were designed to tailor treatment to individual offenders. Increasing rates of crime throughout the 1960s and 1970s, as well as a “radical loss of confidence in [American] political and social institutions” (Allen 1981:18) resulted in a reshaping of the discourse surrounding criminal punishment, particularly concerning the goals of incarceration. Evidence of this shift can be seen in the movement from indeterminate to determinate sentencing that took place throughout the United States in the 1970s (Auerhahn 2003: chapter 2; Hewitt and Clear 1983; Kadish 1978).

In the last three decades, sentencing policy reform in the United States has reflected an emphasis on the objective of *selective incapacitation* (Greenberg 1975; Greenwood with Abrahamse 1982; Zimring and Hawkins 1995). Reforms based on this idea promise to preserve public safety by incapacitating (via incarceration) particularly dangerous offenders for lengthy terms (see Auerhahn 1998 and 2003, chapter 4, for analysis and explanation of the operational