THE ILLUSION OF BROKEN WINDOWS
THEORY: AN ETHNOGRAPHIC
ENGAGEMENT WITH THE THEORY THAT
WAS NOT THERE

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I. INTRODUCTION
This article critically engages with the debate over Broken Windows Theory by drawing on three years of findings from an ethnographic case study of an urban space in Jersey City, New Jersey, in which rates of serious crime were relatively low, yet levels of “disorder,” as typically conceived by advocates of Broken Windows Theory, were relatively high. At the very least, these findings demonstrate that there is no necessary connection between “disorder” and crime.

Such findings do not, however, serve to refute Broken Windows Theory even though it is commonly translated into the simple proposition “disorder causes crime”\(^1\) or into the much more ambitious notion that “crime is the inevitable result of disorder.”\(^2\) It is not clear that the findings even so much as count as evidence against the theory. Rather, as my efforts to engage with the theory revealed, it became increasingly unclear what evidence, if any, could ever count against it, much less disprove it.

Contrary to how some very prominent commentators have interpreted it, Broken Windows Theory does not claim that disorder inevitably leads to crime.\(^3\) Nor does it posit a direct causal connection between disorder and crime. The theory, rather, not only stops short of making deterministic claims about disorder and crime; it is not even “a strong causal theory” as some commentators have interpreted it to be.\(^4\)

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3 Bernard Harcourt, who is widely considered to be Broken Windows Theory’s critic-in-chief, interprets the theory as positing: “[I]f minor offenses, even the little ones, and minor urban degradation at large (infractions, urban vandalism, and so on) were issues known to never be dealt with, there would be the risk of an increase of uncivil activities. This would inevitably lead to more serious ones, like armed robberies or homicides.” Interview by Laurent Mouloud with Bernard Harcourt, “Is ‘Zero Tolerance’ a Solution to Security Issues? It’s All an Illusion, Translated Sept. 25, 2000, available at http://www.humanitinefenglish.com/spip.php?article339; emphasis added. Whether intended or not, this rendering makes a “straw man” of Broken Windows Theory. Interestingly Gladwell’s interpretation is found in a chapter of his New York Time best-selling book Tipping Point in which he praises the theory as responsible for dramatic decline in crime rates in New York City during the 1990s. Gladwell, supra note 2, at 135-151.

4 David Thacher, Order maintenance reconsidered: moving beyond strong causal reasoning, 94 J. Crim. L. & Criminology 381, 412-13 (2004) (referring to Broken Windows Theory as employing “‘strong causal reasoning’—causal analysis that aims to identify large indirect effects produced through complex causal chains”). As this article discusses, while it is true that Broken Windows Theory does posit a somewhat complex causal chain (at least more
Beginning with the essay in which James Q. Wilson and George Kelling first introduced the world to Broken Windows Theory, its most authoritative expositors have never been so bold as to claim that disorder will lead to crime, but merely that it may indirectly cause crime through a “developmental sequence” in which fear, social withdrawal, and a diminution in informal social controls renders a space “more vulnerable to criminal invasion.”

The theory does not, however, claim that any of these variables will necessarily lead to another. Rather, it posits only that: disorder may lead to fear, which may lead to withdrawal, which may lead to a deterioration of informal social controls, and even if all these events come to pass, the result is not necessarily increased crime, but merely increased vulnerability to crime. As such, though Broken Windows Theory amounts to a much more sophisticated and plausible account than it is frequently interpreted to be, its specification of intermediate variables does not render it any more susceptible to disconfirmation than if it merely claimed nothing more than ‘disorder may cause crime.’

Thus, when leading critics of the account insist that the theory has been shown to be wholly “without empirical foundation” or, more resolutely, when they declare it has been “scientifically discredited” or altogether “debunked,” they are missing the point. The problem with the theory, empirically-speaking, is not that it has been debunked but, instead, that its logic is un-debunkable.

No theory should be invulnerable to refutation. To be fair, however, social-scientific theories are rarely, if ever, constructed to allow for their refutation. Rather, unlike many (though not all) theories in the natural sciences, social-scientific accounts tend to be constructed in probabilistic, rather than deterministic, terms. Yet, while the validity of probabilistic theories is typically assessed through large-N statistical analysis, Broken Windows Theory, as we will see, is not the type of account that can be meaningfully evaluated through such an analysis.

To make matters even more complicated, Broken Windows Theory ultimately does not rest upon an empirical claim. Rather, it amounts to a normative argument for deploying the police, at least in certain places, to proactively, if not aggressively, work to restore or maintain “public complex than it is often interpreted to be), it does not make this claim very boldly, but merely contends that the causal sequence leading from disorder to crime may sometimes occur in some as-of-yet specified percentage of instances. As this article also discusses, contrary to what Thacher suggests, the case for the Broken Windows approach does not ultimately hinge on proof of disorder’s criminogenic consequences. See infra notes ___ & accompanying text.


6 See infra notes ___ & accompanying text for discussion of the crucial distinction between intermediate, or intervening, variables and “causal mechanisms.”


9 Forrest Stuart, On the streets, under arrest: Policing homelessness in the 21st century. 9 Sociology Compass 940, 948 (2015); see also Thacher, “Order Maintenance Reconsidered,” 385 (noting that “Over the past few years, however, social science has not been kind to the broken windows theory”).

10 See infra notes ___ & accompanying text.
order,” if need is perceived to be (e.g., if informal methods of control fail).\textsuperscript{11} According to the theory, police may accomplish this end by issuing summonses to “disorderly” (but “not violent”) persons engaging in “disorderly” acts;\textsuperscript{12} arresting them; and potentially incarcerating them. To this point, George Kelling and Katherine Coles concluded in \textit{Fixing Broken Windows}, the crux of the theory is that: “Restoring order is key to revitalizing our cities … \textit{regardless of whether a reduction in crime results}.”\textsuperscript{13}

All of this raises a very basic question that has not received the attention it so desperately deserves: how should Broken Windows Theory be evaluated? This is the question with which this article is ultimately concerned.

The first part of this article discusses the ethnographic case study that inspired and informed the analysis that follows. The second part discusses how, even though such a study is, in crucial respects, ideally suited as a method for testing Broken Windows Theory, its empirical claims are much too vague and uncertain to allow for definitive, or even meaningful, tests of the sort that both proponents and critics of the account have claimed to have conducted. Rather, as the article goes on to discuss, Broken Windows Theory is not so much a theory in the sense of an account that is logically amenable to definitive testing, but is, rather, as an empirical matter, much more in the nature of a “supposition” or conjecture.\textsuperscript{14}

Until recently, this was essentially how the progenitors of the theory viewed it; both Wilson and Kelling repeatedly referred to their theory as a “speculation.” Yet, in defending his theory in the wake of Eric Garner’s death-by-chokehold at the hands of an NYPD officer near Staten Island’s

\textsuperscript{11} Contrary to the notion that Broken Windows Theory is an argument for “zero tolerance” policing, Wilson, Kelling, and other leading proponents of the theory have consistently made clear that discretion is the lynchpin of their approach. How that discretion is to exercised and which places are targeted for the Broken Windows approach, however, are matters which never been fully clarified. While Wilson and Kelling originally emphasized that neighborhoods at the “tipping point” would be the focus of the approach, it is clear that in the intervening decades the approach has been used in other types of areas as well, including, most famously, in neighborhoods across New York City during William Bratton’s latest stint as commissioner of the NYPD; it is hard to imagine that all of these neighborhoods could be fairly characterized as at the “tipping point.” Related to this point, many critics of the Broken Windows approach have persuasively argued that its aim, or at least its function, is to pave the way for real estate development and gentrification. See, e.g., Ronald Kramer, “Political Elites, “Broken Windows”, and the Commodification of Urban Space.” \textit{Critical Criminology} 20, no. 3 (2012): 229-248; Katharyne Mitchell, “Ungoverned space: Global security and the geopolitics of broken windows.” \textit{Political geography} 29, no. 5 (2010): 289-297; Steve Herbert & Elizabeth Brown. “Conceptions of space and crime in the punitive neoliberal city.” \textit{Antipode} 38, no. 4 (2006): 755-777.

\textsuperscript{12} What constitutes “disorder” or “order” are open to debate. In the Broken Windows literature, disorderly acts typically include vagrancy, panhandling, drinking alcohol in public, drunkenness, drug use, petty drug dealing, public urination, and “bothering” pedestrians or commuters. See, e.g., Wilson & Kelling, “Broken Windows.”

\textsuperscript{13} George L. Kelling & Catherine M. Coles, \textit{Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities} 242 (1997).

\textsuperscript{14} David L. Faigman, “To have and have not: Assessing the value of social science to the law as science and policy.” 38 \textit{Emory LJ} 1005, 1013 (1989) (noting that “[m]uch ostensibly scientific social inquiry … does not deserve to be called scientific” and that much of it should instead be treated as “suppositional”). Faigman’s assessment that most social science does consist of bona fide scientific theories is based on the failure to satisfy the “criterion of … falsifiability”. Id. at 1017 (quoting Karl Popper, \textit{Unended Quest}: An s: “The annals of social science are replete with examples of purportedly scientific, yet, nonfalsifiable, theories. Such theories display a profound resiliency to seemingly contradictory data, repeatedly demonstrating their capacity to encompass all observed phenomena.” Id. At 1017.
Tompkinsville Park (a space not unlike Journal Square)\textsuperscript{15}, Kelling boldly declared, with very little basis, that there is now “science” to Broken Windows Theory and that that “the burden’s on the other side” to demonstrate that there is “no link between disorder and crime.”\textsuperscript{16} This article finds Kelling’s invocation of science wanting and argues that Broken Windows Theory is still, after all these years, a speculation.\textsuperscript{17}

It is, though, a plausible enough speculation, and as Bernard Harcourt conceded in his book \textit{Illusion of Order: The False Promise of Broken Windows Theory} “many theoretical accounts in politics, criminal justice, and public policy are not validated but that usually does not stop us from implementing those policies.”\textsuperscript{18} Accordingly, Harcourt, who is widely deemed to be the foremost critic of Broken Windows\textsuperscript{19}, prefaced his critique in \textit{Illusion of Order} by noting that he did “not intend to hold the … theory to an unrealistically high empirical standard.”\textsuperscript{20}

And yet, this article argues, that is precisely what Harcourt and other leading critics of Broken Windows Theory have done. In the process, moreover, as the third part of the article discusses, they have served to distract from fundamental questions about the justice of the approach to policing that the theory urges and has long served to legitimize.

No one has ever succeeded in demonstrating that Broken Windows Theory is less than plausible and one of its ardent critics has even described it as “eminently plausible.”\textsuperscript{21} Yet, while plausibility, or some kind of “rational basis,” may be a sufficient threshold for most of the ideas

\textsuperscript{17} See Faigman, supra note 14.
\textsuperscript{18} Harcourt, \textit{Illusion of Order}, 57. It is an interesting concession for Harcourt to make given that he dismisses the theory on the basis of a handful of studies, which, in his estimation, are based on “weak data.” \textit{Id.}, at 8.
\textsuperscript{19} See supra note 14.
\textsuperscript{20} Harcourt, \textit{Illusion of Order}, 57. It is an interesting concession for Harcourt to make given that he dismisses the theory on the basis of a handful of studies, which, in his estimation, are based on “weak data.” \textit{Id.}, at 8.
upon which our laws and policies are premised, Broken Windows Theory is not just any kind of idea. Nor is the approach to maintaining order that it counsels just any kind of policy. Rather, the theory and practice of Broken Windows raises fundamental questions about the proper limits of state power and about the justice of abrogating rights no less fundamental than freedom from bodily constraint and other forms of violence. While this much is true of criminal laws and their enforcement more generally, what sets Broken Windows apart from other methods of defining and controlling crime is that it calls for, and has long served to legitimize, the criminalization of behaviors and the targeting of persons who are merely “disorderly,” not violent.22 As such, as even Wilson and Kelling acknowledged from the start, the Broken Windows approach is, on its face, suspect as a matter of justice; as they conceded (though stopped short of explaining): “Arresting a drunk or a single vagrant who has harmed no identifiable person seems unjust, and in a sense, it is.”23

The Broken Windows approach essentially entails subjecting individuals to state violence and curtailing their most basic liberties in response to non-violent conduct, and, consequently, does not even pass tests of proportionality and desert widely deemed to be draconian, including the Old Testament standard of *lex talionis*.

24 The case for deploying armed agents of the state to use violence, or at least leverage the threat of it, would be suspect even if the evidence was clear that, in a given scenario, disorder was indirectly leading to serious crime.25

As the fourth part of this article discusses, the case for Broken Windows ultimately rests on normative grounds. Empirical critiques of the theory of the sort that have been conducted to this point, therefore, are problematic, not only because they cannot hope to debunk the un-debunkable, but also because they distract from the fact that the theory is fundamentally a normative argument.

This article concludes by arguing for the use of normatively-oriented ethnographic research on a case-by-case basis to assess the need for order-maintenance policing.26 As my own research illustrates and as proponents of Broken Windows Theory have repeatedly acknowledged, disorder (as conceived by the theory) does not lead ineluctably to serious crime.27 We also know that

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22 In Broken Windows Theory, disorder is, almost as a matter of definition, non-violent. In their original statement of the theory, Wilson and Kelling defined “disorderly people” as “[n]ot violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.” Wilson and Kelling, “Broken Windows.”

23 *Id.* at 36.

24 Paul Butler, Retribution, for Liberals, 46 UCLA L. Rev. 1873, 1885 (1998) (arguing that “potentially cruel” and “politically and academically disfavored” standard “provides little guidance in establishing punishments for victimless crimes like drug selling” “[b]ecause the criminal has taken nothing in a physical sense—neither an eye nor a tooth”); Jeremy Waldron, Lex Talionis, 34 Ariz. L. Rev. 25, 26 (1992) (defining “lex talionis” in terms of the claim that “[the action which constitutes punishment for any offense should be the same as the act which constituted the offense”).

25 David Thacher, “Order Maintenance Reconsidered,” 388 (noting the philosophically-tenuous basis for justifying “criminal justice intervention” against “otherwise-innocuous disorder” on grounds that “it inspired serious crime by an independent party”).


27 Any municipality contemplating the implementation of order-maintenance police certainly ought to carefully consider research conducted in other municipalities, including studies (such as mine) which clearly indicate, not only that disorder does not necessarily lead to serious crime, but also may provide clues to how an acceptable level of order may be maintained without resorting to order-maintenance policing. More than this, however, is required to properly account potential variation in the impact of disorder: research must also be conducted within the municipality.
disorder (again, as conceived by the theory) does not necessarily lead to other similarly catastrophic consequences. It is not clear, then, why we should presume, in advance of investigation, the necessity or desirability of an approach that is predicated upon the use of state violence, and that threatens liberty and potentially life itself, in response to behaviors that do not directly or necessarily jeopardize either.

This article argues instead for a framework for assessing the necessity of order-maintenance policing prior to its implementation. Under this framework, if close, careful, and reasonably objective research determines in a given case that disorder is, in fact, leading to serious crime or other similarly grave consequences and, additionally, that there are no “less restrictive means” available for redressing it, then, much as some fundamental rights can only be burdened under American constitutional law upon a showing of a compelling need to do so, order-maintenance policing could be implemented as an emergency measure, but only for as long as ongoing research deems it necessary. In the absence of such a showing, this article submits that a free and just society ought to err on the side of restraint and, inasmuch as possible, work to resolve social problems in ways that do not rely upon exercises of state violence that are patently disproportionate to the behaviors the Broken Windows approach is designed to repress.

II. THE CASE OF A DISORDERLY BUT SAFE SPACE

For roughly three years, I spent most of my waking hours in a space known to its most dedicated and longstanding users as “the square”—short for Journal Square, the name of the transportation center and “PATH” rail stop that serves as the space’s principal point of attraction, as well as the name of the neighborhood in which the space is situated. The square sits in the geographic heart of Jersey City, roughly three miles from the western bank of Manhattan, which has famously served as the incubator for Broken Windows policing, through various iterations, principally under the command of two-time NYPD commissioner William Bratton, with the steady counsel of George Kelling, whom Bratton has dubbed more than once his “intellectual mentor.”

To the east, across the Passaic River, is Newark, New Jersey, where Kelling found the initial inspiration for his collaboration with James Q. Wilson which, in turn, led to the March 1982 Atlantic Monthly essay in which they first introduced the world to their theory. It was in Jersey City, too, where the criminologist Anthony Braga and his colleagues conducted one of only a handful of studies that proponents of Broken Windows Theory have consistently pointed to in support of its empirical claims. 

contemplating order-maintenance policing.

This framework is not novel. It is, rather, essentially consistent with the “strict scrutiny” for adjudicating fundamental rights claims under American constitutional law. It also not altogether unlike the standards that proponents of Broken Windows Theory have urged municipal governments to follow prior to carrying out a program of order-maintenance policing, including: “careful attention to the fundamental rights of all citizens in implementing [order-maintenance] legislation and the order-restoration program itself”; serious contemplation of “empirical research linking disorder, fear, serious crime, and urban decline”; and an ability to demonstrate “the effectiveness of the program in accord with the stated goals ....”


See, e.g., George L. Kelling and James Q. Wilson, “A Quarter Century of Broken Windows,” The American Interest
From the vantage point of Broken Windows Theory, the square had “more than its share of street people, hustlers, and aggressive panhandlers”31 After getting to know some of them well over the course of my research, and in the years since, these “regulars”32 of the space were not easily reducible to any one type of person, much as is the case with human beings across a wide variety of settings. Moreover, some of the regulars did much more to ensure the order of the square than to undermine it, by intervening to quell conflicts, giving directions to strangers, keeping their “eyes on the street”33 for signs of serious trouble, providing useful information to the police, regulating the boundaries of their group, and cleaning up after themselves and each other, among other things. Nevertheless, viewed through the lenses of Broken Windows Theory, perhaps especially from the outside looking in, they certainly looked the part of “disorderly people”— “[n]ot violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people”, including “panhandlers, drunks, addicts, … loiterers, the mentally disturbed.”34

In effect, the square functioned as something of a refuge for the regulars, albeit not a terribly adequate one. Every day, like clockwork, substantial numbers of regulars gathered together

2, no. 1 (September 2006), available at http://www.the-american-interest.com/2006/09/01/a-quarter-century-of-broken-windows/ (“We know of only one rigorous test of this view, and its results tend to support our claim. Anthony Braga of the Kennedy School of Government at Harvard, working with five coauthors, did such a test in Jersey City in 1999”) (referencing Anthony A. Braga et al., “Problem-oriented Policing in Violent Crime Places: A Randomized Controlled Experiment,” Criminology 37, no. 3 (August 1999): 541–580. But see supra note — (noting that the study was not of Broken Windows policing per se).

The proximity of the square to the cities that have played a central role in the initial conception and development of Broken Windows Theory was not one of the factors that initially led me to conduct research in the space. Nevertheless, as the saying goes in New York and New Jersey, it is certainly “not for nothing.” Nor is it mere context for readers who are unfamiliar with Jersey City, which not very long ago, was scarcely known as a city, even to New York City residents. Though it is rapidly growing in population and stature, Jersey City is perhaps an unknown quantity to many who reside outside the New York City metropolitan area. Rather, the fact that a disorderly-but-safe space is sandwiched between two cities where Broken Windows Theory was first conceived, tested, then implemented, largely on the logic that disorder leads to serious crime, serves to underscore the crucial point that the disorder-crime nexus, to the extent that there is one, as well as municipal responses to disorder, are highly variable even across spaces that are within a few miles of each other. Furthermore, even if proponents of Broken Windows Theory are right to point to Braga et al.’s research as support for the account and perhaps (even though research did not aim to test the validity of the account). Likewise, the contrast between my observations in the square and the results of Braga et al.’s research arguably illustrates what is obviously true: that dynamics that prevail in one city, neighborhood, or public space at one point in time may be very different than those that obtain in the very same place at another point in time.

31 Wagers et al., supra note 1, at 259.

32 This was a term that Wilson and Kelling used in their seminal Atlantic Monthly essay. Wilson and Kelling, “Broken Windows” (noting that “regulars”, as opposed to “strangers,” “included both ‘decent folk’ and some drunks and derelicts who were always there but who ‘knew their place’”). More importantly, the term was one that the most dedicated inhabitants of the square routinely used for themselves and each other, in much the same fashion that persons who frequent a particular bar or club commonly employ to distinguish themselves from other customers. Much like Cheers was “a place where everybody knows your name,” the square was a place where the regulars not only knew each other’s names, but despite their many differences, often showed each other a level of recognition and respect that they likely could not have found, as some of them openly reckoned, anywhere else or perhaps nowhere else at all.

33 This much-used phrase in various urban studies literatures comes out of the writings of Jane Jacobs who argued that “sidewalk[s] must have users on it fairly continuously, both to add to the number of effective eyes on the street and to induce the people in buildings along the street to watch the sidewalk in sufficient numbers” and that “[w]e are the lucky possessors of a city order that makes it relatively simple to keep the peace because there are plenty of eyes on the street.” Jane Jacobs, The Death and Life of Great American Cities 35, 54 (2016).

34 Wilson and Kelling, “Broken Windows.”
in several spots throughout the square, to run down or catch up on the prior day’s events, to joke, to laugh, to run into old friends, to reminisce about days gone by, to talk about their problems, to catch up on the news, to make sense of the world, to debate about politics and sports, to philosophize about life, to “people watch,” to sing doo-wop, to dance, and to think and dream about “next moves.” In these respects, the square functioned, not merely as a point of transit, but as a quintessential public space—with the regulars as its primary public.

All but a few of the square’s regulars were chronically jobless, most of them for nearly the entirety of their adult lives. All but a few were homeless at some point during my research, if not for the entire duration, with the exceptions only being so fortunate as to be “precariously housed,” as in the case of individuals who were receiving Section 8 vouchers or were living, often off and on, with family members. A sizeable portion of the regulars spent their nights “on the streets” including about twenty regulars (give or take, depending on the time of year, month, and so forth) who routinely slept outside in the square, usually on cardboard that they would collect around the neighborhood from local businesses each night as they prepared to end one day and begin the next. Especially on cold or rainy nights, some regulars also found temporary refuge in “abandominiums,” the hallways of nearby apartment buildings or housing projects, and ATM vestibules.

More than half of the regulars were Black men in their 40s and 50s who hailed from Jersey City’s poorest, most reviled, and feared neighborhoods and housing projects. The population also included significant numbers of Black women, Puerto Rican men and women, several Caucasian men and women, a few of whom were longtime regulars, as well as, from time to time, a small number of immigrants.

As the criminological literature on “aging out” would have predicted, even the regulars with the most violent pasts, or who were perhaps still inclined towards violence, were not terribly violent anymore, even if they still could “handle their handle,” a phrase they used to describe those who could still manage to stand their ground in a “real fight.” They did, however, routinely engage in a range of behaviors that, to various degrees, ran afoul of the law or other norms, and as such,

35 Contrary to the suggestion in the Broken Windows literature that seniors are especially inclined to remain indoors for fear of encountering disorderly behaviors in streets and public spaces, older Black men from a senior citizen housing complex located near the square frequently came to the square to sing doo-wop with some of the “old-school” regulars. And far from frightening passersby, crowds would often stop to watch and listen in apparent enjoyment of these older men plying their craft.

36 By the end of my research, I came to know more than a hundred men and women who, at one point or another, regarded themselves and were regarded by others as regulars of the square. Of this number, I became closely acquainted with roughly twenty or so of the most entrenched regulars.


38 Over the duration of my research, the relatively small number of immigrants were, perhaps not quite full-fledged regulars, but were at least on the path towards regular-status and included individuals who made their way to the United States from Haiti, Honduras, Saint Lucia, and Guyana.

at least from the perspective of Broken Windows Theory, have long been regarded as quintessentially “disorderly,” “uncivil,” “boorish,” or unacceptably disruptive to “urban life.”

Nearly all the regulars were habitual drug users of one sort or another. Their drugs of choice included heroin, crack, marijuana, various types of pills, including Xanax and Oxycontin, and, of course, alcohol. “Scarface”41 bags of “dope” (the street term for heroin) in plain view of anyone who cared to pay attention was a commonplace event. So, too, was nodding off. Some substantial portion of the regulars could also be seen at just about any given moment, just about every day, drinking alcohol “in public,” in violation of the city’s “open container” ordinance.42 Several of the regulars routinely drank to the point of passing out or falling down, sometimes injuring themselves or worse, events that frequently led to them being taken away by “the bus”—lingo that both the police, as well as the regulars, commonly used to refer to paramedics.43

Some of the regulars were career panhandlers who plied their trade mostly in and around the square, including at the top of the escalators and stairs leading down into the concourse level of the transportation center. The space outside the bathrooms on the concourse level was also a prime location for panhandling, particularly during inclement weather.

Notwithstanding the availability of restrooms inside the transportation center, public urination in the square was not uncommon, particularly among the regulars who, due to some combination of inebriation and physical disability, had difficulty moving about.44 Loud arguments

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41 This practice involves opening up a “bag” of heroin and snorting it all at once, as in the famous scene from the film “Scarface” in which the main character Tony Montana (played by Al Pacino) does the same with a large quantity of cocaine (a great many times the size of the amount of heroin in a standard bag of heroin). If done carefully, out of the view of cameras, the police, and other onlookers apt to be offended by the practice, it was certainly less likely to be detected than other methods of consumption. It also had the added benefit for users of destroying evidence of possessing the drug in a way that, ironically, would not be nearly so easy with offenses that are much less serious under the law, including the public consumption of alcohol or smoking marijuana.
42 Jersey City, New Jersey, Municipal Code, §§ 84.39-40 states that: (1) “No person shall drink or consume an alcoholic beverage or possess, with intent to drink or consume, an open container containing an alcoholic beverage in any public place except at a block party, feast or similar function for which a permit has been issued”; and (2) “Possession of an open container containing an alcoholic beverage by any person shall create a rebuttable presumption that such person did intend to consume the contents thereof in violation of this Article.”
43 Nine of the square’s regulars died during the term of my research and at least four more have died since then. In one incident, a regular who went by the name of “Eric” (or “Marico”) fell twenty feet backwards to his death, off the ledge of a wall at the top of a set of stairs leading from the back exit of the transportation center to a “kiss and ride” parking lot. While I was not present to observe the tragedy unfold (only its bloody aftermath), witnesses—friends who “Eric” had been drinking with at the time—all recounted that he began to “doze off,” causing him to lean backwards, lose his balance, and fall onto the concrete walkway beneath him. When paramedics arrived on the scene, Eric was unresponsive as he lay motionless in large pool of blood. A few hours later, he was pronounced dead at the hospital. In a separate incident, which occurred during the same week in which three regulars in total died in or around the square, another man, who I came to know about as well as almost any of the regulars at that point, had been drinking in the plaza outside the transportation center late at night when he suffered a seizure, fell to the ground, and, hit his head—much as he had done many times before—though this time, never to regain consciousness. The Jersey Journal, Vigil held in Jersey City's Journal Square for three homeless persons, July 10, 2011, available at http://www.nj.com/hudson/index.ssf/2011/07/vigil_held_in_jersey_citys_jou.html.
44 The restrooms were also closed by 10pm and also, sometimes during long stretches of time, when it was being cleaned—a practice that some of the regulars attributed to an effort to keep them from using the facilities. Whether their assessment was correct or not, the notion that this was the practice functioned as something of a “technique of neutralization”, which emboldened them to urinate outside, typically (though, again, not always) in a public, but
between the regulars were a common event in the square. So, too, were physical scuffles, which, on occasion, threatened to break out into “real fights,” though generally only amounted to nothing much more than, as some of the regulars derisively observed, “pushing and shoving” and a “whole lot of talk.” Litter, including discarded beer cans and liquor bottles, was a common sight, and the regulars, while certainly not the only source of it, were nonetheless substantial contributors.\textsuperscript{45}

Such “disorder” went mostly ignored and unchecked even as the square contained one of the largest police presences in all of Jersey City. The police usually had ample legal cause to at least issue summonses to the regulars, if not arrest them, for their illicit deeds or, more commonly, for open warrants, usually for failures to appear in court, for which officers would have legal grounds to check upon stopping them for non-arrestable offenses such as open-container violations or public urination offenses. The norm among the police in the square, however, was typically to ignore, if not affirmatively tolerate, not just the presence of the regulars, but also their illicit or otherwise disorderly deeds. While the police occasionally issued summonses to the regulars, sometimes arrested them, and sometimes leveraged the threat of such actions to manage the regulars’ behavior, including, at times, incentivizing them to temporarily leave the square with an order of “take a walk” or “keep it movin’” (or else), even this relatively mild sanction was the exception and not the rule in the square.

In short, the extent of disorder (as conventionally conceived) in the square was considerable and the bulk of it was “left untended.” Yet, there were certainly no systematic or sustained efforts to proactively curb or eliminate it, nor were there efforts to “remove” the regulars from the space, by the police or anyone else in the square.

And yet: the sky did not fall. Somehow, the square managed to be a very safe space,\textsuperscript{46} where serious crimes, and especially violent crimes, were a rare occurrence.\textsuperscript{47}

discreet, location, often with the help of lookouts who were as much, if not more so, keen on ensuring that no women or children were passing by than they were about being detected by the police.

\textsuperscript{45} Some of the regulars, though, were not only loath to litter themselves, but made a point of cleaning up after others or scolding them for this and other behaviors that, among other things, they saw as bringing them undue attention from the police and others. Which is to say: they worked to maintain a certain kind and degree of order.

\textsuperscript{46} Part of the multi-faceted story of how some modicum of order and a relatively high degree of public safety was maintained in the square—which is recounted and theorized in other works—derived from the informal social control that existed amongst the regulars in the shadow of law enforcement.

\textsuperscript{47} As critical criminologists have long recognized, crime data is notoriously unreliable. For all we know, differences in officially-recorded crime rates over time or across jurisdictions may have less to do with actual differences in rates of crime than the degree to which people perceive its occurrence and report it to the police, and when they do report it, whether the police treat and record it as such. There is but one crime statistic that does not depend upon these sorts of contingencies, and that is homicide, for rather obvious reasons: there is, of course, a body; perhaps a bit less obviously, it is not just the police who make the ultimate determination of whether the crime has taken place, but also an independent medical examiner. During the course of my three years of research, there was only a single homicide that took place in the square, which had no discernible connection whatsoever to the square’s regulars or their disorderly deeds. See Michaelangelo Conte, Jersey City man charged with murder after Journal Square shooting, The Jersey Journal, April 11, 2012, available at http://www.nj.com/hudson/index.ssf/2012/04/jersey_city_man_charged_with_m_6.html (noting the prosecutor’s opinion that “the defendant and the victim did know one another”). Not only did the regulars play no role—directly or indirectly—in the homicide, but at least one of the regulars readily offered police information in their efforts to apprehend the suspect. The Jersey City Police Department’s COMSTAT reports over three-year period beginning in January 2011, which roughly coincides with the term of my research, just six of Jersey City’s forty-nine homicides
II. UNDEBUNKABLE: THE THEORY THAT WAS NOT THERE

These findings would go some ways towards undermining, if not refuting, Broken Windows Theory if the account claimed, as it is often interpreted to claim—by commentators no less prominent than Malcolm Gladwell, Bernard Harcourt, Rob Sampson, and Don Mitchell, among others—that disorder left untended inevitably, or directly, leads to serious crime. The trouble, however, is that this is not what the theory contends.

In his New York Times best-selling book The Tipping Point: How Little Things Can Make a Big Difference, Gladwell, in an enthusiastically positive appraisal of Broken Windows Theory, described it in no uncertain terms as claiming that “crime is the inevitable result of disorder.”48 However, it is critics of the theory who are prone to reading it in deterministic—and thus easily debunkable—terms. Harcourt, for instance, has characterized it as an argument that “minor offenses” and “minor urban degradation at large,” if left unchecked, will “inevitably lead to more serious [offenses], like armed robberies or homicides.”49 The urban geographer Don Mitchell, who has written extensively on the use of order-maintenance policing to remove homeless people from urban public spaces, argues that municipal laws have been enacted and enforced to effectuate that end through “‘quality of life campaigns’ which focus on penalizing small infractions (such as jaywalking or urinating in public) on the theory that small acts of disorder inevitably lead to more major crimes.”50

Moreover, in Illusion of Order Harcourt contends that there is “little if any empirical evidence” to support “the claim that disorder causes crime,” and that this “cardinal proposition of order-maintenance policing is even less plausible at the theoretical level.” It is as if he is arguing against an account that poses necessary causal connections and neglects to consider the importance of social context. Starting with the obvious premise that “the concept of ‘disorder’ is not natural,” Harcourt reasons:

[The] various ingredients of ‘disorder’ [do not] have a fixed meaning. They do not necessarily, on their own, communicate that a neighborhood has lost control over crime, or does not care about rule violation. The meaning of these various acts is contextual and is itself constructed. Loitering only signals—as one possible

occurred in the entirety of JCPD’s North District, of which the square and its environs are but a small part. Over the same period of time, more than half of the city’s homicides—twenty-six in total—occurred in the South District, the poorest and most isolated part of the city, an area that all but a few of the regulars took care to avoid precisely out of fear of being victimized. See (on file with author) for an extended discussion of this point.

48 Gladwell, supra note 2, at 141.
49 Mouloud, “It’s All an Illusion.”. On the day that New York City’s 2001 mayoral primary was originally scheduled (but was postponed due to the 9/11 terror attacks that day), Harcourt argued in a New York Times op-ed that “[t]he best social-scientific evidence has shown that a neighborhood's graffiti, litter or public drunks do not necessarily point to a serious crime problem.” “The Broken- Windows Myth,” New York Times, September 11, 2001, http://www.nytimes.com/2001/09/11/opinion/the-brokenwindows-myth.html, last accessed February 10, 2018, emphasis added. The implication of this assertion, given that Harcourt’s aim was to demonstrate that the theory of Broken Windows was nothing more than a “myth,” is that the account predicted that graffiti, litter, and drunks, by necessity, engender serious crime. Otherwise, it is not clear what purpose Harcourt’s statement was intended to serve. As authoritative statements of Broken Windows Theory have consistently made plain, any such attribution of determinism or necessity to the account is simply not accurate. Harcourt, Illusion of Order, 243.
meaning among others—that the community is not in control if loitering is perceived by community members as violating certain rules of conduct. But of course loitering is not necessarily perceived that way in all communities. Urinating in the streets signals that rules have broken only if the meaning of public urination is associated with rule breaking. Again, that is not always the case.\footnote{Harcourt, \textit{Illusion of Order}, 243.}

In short, Harcourt is simply contending that various forms of conduct will yield different consequences for social order, disorder, crime, and its control, depending on the physical and social characteristics of the contexts in which they occur and especially on how the conduct is perceived and responded to by different groups in different communities. It is difficult to find fault with this assessment. It certainly coheres with my own observations, as well as findings from other studies and plenty of anecdotal accounts. What is not so clear though, is how Harcourt’s interpretation amounts to a critique of Broken Windows Theory. If anything, it would seem that it confirms the theory’s core empirical logic.

\textbf{A. “IT IS NOT INEVITABLE…”: AN AMBIVALENT ACCOUNT FROM THE START}

Broken Windows Theory, as it has been authoritatively articulated and interpreted, is far from a deterministic account. It was, rather, an ambivalent and ambiguous account from the start. Even at the point in their seminal essay on Broken Windows in which Wilson and Kelling posited that “‘untended’ [disorderly] behavior … leads to the breakdown of community controls” and threatens to transform a “stable neighborhood” into “an inhospitable and frightening jungle”, they cautioned: “it is not inevitable that serious crime will flourish or violent attacks on strangers will occur.”\footnote{Wilson & Kelling, “Broken Windows”; emphasis added.} Instead, much more plausibly—though much less ambitiously, clearly, or amenable to definitive empirical examination—the architects of Broken Windows Theory made clear that, even in a neighborhood so unwelcoming and terrifying as to warrant comparison to a \textit{jungle}, the prospect of “criminal invasion” was far from certain. Indeed, the authors did not even venture to conjecture that criminal invasion would more likely than not occur in a neighborhood so profoundly beset by disorder, but merely argued that such a neighborhood would be “more likely” to suffer an increased incidence of serious crimes, relative to “places where people are confident they can regulate public behavior by informal controls.”\footnote{Ibid.}

And even on this point we are left to wonder: \textit{how much more likely}? In short, contrary to interpretations by critics, but also by once admirers like Gladwell, Wilson and Kelling were not nearly so bold as to claim that disorder-left-untended directly and inevitably causes crime. Rather, it is not even clear that they employed especially “strong causal reasoning” in their original

\footnote{Ibid. The difference between the two assessments of probability is potentially enormous. To say that Sally will probably go to the party tonight indicates that it is more likely than not that she will go. To say, by contrast, that Sally is more likely than Sam to go to the party tells us very little, particularly if we do not know how likely it is that Sam will go to the party. Moreover, if it is very unlikely that Sam will go to the party, the statement that Sally is more likely to go is not very useful information, particularly if our going to the party depends upon the overall likelihood of her going. Similarly, the assessment that disorderly neighborhoods are “more likely” to suffer increased rates of serious crime than other neighborhoods does not tell us anything about the overall probability that rates in the disorderly neighborhood will increase.}
statement of Broken Windows Theory.\textsuperscript{54}

Consistent with this interpretation, Wilson and Kelling also expressly allowed for the prospect that “disorder” can be tolerated without the catastrophic consequences, including increased rates of serious crime, that they otherwise warned against in their seminal essay.\textsuperscript{55} The authors made their position on this point perfectly plain in their only extended depiction of a real-life, concrete instance of order-maintenance policing:

One of us (Kelling) spent many hours walking with Newark foot-patrol officers to see how they defined “order” and what they did to maintain it. One beat was typical: a busy but dilapidated area in the heart of Newark, with many abandoned buildings, marginal shops (several of which prominently displayed knives and straight-edged razors in their windows), one large department store, and, most important, a train station and several major bus stops. Though the area was run-down, its streets were filled with people, because it was a major transportation center. The good order of this area was important not only to those who lived and worked there but also to many others, who had to move through it on their way home, to supermarkets, or to factories.

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The people were made up of “regulars” and “strangers.” Regulars included both “decent folk” and some drunks and derelicts who were always there but who “knew their place.” Strangers were, well, strangers, and viewed suspiciously, sometimes apprehensively. The officer—call him Kelly—knew who the regulars were, and they knew him. As he saw his job, he was to keep an eye on strangers, and make certain that the disreputable regulars observed some informal but widely understood rules. \textit{Drunks and addicts could sit on the stoops, but could not lie down. People could drink on side streets, but not at the main intersection. Bottles had to be in brown paper bags.}


“By tying the evaluation of order maintenance policing so closely to its indirect effects on crime, this literature offers an example of that Martin Rein and Christopher Winship have described as ‘the dangers of strong causal reasoning’—the dangers of policy analyses that rely on claims that an intervention will have large indirect effects on some important social problem (e.g., that incentives for marriage will improve the prospects for low-income children). Rein and Winship argue that claims of this kind ask social science to do too much because it can rarely identify the tight causal relationships of the kind that would be necessary; in the meantime, the focus on indirect effects tends to crowd out questions about the intrinsic wisdom of policy interventions.”

Order maintenance policing is a case in point. Since the early empirical studies that called attention to the order maintenance function and the scholarly debates that considered its intrinsic propriety, criminologists have paid little attention to questions about whether order maintenance activities and the public order they hope to create are desirable in their own right, apart from their indirect contribution to crime prevention. Thacher, “Order Maintenance Reconsidered,” 382.

\textsuperscript{55} Wilson and Kelling, “Broken Windows”; emphasis added.
These rules were defined and enforced in collaboration with the “regulars” on the street. Another neighborhood might have different rules, but these, everybody understood, were the rules for this neighborhood.\footnote{Ibid; emphasis added.}

This depiction of order, as negotiated and maintained by the pseudonymous Officer Kelly, is not exactly a picture of benevolent tolerance or respect for civil liberties. Yet it is scarcely consistent with the oft-repeated notion that Wilson and Kelling were calling for a “zero-tolerance” approach to policing disorder. The passage also further demonstrates that Broken Windows Theory, as it was originally set forth, cannot be plausibly read as posing either a direct or necessary causal connection between disorder and serious crime. Rather, on Wilson and Kelling’s reckoning, Kelly could permit the presence of “disorderly people”—including “drunks,” “derelicts,” and “addicts”—as well as disorderly behaviors—including drinking alcohol in public and “vagrancy”—subject to certain “informal rules” that he negotiated “and enforced in collaboration with the ‘regulars.’” Under these conditions, Kelly could still maintain good order for “those who lived and worked” in the area, as well as for “others, who had to move through it on their way home, to supermarkets or factories.”\footnote{Ibid.}

Far from postulating a direct connection between disorder and serious crime, the theory has rested on a more complex set of claims about one of the indirect, multivariate, and contingent pathways by which disorder can lead to serious crime. As Kelling and Wilson subsequently clarified, the theory is that the disorder-crime nexus is sometimes triggered through a “developmental sequence” in which “high levels of public disorder” can deter “honest people from using the streets,” thereby leading to “less” regulatorily-relevant “eyes on the street” and a more general deterioration of informal mechanisms of social control, thus “leaving public spaces available for small-scale offenses and then more serious ones.”\footnote{Kelling and Wilson, “A Quarter Century of Broken Windows.”.} The process, in short, consists of a “[s]piral of decline” which can culminate in higher rates of serious crime and the deterioration of “public order.”\footnote{William Bratton and George Kelling, “There Are No Cracks in The Broken Windows,” National Review, February 28, 2006, available at: https://www.nationalreview.com/2006/02/there-are-no-cracks-broken-windows-william-bratton-george-kelling/. Last accessed February 3, 2018..} Thus, when critics like Rob Sampson and Steven Raudenbush stress in their evaluations of Broken Windows Theory that “there is evidence that the direct link between disorder and crime is not as strong as the … theory would suggest,”\footnote{Sampson, Robert J., Jeffrey D. Morenoff, and Thomas Gannon-Rowley. "Assessing “neighborhood effects”: Social processes and new directions in research." Annual review of sociology 28, no. 1 (2002): 443-478. Emphasis Added.} it is all too easy for proponents of the account to defend it by simply pointing out that it does not assert—strongly or otherwise—what the critics erroneously presume it to assert. Kelling and Bratton, for instance, point out:

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Sampson and Raudenbush also misrepresented the broken windows hypothesis. They claimed that broken windows posits a direct link between disorder and serious crime. From the first presentation of broken windows we have argued, to the contrary, that the link, while clear and strong, is indirect. Citizen fear, created by disorder, leads to weakened social controls, thus creating the conditions in which crime can flourish.\(^{61}\)

Proponents of Broken Windows Theory might have also emphasized that purported critiques of the account often read, not so much as critiques, but as validating the account’s core empirical assertions. Sampson and Raudenbush, for example, submit:

Although our results contradict the strong version of the broken windows thesis, they do not imply the theoretical irrelevance of disorder. After all, our theoretical framework rests on the notion that physical and social disorder comprise highly visible cues to which neighborhood observers respond. According to this view, disorder may turn out to be important for understanding migration patterns, investment by businesses, and overall neighborhood viability. Thus, if disorder operates in a cascading fashion—encouraging people to move (increasing residential instability) or discouraging efforts at building collective responses—it would indirectly have an effect on crime.\(^{62}\)

It is not clear that what Sampson and Raudenbush are saying here is all that different from what authoritative expositions of Broken Windows Theory have had to say. Rather, as Martha Gault and Eric Silver have argued:

[W]hat Sampson and Raudenbush found was not contrary to the broken windows theory … The basic finding of the Sampson and Raudenbush study was that controlling for collective efficacy, the effect of disorder on crime was reduced and rendered nonsignificant. This is, of course, true; however, based on what Wilson and Kelling proposed … Sampson and Raudenbush’s results could easily be viewed as supporting the theory by showing that disorder undermines informal social control, which in turn leads to more serious crime.\(^{63}\)

Accordingly, Gault and Silver conclude that “the Sampson and Raudenbush study should not be invoked as empirical evidence against the broken windows theory” but instead “could just as easily be seen as empirical evidence in support of the broken windows theory.”\(^{64}\)

Joshua Hinkle similarly observes:

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\(^{64}\) Ibid, 243.
A developmental sequence does not imply a direct relationship. Indeed, going back as far as Zimbardo’s experiment, the broken windows thesis has been a social-psychological theory. It has never suggested that disorder in a community directly causes crime … Wilson and Kelling clearly posited that perceptions of disorder, created through visual cues of disorder in a community, increase fear and lead to residential withdrawal which subsequently leaves communities vulnerable to criminal invasion … [A] drawback of Sampson and Raudenbush’s study is treating collective efficacy as an entirely separate, competing theory from broken windows. While collective efficacy theory is by no means fully subsumed by the broken windows thesis, there is considerable overlap …. Wilson and Kelling suggested that the ultimate causal impact of disorder—through increased fear—is causing people to withdraw from the community. People spend less time outdoors, are less likely to intervene for the common good, and in some cases move away in response to rising disorder. As such, informal social controls in the community are weakened. This is clearly analogous with a reduction in collective efficacy.65

As these accounts indicate, Broken Windows Theory is not the simplistic or easily-disprovable account that critical renderings have made it out to be.66 The problem with the theory

65 Joshua C. Hinkle, “The Relationship Between Disorder, Perceived Risk, and Collective Efficacy: A Look into the Indirect Pathways of the Broken Windows Thesis,” Criminal Justice Studies 26, no. 4 (December 2013): 414. Hinkle also argues that “a true test of the broken windows thesis as outlined by Wilson and Kelling (1982) would test the impact of disorder on fear of crime, which should in turn affect the collective efficacy and then crime in the long run.” Ibid., 415; see also David Weisburd et al., “Understanding the Mechanisms Underlying Broken Windows Policing: The Need for Evaluation Evidence,” 52 Journal of Research in Crime and Delinquency 52, no. 4 (June 2015): 592 (“even some of Sampson and Raudenbush’s (1999) findings were supportive of [the] indirect version of the broken windows thesis, as their analyses found that perceptions of disorder were negatively related to collective efficacy.”).

66 Cf. Anthony E. Bottoms, “Place, Space, Crime, and Disorder,” 4 The Oxford Handbook of Criminology 528 (2007). Discussing Sampson and Raudenbush’s study, as well Ralph Taylor’s assessment of the theory, Bottoms argues:

“There is no doubt that the strong version of the ‘broken windows’ thesis has been severely damaged …” Id. (citing Sampson & Raudenbush, supra note 59; Ralph Taylor, Breaking Away from Broken Windows 20, 231 (2001)) (emphasis added). Bottoms goes on to observe, though, that “neither of these alternative analyses rejects the potential significance of disorders in affecting some social outcomes, such as residents’ confidence in the neighbourhood, or moving decisions ….” Id. With respect to Sampson and Raudenbush’s analysis in particular, Bottoms observes:

[It] is important to note that in their conclusions [Sampson and Raudenbush] emphasized that [their] results do not ‘imply the theoretical irrelevance of disorder’. On the contrary, their results negate only the direct ‘broken windows lead to crime’ hypothesis. Since, however, the authors also consider that disorders ‘comprise highly visible cues to which neighborhood observers respond’, it follows that disorder might indeed ‘turn out to be important for understanding migration patterns, investment by business and overall neighborhood viability’, in which case it could ‘indirectly have an effect on crime’. Id.

It is not clear that Bottoms’ concession is as partial as he presents it to be. While he sees the “strong version of the broken windows’ thesis” as “severely damaged”, Bottoms, like Sampson and Raudenbush, appears to interpret the
as an empirical account is not that it has been debunked or that it is somehow implausible to think that research could ever substantiate it, but that it fails to make clear what evidence, if any, could ever conceivably count against it, much less disprove it, while at least anecdotal or circumstantial support for its claims is easy enough to find.

B. BROKEN WINDOWS THEORY’S “BLACK BOX PROBLEM”

The problem, empirically-speaking, lies in the theory’s failure to specify the causal mechanisms by which disorder supposedly leads to serious crime. The theory does not just stop short of positing a direct or necessary causal connection between disorder and serious crime, but refrains from making any definitive causal claims that could ever be disconfirmed. Rather, while the theory conceives the relationship between disorder and serious crime as mediated through the activation of other variables—namely fear, physical and social withdrawal, and a breakdown of informal mechanisms of social control—it does not identify any of these variables as either necessary or sufficient to trigger the “developmental sequence” it posits. As such, the sequence in any given scenario could abort at any stage without counting against the theory. Disorder may engender fear, or it may not; fear may prompt significant numbers of “honest” people to physically and socially withdraw from the spaces in which they encounter disorder, or it may not; and so on. All these possibilities are allowed for under the logic of authoritative renderings of the theory. As such, even if neither prior research, nor presently available evidence, supports Broken Windows Theory, there is no logical hope of ultimately discrediting what is essentially an unfalsifiable set of claims.

The difficulty of identifying causal mechanisms—what sometimes goes by the name of the “black box problem” of causal explanation—is not an easy nut to crack. As James Mahoney explains, the identification of ‘intervening variables’ does not solve the problem:

[T]he ‘black box problem’... refers to the difficulty of explaining why a given causal variable exerts an effect on a given outcome variable .... Researchers usually respond to the black box problem by speculating about the reasons why a given association should exist, perhaps drawing on established research orientations and general concepts. Sometimes they may attempt to identify intervening variables that link a cause and an effect through statistical procedures (e.g., structural equation and path models) or qualitative techniques (e.g., process tracing and narrative analysis). However, ... these strategies will not fully resolve the black box problem. Rather, they will end up explaining an association between variables by appealing to another association between variables; the new association itself will contain a black box and require a separate explanation. Without the identification

“strong version” of the theory as posing a direct relationship between disorder and crime, which it does not do, while the concession that “disorder … could indirectly have an effect on crime” seems to affirm precisely what the theory claims.

Likewise, it is not clear who would disagree with Taylor’s notion that “[c]hanges in neighborhood fabric, neighborhood crime rates and residents’ safety concerns are each tangled topics with a range of causes.” Id. (quoting Taylor, supra, at 20). It certainly paints a more complicated picture than one in which disorder directly causes crime at the neighborhood level; the same is true of authoritative articulations of Broken Windows Theory. In short, as with many an ostensible critique of the theory, it is not quite clear what the bone of contention is. It is as if critics interpret the theory as postulating the implausible position that disorder is both a necessary and sufficient cause of serious crime, which the theory does not do.
of a mechanism, then, the analyst will be forced into an infinite regress as he or she pursues deeper and deeper intervening variables.\textsuperscript{67}

Thus, when proponents of Broken Windows Theory emphasize that fear, physical and social withdrawal, and a breakdown of informal social controls are variables that mediate the connection between disorder and serious crime, but refrain from identifying any one of the variables as necessarily leading to any others, not only do they fail to resolve the “black box problem” of why disorder leads to serious crime, they have also created more black box problems for which the theory offers no solutions.

The problem of “infinite regress” clearly arises with the notion, which Kelling and his colleagues have identified as one of the “eight core ideas of broken windows”, that: “[d]ifferent neighbourhoods have different capacities to manage disorder.”\textsuperscript{68} While Wilson and Kelling made this point obvious at the outset, subsequent treatments of Broken Windows Theory have made the point clearer and advanced it much further. Kelling and his colleagues, for example, point to Harvard Square in Cambridge as an example of a neighborhood with “an enormous capacity to manage disorder” through informal means without the need to resort to schemes of aggressive order-maintenance policing:

Harvard Square has more than its share of street people, hustlers, and aggressive panhandlers, yet it can absorb their behavior without major threat to citizens’ sense of security, commerce, or community life. One can find many other neighborhood centres, however, that would grind to an economic and social halt if they had half of the disorder that characterizes Harvard Square.\textsuperscript{69}

More significantly, after acknowledging the obvious point that “Harvard Square is a relatively wealthy neighborhood surrounded by what is perhaps the world’s most prestigious university,” Kelling and company further observe that “even neighborhoods that are socially and economically disadvantaged but are characterized by collective efficacy—that is, the capacity for informal social control—can manage and reduce disorderly behavior and serious crime.”\textsuperscript{70}

This analysis clearly indicates that disorder does not ineluctably lead to serious crime, nor to fear, nor to patterns of avoidance, nor to a deterioration of mechanisms of informal social control. This means, then, that none of these variables is the decisive mechanism that leads to serious crime, which raises the question: what is? To explain the variation in the consequences of disorder across different spaces in terms of variable capacities for informal social control is not really saying much of anything at all, but amounts to little more than a tautology.\textsuperscript{71}

\textsuperscript{67} James Mahoney, “Tentative Answers to Questions about Causal Mechanisms” (Paper presented at the annual meeting of the American Political Science Association, Philadelphia, August 27, 2003); internal citations omitted.

\textsuperscript{68} Wagers et al., supra note 1, at 253.

\textsuperscript{69} Ibid, 257.

\textsuperscript{70} Ibid.

\textsuperscript{71} This is particularly true to the extent that collective efficacy is defined or measured by a community’s capacity to prevent serious crime.
C. UNBREAKABLE: THE UN-FALSIFIABILITY OF BROKEN WINDOWS THEORY

Critical appraisals of Broken Windows Theory often claim that the theory itself is irreparably broken or shattered. Such appraisals of the theory tend to be premised on the notion that it has failed the purportedly rigorous empirical tests to which critics like Harcourt and Sampson have subjected it.

Such appraisals, however, are untenable, because Broken Windows Theory is essentially an “unfalsifiable” account. The theory hedges at every turn through the use of “modal” and hardly deterministic verbiage like “may” and “can.” Thus, the “empirical crux” of the theory is not that disorder will lead to crime, but simply that it may; the logical corollary of which is that the connection, in some portion of instances, will not prevail. And a claim that something might occur, particularly without any boundary conditions, is not disproved by evidence that it did not occur in some portion of instances; so long as the qualified conjecture is facially plausible, the prospect will remain that future research might confirm that, perhaps under some alternative set of conditions, through some as-of-yet-theorized mechanism, that there is, in fact, something to the hypothesized linkage after all.

Under the Popperian standard of “falsificationism,” Broken Windows Theory’s assertions regarding the connection between disorder and crime surely do not qualify as scientific hypotheses. The claim that it “[i]t never rains on Wednesdays” is “falsifiable because it can be falsified by observing rain to fall on a Wednesday.” By contrast, the claim that “it is raining or not raining” (or that it may, or may not, rain tomorrow) is not falsifiable because “[n]o logically possible observation statement could refute [it].” Similarly, the fortune-teller’s assertion that “[l]uck is possible in sporting speculation” is, very likely by design, “unfalsifiable” because “[i]t amounts to telling the reader that if he has a bet today he might win, which remains true whether he bets or not, and if he does, whether he wins or not.” Likewise, with Broken Windows Theory’s claim that disorder may lead to serious crime—or that disorder may engender other conditions, which, in turn, may render an area relatively more vulnerable to crime, such that a greater amount of serious crime may occur there—cannot be disproved, but is, in fact, all too bound to be true. As with the fortune-teller’s all-too-destined-to-be-true assertion about the possibility of luck in sports bets, the claim that something may lead to something else is far too indefinite to be disproved. However much the available evidence may not substantiate the claim as it presently stands, there is no way of knowing—especially not on the basis of “weak” data—that the evidence that becomes available at some point later will not lead us to a different conclusion.

In short, under the
falsificationist approach, the trouble with an account like Broken Windows Theory is that it “is so vaguely stated that it is not clear what exactly it is claiming,” such that “when tested by observation or experiment it can always be interpreted so as to be consistent with the result of those tests.”

D. “PEOPLE HAVE NOT UNDERSTOOD …”: BROKEN WINDOWS THEORY AS “SPECULATION”

One does not have to read between the lines to realize that Broken Windows Theory is not a theory in the sense in which it has so often been regarded. In an interview with the New York Times more than two decades after the theory’s inception, James Q. Wilson remarked: “I still to this day do not know if improving order will or will not reduce crime … People have not understood that this was a speculation.”

Consistent with this assessment, Harcourt also recounts a conversation with Wilson in which the latter recognized that no one had “proven” the theory of Broken Windows, but then immediately added, “but you, Bernard, didn’t disprove it.”

Along similar lines, Kelling has more than once expressed grave doubts about the capacity of criminological theories in general—including his own—to make sense of fluctuations in crime trends. At one point, for example, Kelling observed that “in a scientific sense—neither the question of why crime declined in New York City nor why crime declined nationally, is answerable.”

More recently, Kelling has even entertained the prospect of abandoning the language of Broken Windows altogether:

> It’s to the point now where I wonder if we should back away from the metaphor of broken windows. Broken windows was a powerful metaphor … We didn’t know how powerful it was going to be. It simplified [sic]. It was easy to communicate. A

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**Notes:**

75 Id., at 63.


lot of people got it as a result of the metaphor. It was attractive. And it carried us for a long time. But as you know, metaphors can wear out and become stale.\textsuperscript{79}

While the uncertainty that proponents of Broken Windows Theory have expressed about its core empirical contentions have often been read as something of a concession or admission, they do not really convey anything all that different from what the account has claimed from its inception. Notwithstanding their invocation of the disorder-crime nexus in their relentless and urgent calls for programs of proactively and aggressively policing disorder, or the bold, retrospective assertions they have made about reductions in rates of crime by way of order-maintenance policing, the chief exponents of Broken Windows Theory (including Wilson and Kelling) have always hedged on their empirical assertions, even when, as we are about to see, the rhetoric they employ has sometimes suggested a much firmer level of conviction.

E. OLD WINE WITH A NEW LABEL: THE PECULIAR NEW “SCIENCE” OF BROKEN WINDOWS THEORY

Some remarks that Kelling has made in recent years about Broken Windows Theory might appear, at first glance at least, to indicate a much greater level of confidence in the empirical merits of the account. Most notably, Kelling has suggested that it has blossomed into nothing less than a bona fide scientific theory.

Amid controversy and protest in the wake of Eric Garner’s death-by-chokehold at the hands of an NYPD officer during what Kelling and then-NYPD Commissioner Bratton later referred to as “an arrest for a quality-of-life offense,”\textsuperscript{80} Kelling defended the theory and practice of Broken Windows by claiming that, while “[i]t started as an observation ... since then there’s been science.”\textsuperscript{81} Repeating a clarion call that he had issued several years earlier—this time, citing some rather modest results from a handful of recent criminological experiments in the Netherlands and Lowell, Massachusetts—Kelling added: “The burden’s on the other side to say there is no link


\textsuperscript{81} Roberts, “Author of ‘Broken Windows’ Policing Defends His Theory”; emphasis added.

\textsuperscript{82} The team of researchers who conducted field experiments in Groningen, Netherlands, found that their most “robust” results came from a study in which they “examined whether an envelope, visibly containing a €5 note and hanging out of a mailbox, would be stolen more often” if there was graffiti on the mailbox. The team found that “13% stole the envelope” when there was no graffiti on the mailbox out of the 71 “people who singly passed” it, versus “27% [N = 60] graffiti of people in the disorder condition.” on the mailbox and/or litter on the ground near the mailbox—“was violated.” Keizer Kees, Siegwart Lindenberg, and Linda Steg, “The spreading of disorder,” Science 322, no. 5908 (December 2008): 1684. The authors of the Dutch paper describe the results as “quite dramatic.” The experimental research in Lowell, Massachusetts was conducted by Anthony Braga and Brenda Bond who concluded that their “results do lend considerable credibility to Wilson and Kelling’s perspective that policing disorder can generate crime-prevention gains.” Anthony A. Braga and Brenda J. Bond, “Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial,” Criminology 46, no. 3 (August 2008): 598 SeeMarc Keuschnigg and Tobias Wolbring, “Disorder, social capital, and norm violation: Three field experiments on the broken windows thesis,” Rationality and Society 27, no. 1 (February 2015): 96–126.
between disorderly conditions and serious crime.” At first glance, Kelling’s seemingly newfangled position may appear rather ambitious. It is, though, just one of the most recent iterations in a decades-old illusion, propagated and perpetuated by both proponents and opponents of Broken Windows Theory alike, that it claims a great deal more than it has ever come close to clearly or coherently claiming.

His reference to “science” notwithstanding, Kelling’s remarks do not say much more than what he and other proponents of Broken Windows Theory have always ever-so-modestly claimed. The notion that critical engagement with the theory could only hope to undermine it by somehow demonstrating that there is no evidence to support it is not all that different from requiring evidence to refute the idea that disorder may lead to serious crime—a burden which would essentially necessitate proof of the implausible position, based on necessarily limited data, that there is no possibility that disorder can ever lead to crime. No amount of research could ever provide grounds for such a refutation. The possibility, rather, would always remain that future research could demonstrate some link—as, in fact, Kelling has already claimed, thus raising the question of why he would even issue the challenge to critics to demonstrate the absence of what he claims has already been demonstrated.

Surely, this is not how science is supposed to work.

The most charitable interpretation of Kelling’s position is perhaps that he is arguing for the application of something like a “precautionary principle” when it comes to what, at most, in light of all that we know, is merely a theoretical risk.

A contest that proceeds on these terms does not merely disappoint the exceedingly high Popperian standard of falsifiability; it turns that standard on its head entirely by essentially rigging the game such that Broken Windows Theory cannot lose. While no kind or degree of study, no matter how well-designed or executed, could hope to refute the notion that disorder might sometimes lead to serious crime, research—such as the studies Kelling cites in support of his claim to science—can, on the other hand, be marshalled all too easily in its favor.

And so, invocations of “science” notwithstanding, we find ourselves right back where we started—with an account so amorphous and ambivalent that it defies efforts to disconfirm it, while simultaneously, without much in the way of argument or evidence, order-maintenance policing continues to serve as essentially the default policy position for contending with disorder and

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83 Roberts, “Author of ‘Broken Windows Policing’ Defends His Theory.”
84 Much as some environmentalists have argued with respect to the importation of genetically-modified foods, Kelling is perhaps suggesting that, short of evidence categorically demonstrating the absence of a connection between disorder and serious crime or other similar calamities, the old adage ‘better safe than sorry’ ought to apply by default. Regardless of what one may think about erring on the side of order-maintenance policing (rather than, as this article ultimately argues, liberty, justice, and limited government), it is, as a matter of science, a highly dubious position as it poses “a formidable, perhaps even a logically impossible task” for critics. Henk van den Belt and Bart Gremmen, “Between Precautionary Principle and ‘ound Science’: Distributing the Burdens of Proof,” Journal of Agricultural and Environmental Ethics 15, no. 1 (March 2002): 107 (discussing this notion in the context of the precautionary principle as applied to GM foods); Henk Van den Belt, “Debating the Precautionary Principle: ‘Guilty Until Proven Innocent’ or ‘Innocent Until Proven Guilty’?,” Plant Physiology 132, no. 3 (July 2003): 1125.
85 van den Belt & Gremmen, “Between Precautionary Principle and ‘Sound Science,’” 108 (comparing adjudication of claims under such a standard to “a game that allows one party to play by the rule ‘heads I win, tails you lose,’” which to say the least, “is not entirely fair”).
preventing crime.

As the theoretical physicist Wolfgang Pauli is said to have quipped about one of his student’s unfalsifiable ideas: “This isn’t right. It’s not even wrong.” The point being that imperviousness to empirical proof is no kind of theoretical virtue.

Yet this flaw, to the extent it makes sense to consider it as such, is hardly unique to Broken Windows Theory. While Popper argued that empirical theories must be falsifiable in the sense that they are amenable to disconfirmation, this standard has never come close to prevailing among social scientists. Phillip Gorski observes, for instance, that:

[W]hile sociologists pay a great deal of lip service to falsificationism, they would be hard put to identify a single, major theory that has been definitively falsified. Marx, Weber, and Durkheim are alive and well and by all indications remain as influential as ever. Rumors of Parsons’ death are also premature; functionalism has simply gone into European exile, where it lives under a new identity: “systems theory.”

Thus, to dismiss Broken Windows Theory because it is unfalsifiable would be to hold it to a standard inconsistent with prevailing norms in the social sciences. Still, whatever one may think about falsifiability as a baseline litmus test for adjudicating whether a set of empirical claims taken together ought to count as a theory worthy of critical engagement, surely the standard is not the veritable opposite, as Kelling intimates. And if that much is right, the obvious question is: how should Broken Windows Theory be evaluated?

F. THE PROBLEMATIC PATH OF PROBABALISM

Most (if not all) theories in the social sciences consist of probabilistic, rather than deterministic, causal claims. The structure of probabilistic claims goes something like this:

[O]ne event is the cause of another if the appearance of the first event is followed with a high probability by the appearance of the second, and there is no third event which we can use to factor out the probability relationship between the first and second events.

Yet, whatever the merits of this approach might be for other accounts, Broken Windows Theory does not lend itself to this kind of interpretation or examination.

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88 It is not just social-scientific theories that are unfalsifiable. Such theories are found in the natural sciences as well. Theoretical physicists, for instance, trade in numerous unfalsifiable theories and concepts, including String Theory. See, e.g., Sean Carroll, “2014: What Scientific Idea is Ready for Retirement? Falsifiability,” Edge, March 27, 2017, available at https://www.edge.org/response-detail/25322, last accessed February 10, 2018 (noting, moreover, that Einstein’s Theory of Relativity did not entirely satisfy the “falsifiability criterion” insofar as Einstein eventually adjusted his view of the universe as “static” towards the now-accepted position that it is, in fact, ever-expanding).


The theory does not consist of statistically generalizable claims, nor is it suited for the sort of regression analysis that is typically performed to test such claims. It is, rather, a highly context-sensitive account of micro-level dynamics; as such, it lends itself instead to an inductive, mixed-method, site-specific research approach and, as Thacher has argued, to ethnographic case study.

As Kelling has made clear, one of the core underlying premises of the Broken Windows logic—even if it has not always been adhered to—is that the catalysts of trends in crime, as well as the behavior of the police, are not “uniform” across different spaces and communities because “social conditions, policies, and practices interact with cities, communities, and neighborhoods in very different ways.”

Kelling further explains (comparing two cities that share borders with Jersey City):

The problem for social scientists is that there are no easy ways to study such neighborhood interactions and attribute causality. To do so, one first has to spend a lot of time in neighborhoods and cities, often in quite dangerous locations, collecting an assortment of disparate data. Then one must make comparisons to broader economic and demographic statistics—much of it outdated or not broken down by neighborhood. Even when these tasks are completed, however, the findings for New York City may have no relevance for, say, Hoboken, New Jersey, which probably has an entirely different social structure and culture. Few social scientists bother to conduct the necessary fieldwork. How much easier, instead, to download aggregate Uniform Crime Reports from the Federal Bureau of Investigation and correlate them with widely available economic and labor data. The simple reality is, however, that when inferring about crime, the farther one is from the ground, the less reliable the inference. If criminological research has demonstrated anything over the past forty years, it is that the "crime problem" that drives public concern is a local problem, only understandable within a local context.

Another closely-related problem with employing statistical methods of research to engage with Broken Windows Theory is that they tend to rely upon data sets that fail to capture micro-level dynamics that are crucial to assessing its core claims regarding both crime and policing. The data that tends to be available for such analysis are problematic in several important respects.

First, “disorderly” behaviors are not officially recorded or documented unless they are illegal, such that people who engage in them are subject to being issued summonses or arrested by the police. Acts that may offend some observers but do not offend the law, including a myriad of ways in which people can be “rude” or “uncivil” towards each other, such as “bothering” people in line for a bus, will simply not show up at all in the available data sets, no matter how prevalent

91 Kelling, George L. “Why Did People Stop Committing Crimes,” 569.
92 Ibid; internal citations omitted and emphasis added. When I began my research in Journal Square, I was not initially focused on engaging with Broken Windows Theory, but with a very different body of theory. Mike Rowan, “Regulating the Destitute: An Account of How the Very Poorest of the Urban poor are Policed and Otherwise Regulated in One Slice of Postindustrial America.” (Doctoral dissertation, New York University, 2013).
93 See Braga and Bond, “Policing Crime and Disorder Hot Spots.”
their occurrence may be.

Furthermore, a point to which many an ethnographic account has attested: even when certain disorderly acts have been made crimes or ordinance violations, the available data on summonses and arrests will only reflect a fraction—likely a small one—of the actual overall incidence of such offending conduct. They size of the gap between the actual and documented incidence of illicit disorder is also liable to vary substantially over time, and across different spaces, depending on a range of idiosyncratic factors, including variations in the extent to which disorderly behaviors are detected or go unnoticed (whether by police or others), which, in turn, may be driven by differences in the physical designs of different spaces. The problem is much akin to the long-recognized problem of the “dark figure” of crime, which poses an enormous obstacle even for the study of very serious crimes, which however underreported they may be, are nevertheless more apt to show up in the available data than petty crimes or mere ordinance violations.

G. THE PROMISE AND PERILS OF QUALITATIVE CASE STUDIES

Ethnographic case studies can tell us a lot about the concrete happenings in particular spaces at particular times. Yet, although case studies can certainly inform efforts to formulate or adjust causal hypotheses that concern more than just individual cases, the findings from such narrowly-focused research are not a legitimate basis for statistically generalizable claims. To pretend otherwise, as Mario Small has deftly pointed out, is much like trying to get replica airplanes to fly: no matter how much they may look the part, without engines, they will never fly. Similarly, no matter how much the design of ethnographic case studies, or any other small-n studies, might succeed in emulating the practices of “quantitative researchers”—namely “standard survey practices designed to ensure representativeness and thus generalizability.” Such an effort, like a plane without an engine, promises, at the very best, to go nowhere. Ethnographic case studies can go some way towards accounting for dynamics that are clearly pertinent to Broken Windows Theory but are unlikely to ever be accurately captured in large-scale, systematic, and reliable data-collection efforts. However, no amount of such research will ever get us close to anything like a hard-and-fast test of the account, nor anywhere near the point that one could credibly claim to have confirmed or disconfirmed it. If, as in my research, the hypothesized connections are not found, the prospect will remain nonetheless that they will show up in future research or in a study of some other space. At the same time, findings consistent with the theory will not prove it because, insofar as the theory fails to identify the mechanism by which disorder leads to crime, affirmative evidence will be of correlation, not causation, thus leaving numerous important questions to be resolved, including whether the observed associations are driven by

95 This, we know at least, is certainly true of murders and manslaughter than other crimes. One prominent account of the decades-long crime decline in the United States explains: “Among the range of offenses for which the FBI attempts to compute a crime rate by adding up crimes reported to the police, the two offenses with the best reputation for accuracy are homicide (because of its importance and the presence in most cases of a body) and auto theft (because of widespread insurance).” Franklin Zimring, The Great American Crime Decline 4 (2006). The problem with the example of auto theft is that not everyone carries insurance for collision or theft, perhaps especially those who live in neighborhoods where they are particularly vulnerable to such a crime and whose vehicles are not nearly as theft-protected as their more affluent automobile-owning counterparts.
some as-of-yet contemplated or observed factor. In other words, even if evidence to corroborate the theory is discovered, it will remain a “speculation” absent of further development.

This discussion additionally underscores the point that Broken Windows Theory is a much more complex and sophisticated theory than the simplistic, mono-causal “straw man” of an account that critics of Broken Windows Theory are in the habit of characterizing it to be. At the same time, it also reveals an account that raises far more questions, substantively and methodologically, than it answers. Such questions are much more than merely academic, as our answers, however we may arrive at them, have the potential to impact real lives in real ways.

H. GOOD ENOUGH FOR GOVERNMENT WORK?

In a far more certain and predictable social universe, perhaps it would be best not to implement any public policy until we can substantiate the empirical merits of the ideas upon which it is based. As it is, however, our world is far too messy and unpredictable for such an exacting standard to be practicable.  

It would hardly be feasible for policymakers to abide by the same standards of evidence towards which science ideally aspires. While the prudent course for social scientists to take in most instances might be to err on the side of caution when drawing conclusions from their readings of the available evidence, policymakers often do not have that luxury and generally work under an entirely different set of demands and pressures. There are many occasions when ‘something must be done’ when the evidence is less than clear about what that something should be. Political considerations of various sorts also come into play for policymakers in ways that, in theory at least, should not be the case for researchers. In sum, policymakers, as well as frontline administrators (e.g., police officers), frequently need to act decisively before all the evidence is in, before it can be properly analyzed, and before the theory behind a given course of action can be confirmed or disconfirmed.

On this point, Kelling argues that critics of Broken Windows Theory (and criminologists more generally) have not been nearly attentive enough to the challenges of formulating and

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97 This is not to say that the lack of consistent and coherent criteria for evaluating Broken Windows Theory is unproblematic. It is, without question, very much a fundamental weakness of the account. On much the same logic as we are in the habit of thinking no person should be above the law, our theories should not be above principled examination, Samuel Bacharach, “Organizational Theories: Some Criteria for Evaluation,” *Academy of Management Review* 14, no. 4 (October 1989): 496, 501. (“Just as no person can be above the law, no theory ought to be constructed in such a way that it is forever exempt from empirical refutation.”) Yet, as we have seen, the fact that Broken Windows Theory fails to provide a workable framework for assessing its empirical claims is hardly an aberration either in policy research or in social science more generally.

98 We should be careful not to overdraw the distinction, however, between the so-called social and natural sciences.

99 Cautioning against “the dangers of strong causal reasoning in social policy,” Martin Rein and Christopher Winship observe:

>Social science has been able to provide only what we would call “weak” causal theories. In the vast majority of cases the effects that are found are of modest size and only a small amount of the variation in the dependent variable is explained. It is doubtful that complete explanations will ever be forthcoming in most social science. The use of “weak” theories as the basis for social policy implies that the policy’s effectiveness is far from assured.

implementing policies with less-than-perfect information:

[C]riminology and criminal justice have confused scientific standards of evidence with the evidence that policy makers and practitioners require in the real world. To be sure, policy makers would love to live in a world where they were 95 per cent certain that implementing particular policies or practices would have the desired outcome. As a matter of fact, they do not and will not. Policy makers live in a world in which they have to make decisions—many of them, life and death—in which they are confronted with mixes of problems and programs that do not lend themselves to clean experiments, bad data, and often conflicting and/or uncertain research findings.¹⁰⁰

Furthermore, while some theories are so empirically implausible on their face that they can be rejected as out-of-hand—as unworthy of serious and sustained empirical investigation or as a basis for policy action—even leading critics of Broken Windows Theory recognize, with good cause, that it is an “eminently plausible” account.¹⁰¹ As Gladwell describes the theory he once loved,¹⁰² it is merely an instance of the more general bit of conventional wisdom that “little things” in the aggregate “can make a big difference.” This logic surely helps to make some sense of how social orders, from the most micro to the most macro, are produced and reproduced, as well as how they are disrupted and changed. Indeed, it is difficult to imagine how one could make sense of processes of social reproduction or social change without at least considering the applicability of the epidemiological common sense that “ideas and products and messages and behaviors [can] spread just like viruses do.”¹⁰³ If, for example, there was much cause to doubt that something like this kind of dynamic is at work in the rise and fall of various social movements, recent events—including the Arab Spring insurrections, the Black Lives Matter movement, and the improbable ascent of Donald Trump to the most powerful political office in the world—surely demonstrate that disruptions to the normal “order of things” can become contagious.¹⁰⁴

¹⁰⁰ Moreover, as Kelling and Sousa have suggested, an empirical account may pass the muster of social-scientific critique, yet provide “little in the way of policy options.” Kelling & Sousa, supra note 10, at 91. Harcourt similarly acknowledges: “The truth is that many theoretical accounts in politics, criminal justice, and public policy are not validated, but that usually does not prevent us from implementing those policies.” Harcourt, Illusion of Order, 57. As such, Harcourt also prefaces his critique of Broken Windows Theory by saying “I do not intend to hold the broken windows theory to an unrealistically high empirical standard.” Ibid. Ultimately, though, as this article argues and as proponents of Broken Windows Theory have long complained, Harcourt not only holds the theory to an unrealistic standard, but he does so largely on the basis of what he concedes refers to as “weak data.” Ibid.

¹⁰¹ Matthews, supra note 5.


¹⁰³ Gladwell, The Tipping Point, at 7.

¹⁰⁴ For a discussion of the notion of the “tipping point” in the context of contagion effects, including the application of the notion to the Arab Spring, see Miriyam Aouragh and Anne Alexander, “The Egyptian Experience: Sense and Nonsense of the Internet Revolution,” International Journal of Communication 5 (2011): 1348.
It is not clear why street-level disorder, as typically conceived by proponents of Broken Windows Theory, could not become similarly contagious. Conversely, it seems implausible to think that disorder has never given rise to the kinds of dynamics that the theory posits. Consider, for example, the following description of life in Los Angeles’ Skid Row:

The 50-block area has all the markers of what qualifies as “disorder” under the broken-windows theory: graffiti, public urination and defecation, peddling, aggressive panhandling, prostitution, public drinking—you name it … “A woman in ragged clothes, pus and blood running from a burn on her leg, was lying on the sidewalk, mumbling incoherently,” reports the L.A. Times. A destitute man in wheelchair, his head locked back, mouth gaping open, drooling, wheezing, with bloated ankles and fleshy, pussing wounds on the side of his legs. L.A.’s Skid Row is truly a shocking sight, and, as the sun sets, it gets even more disorderly. If you walk the streets at night, you literally have to wind around fifty tents and box encampments on a single side of a single street.105

This description comes, not from an account making the case for the enactment of the Broken Windows approach in L.A.’s Skid Row—as perhaps one might be inclined to guess—but from Harcourt, Broken Windows’ critic-in-chief, during a Legal Affairs blog debate with Thacher. Harcourt’s aim in drawing attention to these conditions was to emphasize the extreme level of human misery experienced by the Skid Row inhabitants, as if to intimate that people suffering so much should not be made to suffer more by subjecting them to unwanted encounters with the police, arrest, incarceration, or worse. Still, as Thacher observed in response to Harcourt’s ethnographic account, “it defies reason to believe that the truly appalling disorder [Harcourt] describe[s] so vividly on LA’s skid row doesn’t affect some people’s propensity to commit crime there.”106 Surely, lots of social epidemiologists would be inclined to concur with Thacher even if they are not inclined to think, as Thacher does, that policing is an appropriate intervention to contend with such a tragic and otherwise appalling state of affairs in one of the wealthiest cities in America.

As an empirical matter, Broken Windows Theory might still be, as the saying goes, “good enough for government work.” Surely, it is not the case that the empirical grounds for policy interventions must be scientifically demonstrated in the way we demand when it comes to most theories in the natural or so-called “hard” sciences.107 As a general matter, plausibility certainly

106 Ibid.
107 Even the “lines” of demarcation in the hard sciences are not so clear. See, e.g., Carroll, supra note 104; “Philosophers and other theoreticians of science” do not even agree on “what science is.” Sven Ove Hansson, “Science and Pseudo-Science,” The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, Summer 2017 edition, available at https://plato.stanford.edu/archives/spr2015/entries/pseudo-science/, last accessed March 7, 2018 (noting the paradox “that so much agreement has been reached in particular issues [e.g., whether creationism or ufology are sciences] in spite of almost complete disagreement on the general criteria that these judgments should presumably be
seems like a reasonable enough standard for all practical purposes. Under this rubric, Broken Windows Theory does not appear to be appreciably less adequate than plenty of other, decidedly less controversial policies. As Thacher concludes, the evidence will likely never be as clear as the most vociferous proponents and opponents of the theory have so often declared.

This is not just the product of a difficult empirical problem requiring difficult analysis. It is also, as my engagement with Broken Windows Theory demonstrates, a problem of a theory that is not constructed to be empirically examinable in a way that will ever prove decisive and certainly not in a way that would be likely to convince a skeptic of the account in one direction or another.

However much the results of my research in the square (or any other research) might count towards the refutation of the notion that there is an ineluctable connection between disorder and serious crime, they do not serve to refute Broken Windows Theory because the account makes no such assertion. Nor does my research provide me with grounds for conclusions more definitive than those that led to the formulation of the Broken Windows account. To reach a more decisive conclusion than this would require reading more into the theory than what is there, which would require the violation of basic principles of “second-order agreement,” thus only serving to confuse what has already proven to be a confounding debate.

III. THE NORMATIVE UNDERPINNINGS OF BROKEN WINDOWS THEORY

Nothing in the analysis that this article has proffered to this point is intended to convey, nor does it logically imply, that order-maintenance policing is an acceptable response to the conditions that Harcourt describes as prevailing in Skid Row or to those that prevailed in my observations in the square. As Thacher has persuasively pointed out, even if it could somehow be established that the empirical claims of Broken Windows Theory were true, the irreducibly normative question would nonetheless remain of whether we should deploy the police to aggressively check disorder as proponents of the theory have so consistently urged.

In all the back-and-forth over the empirical merits of Broken Windows Theory, this and other crucial normative questions begged by the account have gotten lost in the wash. The emphasis on the empirical merits of the theory is misplaced because as we have seen, contrary to what critics have argued, its claims are simply not amenable to dispositive empirical testing or even to minimally-meaningful examination, at least not beyond singular case studies or experiments.

More fundamentally, the empirical debate over Broken Windows Theory may have effectively served to distract from the fact that the account has never rested on an empirical claim—“strong” or otherwise. Instead, it has been hedged by a fundamentally normative commitment to order and to entrusting the police—at least in certain neighborhoods and under certain conditions—with the primary responsibility for maintaining it. In pursuing this end, police arrest and jail people, thereby doing violence to them, in response to behaviors that are not themselves violent and have often done no lasting, appreciable harm to anyone, except themselves.

A. RECONSIDERING THE THEORY BEHIND ORDER-MAINTENANCE POLICING

The most forceful and developed argument for justifying order-maintenance policing on normative grounds is found in the work of the public policy scholar David Thacher. In an article in which he reconsiders the rationale for order-maintenance policing, Thacher contends that the approach relied on “strong causal reasoning” about its potential to indirectly reduce rates of serious
crime. The problem with strong causal claims, Thacher argues, is twofold: first, they tend to ask more out of social science research than it is typically capable of delivering and, second, such claims have a tendency “to crowd out questions about the intrinsic wisdom of policy interventions.”  

Lamenting that “criminologists have paid little attention to ... whether order maintenance activities and the public order they hope to create are desirable in their own right, apart from their indirect contribution to crime prevention,” Thacher calls for scholarship that aims for a greater appreciation of “the intrinsic merits” of order-maintenance policing through firsthand observations of how it is actually implemented “on the ground.”

It is not clear that Thacher is really making the case for an approach all that different than what leading proponents of Broken Windows Theory have long argued. Any theory that prescribes a course of action is a normative theory. Such an account speaks not merely to what is, but also to what ought to be done about it. Clearly, Broken Windows Theory is, and always has been, a normative account in the most pragmatic of senses.

Numerous passages from Wilson and Kelling’s seminal essay make this clear, though none perhaps so much as the concluding paragraph of their essay in which the authors contend:

> Above all, we must return to our long-abandoned view that the police ought to protect communities as well as individuals. Our crime statistics and victimization surveys measure individual losses, but they do not measure communal losses. Just as physicians now recognize the importance of fostering health rather than simply treating illness, so the police—and the rest of us—ought to recognize the importance of maintaining, intact, communities without broken windows.

As this passage illustrates, and as the enormous influence of Broken Windows Theory on crime control policies has made abundantly clear, there is no mistaking the thesis for anything less than the prescriptive—and therefore normative—account that it is. At the same time, the standard critical assumption is that the theory’s call for order-maintenance policing is ultimately premised on its empirical contention that disorder leads to serious crime, such that, if research demonstrated otherwise, the theory would be rendered without foundations and debunked. We have already seen that it is not nearly so simple to debunk an account so uncertain. More than this, the assumption is incorrect: the case for the Broken Windows approach is ultimately normative—not empirical—and, more specifically, is not ultimately premised on evidence of a causal linkage between disorder and serious crime, or upon proof that order-maintenance policing works to prevent or reduce serious crime through efforts to proactively and aggressively police disorder.

While Wilson and Kelling did not expressly set forth this position in their original statement of the theory, their analysis certainly implied as much. Initially, the essay reads like a

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109 Ibid; emphasis added; see also Thacher, “The Normative Case Study” (arguing for the application of this approach, even more generally, to all manner of social policy).
studious attempt to direct attention away from questions of crime causation and crime prevention. The progenitors of Broken Windows Theory began their seminal *Atlantic Monthly* essay by discussing the “Safe and Clean Neighborhoods Program,” an experiment in policing conducted in Newark, New Jersey in the mid-1970s, which involved moving police officers from squad cars to foot patrol beats. One might assume that Wilson and Kelling would proceed to tell us that the experiment demonstrated that foot patrols worked to reduce rates of serious crime by maintaining or restoring order in the neighborhoods where they were conducted. Instead, we learn that the Police Foundation’s report concluded, on the basis of what Wilson and Kelling describe as “a carefully controlled experiment”, that, “to the surprise of hardly anyone … foot patrol had *not* reduced crime rates.” A little later, we also learn that the Foundation’s report indicated that rates of crime *increased* during the term of the experiment.

Nevertheless, Wilson and Kelling argued:

> [R]esidents of the foot-patrolled neighborhoods seemed to feel more secure than persons in other areas, tended to believe that crime had been reduced, … seemed to take fewer steps to protect themselves from crime … [and] had a more favorable opinion of the police than did those living elsewhere.

* * *

These findings may be taken as evidence that the skeptics were right—foot patrol has no effect on crime; it merely fools the citizens into thinking that they are safer. But in our view, and in the view of the authors of the Police Foundation study (of whom Kelling was one), the citizens of Newark were not fooled at all. They knew what the foot-patrol officers were doing, they knew it was different from what motorized officers do, and they knew that having officers walk beats did in fact make their neighborhoods safer.

This analysis would seem to defy reason, particularly since Wilson and Kelling say nothing in critique of the Police Foundation’s assessment that the foot patrols did not work to reduce rates of crime. In the very next line of the essay, Wilson and Kelling posed the question that surely many a careful reader of the essay has wondered: “how can a neighborhood be ‘safer’ when the crime rate has not gone down—in fact, may have gone up?” The authors’ answer served as the segue to the beginnings of what we now know of as Broken Windows Theory:

> Finding the answer requires first that we understand what most often frightens people in public places. Many citizens, of course, are primarily frightened by crime …. This risk is very real, in Newark as in many large cities. But we tend to overlook another source of fear—the fear of being bothered by disorderly people. Not violent

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112 Ibid; emphasis added.
113 Wilson and Kelling inquired: “[H]ow can a neighborhood be ‘safer’ when the crime rate has not gone down—in fact, may have gone up?” Ibid.
114 Ibid.
115 Ibid.
116 Ibid.
people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.

What foot-patrol officers did was to elevate, to the extent they could, the level of public order in these neighborhoods. Though the neighborhoods were predominantly black and the foot patrolmen were mostly white, this “order-maintenance” function of the police was performed to the general satisfaction of both parties.\(^{117}\)

Thus, the sum of Wilson and Kelling’s analysis of the only systematic research upon which they base their “theory” amounts to essentially this: efforts by police to maintain order at the neighborhood-level did not yield crime reductions, yet such efforts did work to promote “public order”—or a very particular “vision” of order.\(^{118}\)

The rest of the essay, as this article has already discussed, proved to be an exercise in ambivalence. When considered in conjunction with the urgency of their appeal for communities “at the tipping point” to implement what would later come to be known as Broken Windows policing, the implication seems clear: contrary to popular belief, the real crux of Wilson and Kelling’s argument was that, in certain spaces where informal social controls are deemed to be inadequate, the police should intervene to maintain or “restore” order for the sake of cultivating a certain brand of order—even if such efforts do not work to reduce or prevent serious crime.

Over the years, the proponents of Broken Windows Theory would make this point explicit. In their conclusion to *Fixing Broken Windows*, Kelling and Coles offered the following “caveat”:

Let us suppose that public order-maintenance activities have not reduced crime and have little potential for doing so … Such an outcome would dampen only slightly our enthusiasm for restoring order. Both disorder and the fear it generates are serious problems that warrant attention in and of themselves … Restoring order is key to revitalizing our cities, and to preventing the downward spiral into urban decay that threatens neighborhoods teetering on the brink of decline, regardless of whether a reduction in crime results.\(^{119}\)

Similarly, in an essay in which they “reaffirm” the core tenets of their theory a “quarter-century” after its inception, Wilson and Kelling argued:

The broken windows idea does two things, one indisputably good and the other probably effective: *It encourages the police to take public order seriously*, something that the overwhelming majority of people ardently desire, and it raises the possibility that more order will mean less crime. *The first goal requires no*

\(^{117}\) Ibid.


\(^{119}\) Kelling and Coles, *Fixing Broken Windows*, 242; emphasis added.
evidence. The second does, and so far most studies suggest that more public order (along with other factors) is associated with less predatory street crime. With all this in mind, we believe that it remains a strategy worth pursuing.  

To make matters even clearer, Kelling has expressly endorsed Thacher’s view that the case for order-maintenance policing has unduly focused on the criminogenic effects of disorder and, going forward, that the argument should shift to the value of order-maintenance policing as a sufficiently worthy end unto itself. Kelling and longtime collaborator William Sousa write:

[A]s Thacher (2004) indicates, both proponents and opponents of ‘broken windows’ have become preoccupied with the search for strong causal relationships between disorder and criminal activity—a type of connection that is rarely (if ever) clearly understood in criminology despite the best efforts of objective social science.

* * *

In his analysis, Thacher argues that at least some types of order maintenance policing practices are important as ends unto themselves – regardless of their impact on serious crime—because “they address important instances of accumulative harms and offenses”. Indeed, some police order maintenance strategies are implemented with no original intent to reduce serious crime but instead with the goal of restoring public order … Even when an order maintenance intervention that is designed to reduce serious crime fails to do so, this does not necessarily mean the intervention is without merit.

Contrary to the notion that, as Harcourt puts it, the “cardinal proposition of the order-maintenance approach” is the “claim that ‘disorder causes crime,’” the case for it instead rests on the idea that the approach is intrinsically valuable, irrespective of its impact on rates of serious crime.

B. THE ILLUSION OF CRITIQUE

Broken Windows Theory is also a “theory” in the sense of “a belief, policy, or procedure proposed or followed as a basis of action.” It is a normative theory, and while Thacher has advanced it as such to a more detailed and extensive degree than anyone else, it was a theory in this sense from the time that Wilson and Kelling first introduced it to the world. Critiques that ignore this fundamental fact are only partial critiques, at best.

In response to Thacher’s position that “[p]olice should do something” about behaviors like public urination and panhandling “because they are wrong,” Harcourt argues:

120 Kelling and Wilson, “A Quarter Century of Broken Windows”; (emphasis added).
121 George Kelling & William Sousa, Of ‘broken windows’, criminology, and criminal justice in Police Innovation: Contrasting Perspectives 77-97, 88 (emphasis added) (internal citations omitted).
124 Harcourt/Thacher Debate; emphasis added.
But that's a moral, political, legal, and aesthetic judgment, not a social scientific question. The social sciences have been asking the only appropriate questions for social scientific inquiry in light of the broken windows hypothesis. I'd be happy to debate whether disorder is ‘wrong,’ but realize, that doesn't call for scientific reasoning. It doesn't call for regression analysis or ethnography.

And ultimately, I don't think that ‘right’ or ‘wrong’ are the correct categories. Those terms don’t begin to capture the complexity of order and disorder. Once we move away from the narrow social scientific inquiry, then a whole new set of questions arise, and they're different than the ones you mention. The proper questions are: How do we define disorder? Who defines disorder? How do we come to believe that any conduct is disorderly? In other words, what do we see as disorderly and at what price? You suggest that disorder, in contrast to crime, “is what you can see.” That, I believe, is what the debate is really all about.125

It is a curious response from Harcourt who devotes the last third of Illusion of Order to a “rhetorical critique” of Broken Windows Theory, an “alternative vision” of punishment and criminal justice, and “a new mode of political analysis.” At various points, Harcourt surely does not refrain from moral, legal, or aesthetic judgments. For instance, contrasting his perspective on the “rhetoric of harm” from the views of scholars like Wendy Brown and Richard Rorty, Harcourt argues in the final pages of Illusion of Order:

[I]n sharp contrast to Rorty, Brown, and others, I draw drastically different implications from this trend in social and political theory. Far from decrying this rhetorical shift, I applaud it. The proliferation of harm arguments—conservative or neoconservative, progressive or New Progressive, “postmodern” or poststructuralist—is ultimately a positive development for political debate. It augurs a new and improved political analysis—a mode of analysis that confronts head-on, the difficult task of assessing, comparing, and weighing harms. It forces the participants in the debate to address and balance harms in a manner that had previously been obfuscated by the harm principle.126

In employing terms and phrases like “applaud,” “positive,” and “new and improved,” Harcourt is not just offering an empirical critique. Even in his debate with Thacher, moreover, Harcourt does not eschew normative arguments. Referencing his depiction of life on Skid Row, for instance, Harcourt poses the following questions:

How is it that we have turned these social problems over to the police? Why isn’t

125 Ibid. Harcourt refers to this point of contention as reflecting “probably [his] sharpest disagreement” with Thacher’s position.
126 Harcourt, Illusion of Order, 246.
it the job of social services? Should we arrest these street people for urinating and defecating in public, or should we build secure public toilets?\footnote{127}{Harcourt/Thacher Debate.}

As with much else that Harcourt says in the debate, these questions implicate moral, political, and legal judgments—particularly the last in the series, which plainly betrays an abiding commitment to strictly empirical analysis with multiple uses of the verb \textit{should}.

Even if Harcourt had succeeded in refraining from normative argumentation in his critique of Broken Windows Theory, it is not clear how or why anyone would endeavor to do so in evaluating an account which, as we have seen, is ultimately normative in its orientation. If, as Max Weber would have it, one of the main goals of social analysis is \textit{“clarity,”} then surely the far better course would be to take care to separate out the empirical and the normative claims that the theory makes and analyze them accordingly. Perhaps the empirical portions of the account should be left to the social scientists, while the normative portions should be left to the philosophers; however one comes down on this question, it is surely not in the interests of clarity to insist upon treating a fundamentally normative account as strictly empirical. To do so only adds to the illusion that the theory is something other than what it is revealed to be upon close and careful examination of its most authoritative texts.\footnote{128}{Even if Harcourt and other critics set out to follow the supposed Weberian standard of \textit{“value neutrality,”} they crossed that Rubicon some time ago. Cf. Max Weber, \textit{“Science as a Vocation,”} Daedalus \textbf{87}, no. 1 (Winter 1958): 111, 130; see also C. Wright Mills, \textit{The Sociological Imagination} 78 (2000). Much as Weber enjoined us to contend with \textit{“inconvenient facts,”} Mills emphasized that, if the results were not what we hoped to find, \textit{“too bad”} or, if they are, that’s \textit{“fine”} too; the goal in any event is \textit{“to get it straight—to make an adequate statement.”} Ibid. As uncontroversial as this position may seem to some readers, it is not very difficult to find examples of research that appear to be driven in other directions by competing motivations. As irony would have it, the danger, politically, of getting things wrong—perhaps, as Mills put it, to render the world more or less \textit{“gloomy,”} \textit{“sunny,”} or otherwise than it really is or has been—might well serve to undermine the credibility of a position that would have otherwise proven more influential.

The foregoing underscores another key point of confusion in the debate over Broken Windows Theory: that the ostensible criticisms of the theory really add up to all that much in the

While ambiguities in any textual analysis invariably arise, as they certainly do with Broken Windows Theory’s authoritative texts, there are no logics of interpretation that permit terms like \textit{“indirect”} and \textit{“inevitable”} to be rendered as their opposites. Nor is any clarity gained by treating logically-unfalsifiable claims as falsifiable. Nor, to the point of the remainder of this article, is the aim of clarity advanced by treating a fundamentally normative argument as a strictly empirical account.

Assuming it should matter at all, it seems doubtful that Weber’s ghost would approve of any of these moves. Indeed, regarding the fact/value controversy, surely it is well within the purview of social-scientific analysis to assess the relative degrees to which a discourse (of whatever sort) rests upon, or is informed by, one or the other, and if both are at work, the interplay between the two basic types of claims. This type of analysis has long been a concern of sociologists—including Weber himself. Lastly, on this point, it is worth bearing in mind that Weber viewed the posture of \textit{“let[ting] the facts speak for themselves’} [as] the most unfair way of putting over a political position.” Weber, \textit{“Science as a Vocation,”} 124. This is precisely what both proponents and opponents of various theories, including Broken Windows, have all too often tended to do in a discourse dominated by mantras like \textit{“what works,”} \textit{“evidence-based,”} and \textit{“smart on crime.”} It is not clear how else to assess a fundamentally normative account, which begs enormously important normative questions, except through normative engagement of some kind.

As Thacher compellingly argues, normative analysis need not, and ought not, preclude serious efforts at unbiased, objective empirical research and analysis, but the facts, with respect to any policymaking decision or any other morally-significant course of action, will never \textit{“speak for themselves,”} but will always be assessed through normative or ideological lenses.
way of critique, much less a “damning” one, as some have said of Harcourt’s account.\textsuperscript{129} The problem is not, as Harcourt’s analysis plainly illustrates, that critics have refrained from normative argumentation in critiquing a normative account. It is, rather, that the normative arguments that critics offer are just not very compelling or even apposite.

According to Harcourt, “the real issue” in determining whether some behavior should be subjected to “legal or political intervention”, comes down to “assessing, comparing, and weighing harms.”\textsuperscript{130} Under the calculus Harcourt counsels in the closing paragraphs of \textit{Illusion of Order}, on one side of the scale are the harms the conduct causes, while on the other side, are “the harms of … the proposed … intervention.”\textsuperscript{131} The overarching aim of this calculus is “to design policies” that keep all manner of harms, very broadly-conceived, including “financial,” “other economic harms,” and “aesthetic harms,” to a minimum.\textsuperscript{132} In Harcourt’s view:

\begin{quote}
[T]he proliferation of harm arguments in political debate, including poststructuralist claims of injury, is a \textit{positive development} because among other things, it forces us to address the hidden normative dimensions lurking beneath conceptions of harms. It helps us realize that there is probably harm in most human activities and, in most cases, on both sides of the equation—on the side of the persons harmed by the purported offense, but also on the side of the actor whose conduct is restricted by legal intervention.\textsuperscript{133}
\end{quote}

Thinking critically about what comes to count as a harm or injury—and why—is certainly a worthy endeavor, as many a social-constructionist interrogation of normatively-loaded, yet taken-for-granted, concepts (including “disorder” and “crime”) and theories have repeatedly demonstrated. Harcourt’s analysis, however, hardly provides the makings of a coherent and viable framework for critically assessing the desirability, necessity, or justice of proposed programs of order-maintenance policing or similarly-conceived crime-control ventures. While Harcourt ultimately comes down against the theory and practice of Broken Windows as a method of preventing crime and maintaining order, his case against it is highly tenuous, certainly a great deal more so than one might anticipate from an author who is routinely cited for discrediting it. At crucial points in his purported critique, it is not even clear just what Harcourt’s points of contention with the account are.

After all, Harcourt concedes that the very sorts of disorderly conduct with which proponents of Broken Windows Theory tend to be most concerned are, in his estimation, the source of “serious” harms:\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{129} See, e.g., Steve Herbert, review of \textit{Illusion of Order: The False Promise of Broken Windows Policing} by Bernard Harcourt, Theoretical Criminology 6, no. 1 (February 2002): 103, 104.
\item\textsuperscript{130} Harcourt, \textit{Illusion of Order}, 247.
\item\textsuperscript{131} Ibid.
\item\textsuperscript{132} Ibid.
\item\textsuperscript{133} Ibid.; emphasis added.
\item\textsuperscript{134} While Harcourt ultimately embraces the “proliferation” of “harm arguments” (at least of the “non-trivial” variety), his critique of Broken Windows sometimes reads like a lamentation on the effective “collapse” of John Stuart Mill’s “harm principle” as a viable “limiting principle on legal intervention[s]” like order-maintenance policing:
\end{enumerate}
\end{footnotesize}
[T]here is little if any evidence supporting the … theory. That does not mean, of course, that disorder and disorderly conduct cause no harm. It would be misleading to stop the discussion here. Disorderly conduct does cause economic and aesthetic harms. Graffiti spraying is vandalism, and causes some economic harm: graffiti either has to be removed by the property owner, or will reduce the value of the property. The same is true of public littering and vandalism. Turnstile jumping results in decreased public revenues for public transportation, and may increase the cost of ridership for other subway riders. Homelessness, loitering, and aggressive panhandling are aesthetically unpleasant, and may have a negative impact on commercial activities in downtown neighborhoods. Many people are bothered by panhandlers, and may in fact change their behaviors in order to avoid homeless street people. Although these phenomena are not evidence of the broken windows they are nevertheless harms, and they must be weighed in the analysis.135

Then, after quoting a lengthy excerpt from *Fixing Broken Windows* in which Kelling and Coles assert that “restoring order is key to revitalizing cities” and “preventing spiral into urban decay … regardless of whether a reduction in crime results,”136 Harcourt goes on to say: “These effects on communities are serious and need to be weighed in the balance.”137 Thus, Harcourt concedes that the impact of disorder is potentially quite serious—for the same reasons that proponents of Broken Windows Theory claim as much.

Although the harm principle formally remains a necessary but not sufficient condition [for legal enforcement], harm is no longer in fact a necessary condition because non-trivial harms are being made about practically all conduct. As a result, we no longer focus on the existence or nonexistence of harms. Instead, we focus on the types of harms, the amounts of harms and the balance of harms. As to these questions, the harm principle offers no guidance. It does not tell us how to compare harms. It served only as a threshold determination, and that threshold is being satisfied in most categories of conduct, especially traditional categories of moral offense. As a result the harm principle no longer acts as a limiting principle on the legal enforcement of morality ….

Ibid.

While it is none too clear that Mill’s harm principle ever functioned to significantly (or at least non-trivially) limit the scope of the criminal law in the manner that Harcourt’s “collapse” narrative suggests, he is certainly on solid ground in contending that harm, as broadly as the term has come to be understood, renders it a weak, if not altogether meaningless, basis for a limiting principle. After all, with a little creativity and a bit of ability to see the world from different perspectives, it is not terribly difficult to conceive of a great many behaviors—including conduct that is not currently criminalized—as “non-trivially” harmful. Even if some of us are inclined to view acts like graffiti or public urination as perfectly harmless, or merely annoying, others may—as both proponents and opponents of Broken Windows Theory tend to readily recognize—see matters differently, and as a result, may experience harm, even if “only” psychic and ephemeral.

135 Ibid, 211–12. In reiterating that “there is little if any evidence supporting the broken windows theory,” Harcourt reduces Broken Windows Theory to the claim that disorder causes crime. What follows in the remainder of this excerpt, however, very much confirms the case for Broken Windows to the extent that Harcourt is following Kelling and Wilson’s injunction to take disorder very seriously—ultimately, because it is consequential, “regardless” of its connection to crime. In this sense, if we interpret the “theory” of Broken Windows as essentially an account that stresses the importance of tending to disorder—conceived as graffiti spraying, public urination, littering, and the like—Harcourt’s analysis here can be viewed more as an affirmation than a refutation of the account.


137 Ibid, 212.
Upon what, then, does Broken Windows’ “arch-critic” rest his case? Enter “the collapse of the harm principle.” Upon concluding that “the proliferation of harm arguments and the collapse of the harm principle has fundamentally altered the structure of the debate over legal and political intervention,” Harcourt declares:

The rhetorical shift and collapse of the harm principle suggests a final weakness in the order-maintenance approach. The approach focuses on the harms of the challenged conduct … but fails to investigate or explore sufficiently the harms of [its] proposed policing initiative. The point is, after the proliferation of harm arguments, the harms associated with quality-of-life offenses are no longer determinative of the outcome of the debate. They are no longer the touchstone of the discussion. They are but one set of harms among others that need to be assessed, compared, weighed, and judged.138

If we are serious about counting all harms under this equation, Harcourt quite rightly—or, at least, certainly quite plausibly—observes:

But there are other harms to consider. Order maintenance, in large part, by means of a significant increase in misdemeanor arrests, and these arrests, as we have seen, can be quite an ordeal. Being arrested, handcuffed, transported, and booked, and spending the night in jail, is an experience that many of us had the good fortune to avoid. The quality-of-life initiative has been accompanied by a significant increase in the number of complaints of police misconduct, and it ends up targeting minorities because misdemeanor arrests have a disproportionate effect on them. It reinforces the stereotype of black criminality, and in many cases delegates the power to define order and disorder to police officers and designated community members in a manner inconsistent with our conception of democratic theory or constitutional principles.139

Still, notwithstanding the potential, if not near-certainty, of these undoubtedly “extremely troubling” “harms” of “order-maintenance policing,” Harcourt still leaves the door plenty ajar for instituting the Broken Windows approach:

We might be willing to bear some or all of these costs if the broken windows theory did in fact work—if the evidence suggested that creating order significantly reduces serious crimes such as murder, rape, and armed robbery. Barring that evidence, though, the hard question is whether the indirect benefits or order, the economic and aesthetic harms of disorder, and the potential benefits of increased surveillance outweigh the harms of order maintenance. I think the answer is no, particularly

138 Ibid, 211.
139 Ibid, 213.
since we can promote order and attack ingredients of crime in other ways.\textsuperscript{140}

On this analysis, the unfalsifiable theory not only remains unfalsified, but apparently remains open to future efforts to confirm it through evidence that “creating order significantly reduces crime.”

C. THE POVERTY OF POST-STRUCTURALISM

Harcourt writes in \textit{Illusion of Order} that he welcomes “the opportunity to deploy interpretive and poststructuralist insights in contemporary political decision making” because it enables us “to close the gap and use Foucauldian insights to interpret and criticize policies and programs in specific social contexts” and “to use Foucauldian insights to assess, propose, and adopt policies and programs in specific social contexts.”\textsuperscript{141} Through such insights, and by further “tak[ing] advantage of the insights of the linguistic turn and of poststructural theory,” Harcourt writes in the final sentences of \textit{Illusion of Order} that we may arrive at a:

\begin{quote}
[p]olitical analysis that no longer hides behind formalism and ignores the multiple hidden normative dimensions of harm. Political analysis that asks hard questions and forces us to make hard choices.\textsuperscript{142}
\end{quote}

Harcourt’s hope is that a “shift in harm rhetoric”, which “highlight[s] the harms on both sides of the equation, … may help us to make more informed arguments and reach more informed decisions.”\textsuperscript{143} This may well be true, but it just does not take us very far.

It is hard to quibble with the aim of keeping harms to a minimum.\textsuperscript{144} Likewise, it seems almost to go without saying that we ought not to arbitrarily highlight and attend to some forms of harmful conduct, while downplaying or ignoring others. As Harcourt and others emphasize, efforts to reduce harms, as in the case of order-maintenance policing, frequently entail harms of their own.

Yet, while Harcourt rightly recognizes the difficulty of determining what ought to count as a harm and how to assign weight to different harms to extend well beyond physical harms, he provides us with no principled or otherwise workable framework for making “hard choices” about “hard questions.” While there is certainly something in the notion that there is “probably harm in most human activities,”\textsuperscript{145} and this is surely more than sufficient cause to pause as we contemplate the justice of social control schemes premised upon reducing harms through the threat or actualization of state violence, it is not at all clear where this insight leads us.

If harm is entailed in all human activities, then it would seem to make a poor guide for thinking about where to draw the line of demarcation between the harmful behaviors we endeavor to control, repress, and punish and those that we decide instead to leave be or to regulate through means other than arrest, incarceration, or other forms of state violence. Harcourt happily hints at this conundrum, but offers little-to-nothing in the way of a potential resolution. If anything, he strongly suggests that any effort to meaningfully demarcate the harmful behaviors that we should grin and bear, from those that we should subject to the awesome and extraordinary powers of the

\begin{footnotes}
\item[140] Ibid.
\item[141] Ibid, 248.
\item[142] Ibid.
\item[143] Ibid, 247.
\item[144] But see Waldron, “Lex Talionis.”
\item[145] Ibid.
\end{footnotes}
state to repress and punish, would be futile.

In what he styles “postmodern meditations” on policing and punishment, Harcourt contends that “[w]e should no longer take … leap[s] of faith” when the empirical models relevant to public policy choices leave us with “gaps” “between the not-yet-falsified-because-not-really-tested and truth” and that we ought instead “turn to the coin toss, the roll of the dice, the lottery draw—in sum, to randomization.” In setting forth this argument, Harcourt asserts that we thereby avoid the use of “[t]heories that depend on the intermediation of human consciousness and decision-making,” an inquiry which he contends “should be set aside, left to deal with later when we have more leisure time or, perhaps, when we have made breakthroughs in those new consciousness studies.”

As Harcourt sees it, all manner of “discourse” on punishment—“whether in social contract theory, utilitarianism, social science, cultural criticism, or even deconstruction”—is a reflection of “more than anything the author’s intuition … not a correct derivation of principle.” “No matter how the inquiry is formulated, nor how the question is framed,” Harcourt tells us, “modern writings constantly reveal the author’s ethical choice.”

And “ethical choice” is something that Harcourt for some reason desperately wishes to avoid.

Invariably, Harcourt tells us, rationality with respect to punishment (and presumably all else) eventually runs its course, such that we find ourselves fresh out of reasons for resolving the gaps in what is empirically knowable or logically derivative of first principles of some kind. What, Harcourt asks, do we do, and what should we do, when we arrive at these moments? We “moderns,” he tells us, have come “in different flavors”:

There were those who didn’t really notice they were taking a leap of faith. They worked through problems with reason—deriving principles, making empirical findings, drawing policy conclusions—without ever noticing that they were bridging some gap or ambiguity. There were those who spent all their time excavating the gaps and ambiguities, and then offering explanations for the leaps of faith—explanations which themselves always ended up bridging another gap. There were those who heard the voice of critical reason, but who adamantly denied that they were making any choices. And then there were those who believed they were, indeed, making a leap of faith, but felt there was no other option in the human domain and tried as best they could to render transparent their ethical choices.

We can think of these as stages of modernity: from early enlightenment, to critical theory, to positivist social science, to cultural critics, to postmodern ethicists. I myself have passed through many of them. Until recently, I truly believed that we should just accept the inevitable leaps of faith in human knowledge, but make them transparent. That we had to “dirty our hands” by setting out fully the ethical choices we make whenever we draw conclusions and advocate for public policies. My

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147 Ibid, 14.
work, like that of many other poststructuralists—Foucault especially at the end of his life—had taken a turn to ethics and to the cultivation of the self. It seemed that there was no other option but to recognize human frailty and proceed more honestly.148

At least in his more postmodernist, meditative moments, Harcourt has converted to a different way of seeing matters:

No more. No more leaps of faith. There is an alternative. Whenever we are at the precipice of reason, faced with competing empirical hypotheses that have not been falsified or an indeterminate principle, or questionable assumptions, we need to stop using reason: stop rationalizing which hypothesis makes more sense, stop marshalling better reasons for one derivation of principle over another, stop legitimizing the questioned assumption. Turn instead to chance. Resolve the indeterminacy by drawing straws, flipping a coin, pulling numbers from a hat, running a randomized computer algorithm. We need to let chance take over when reason ends.

The end of modernity is within our reach. The final triumph of rationality is near. Reason has finally achieved that exalted state of self-consciousness that can allow it to identify its own extremity and stop there: no longer to rely on blind faith in itself to bridge the inevitable gaps, ambiguities, and indeterminacies of human knowledge; no longer to fill that space beyond the non-falsified hypothesis; ready to relinquish that realm to chance, the coin toss, randomization—the arbitrary.149

Why we ought to desire any of this is left unclear—except that the intended irony, presumably, is that the point is the lack of a point. That is, so the argument seems to go, since Reason supplies us with no clear resolutions, we should simply let chance decide.150

148 Ibid, 28.
149 Ibid, 12.
150 This recalls the Chigurh’s coin toss in Cormac McCarthy’s No Country for Old Men (2005), which might be read as the quintessential illustration of descent into postmodern nothingness, as nothing less than human life is determined through sheer chance. There is, though, another way of interpreting the Chigurh’s coin flip that is relevant to the matters at hand:

The coin toss of both of these scenes is interesting and potentially misleading in its seeming reliance on chance. In Roman society it was used as a way of revealing already determined fate … It is interesting that in neither case does the participant other than Chigurh know exactly what the toss is for or whether heads will be in her or his favor or Chigurh’s, or even if heads is the desired result.

Further, in the incident at the filling station, readers only assume that it is a life-or-death toss based upon their knowledge of Chigurh as killer. Thus, the outcome is still fully hidden in the mind of Chigurh, and perhaps, like the Romans, he is waiting for revelation of determined fate. The man at the filling station says, “Well I need to know what it is we’re callin here,” and Chigurh responds, “How would that change anything?” The coin, like Chigurh, has become an instrument of determined consequence: “It’s just a coin. For instance, nothing special there. What could that be an instrument of? You see the problem. To separate the act from the thing. As if the parts of some moment in history might be interchangeable with the parts of some other moment. How could that be? Well, it's just a coin. Yes. That's
Let us imagine Harcourt’s dream is one day realized: when research and reason reach their limits, we turn to randomization. Will we have succeeded in resolving the problem of the indeterminacy of human knowledge about our own affairs?

It does not appear so.

First, while the point of departure for Harcourt’s “turn to chance” is his radical, though long-realized limits of reason (long before Nietzsche and longer still before Foucault), his manifesto for randomization reflects an underappreciation of reason’s limits. In a “seven-point plan to brutally simplify our criminal justice sphere and stop, once and for all, trying reshape, correct, deter, or engineer the next generation,” all of Harcourt’s otherwise-provocative proposals pertain to the administration of criminal laws—not to their substance. It is the determination of the latter, much more so than the former that would seem to depend on something more than the merely instrumental application of reason. The very definition of crime, after all, is socially and politically constructed—not derivative of settled first principles and certainly not reducible to any simple, straightforward calculus of harmfulness, wrongness, or any other standard metric—as a quick glance at criminal codes over time and across different societies readily confirms.

Additionally, given the harms that are entailed in a great many human activities and, as Harcourt has stressed, the subjectivity invariably entailed in assessing them, why not flip coins true. Is it?”

In the later incident Carla Jean questions the coin toss: “You make it like it was the coin. But you're the one” and “The coin didn't have no say. It was just you.” To which Chigurh replies, “Perhaps. But look at it my way. I got here the same way the coin did.” And later speaking of the inevitability of the results of the coin toss, he says, “I had no belief in your ability to influence a coin in your favor. How could you? A person's path through the world seldom changes and even more seldom will it change abruptly. And the shape of your path was visible from the beginning.”


And so it perhaps would be—or, in some sense, already is—in matters of justice and public policy when randomization is brought to bear at the end of a very long sequence of events that, in many respects, is all too predictable.

In the case of prostitution, Harcourt counts the harms of prostitution and the social response to it as including everything on the harm that prostitution causes “to the HIV-infected, drug-addicted, sexually and emotionally abused streetwalker who is dependent on an exploitative pimp” to “the potential harm” caused by writings of the feminist scholar Catherine MacKinnon, which, according to Harcourt, threatens to injure women insofar as it “mirrors, perpetuates, and solidifies [their] identity as object of pornography, and undermine[] radical opposition.” Harcourt, Illusion of Order, 247 (citing Wendy Brown’s view, as expressed in States of Injury: Power and Freedom in Late Modernity (Princeton: Princeton University Press, 1995)).

This suggests that perhaps “feminist writing” like MacKinnon’s should be as much a candidate for consideration—under a loosened ‘harm principle’ analysis—as prostitution. There are a great many considerations to make in
to decide which come to be criminalized in the first place? As absurd as the question may seem, it
is not clear why randomization, under Harcourt’s criteria, is any less applicable on the front-end
of the criminalization equation than on the back-end. Moreover, in partial defense of Harcourt’s
plea for randomization, it is not clear that the reality of how we go about criminalizing some forms
of conduct and not others is an appreciably more principled process than the sorting mechanisms
he suggests, particularly as the process concerns the borderline cases, such as (to bring the
discussion round full-circle) the behaviors that have come to be criminalized in the name of “fixing
broken windows.”

IV. TOWARDS A MORE ORDERLY DEBATE

What is to be done with the theory and practice of Broken Windows? The remainder of this
article is not so much devoted to answering this question as to sketching the outlines of what the
Broken Windows debate has long been missing: namely, a clear and coherent framework for
analyzing the myriad of issues that the debate raises, or ought to raise, under some well-established
principles. While the orientation of this framework is unapologetically normative, it leaves open a
potentially decisive role for empirical research in instances when there is at least prima facie
evidence to suggest that the prospect of order-maintenance policing is worthy of serious
contemplation.

A. BEYOND ‘BALANCING HARMS’

In their original statement of Broken Windows Theory, Wilson and Kelling made some
rather remarkable concessions, one of which, once more, was their acknowledgement that:
“Arresting a single drunk or a single vagrant who has harmed no identifiable person seems unjust,
and in a sense it is.”¹⁵⁵ Some might see this as the end of the matter: unjust arrests ought never to
be executed, and that’s that. Yet, for the sake of this discussion, let’s assume there is something to
Wilson and Kelling’s dire prognostication—which they express immediately after their startling
concession—that “failing to do anything about a score of drunks or a hundred vagrants may destroy
an entire community.”¹⁵⁶ Under such circumstances, even some of the most libertarian-minded
commentators allow for the contemplation of unjust action. For example, while the legal
philosopher Douglas Husak has offered one of the strongest arguments against the criminalization
of drug use on grounds that it is unjust and that, reasonably enough: “We should not implement
policies that are unjust, even if they have favorable ratios of benefits to costs”; still, he nevertheless
rejects the Kantian notion that people or societies “are never permitted to commit an injustice”:

[This] view is extreme and unacceptable. Extraordinary circumstances might arise
in which we should adopt an unjust alternative. We are permitted to commit an
injustice if we need to do so in order to avoid a catastrophe. War, for example, may
necessitate injustice. We should be prepared to tolerate the injustice … if it really

¹⁵⁶ Ibid.
were needed to avert a disaster.\footnote{Douglas N. Husak, Legalize This!: The Case for Decriminalizing Drugs (New York: Verso, 2002): 171; see also: David Cole, Justice at War: The Men and Ideas That Shaped America’s War on Terror (New York: NYRB Books, 2008); and Bruce Ackerman, “The Emergency Constitution,” Yale Law Journal 113, no. 5 (March 2004): 1029–1091.}

Husak’s position aligns closely with the logic of fundamental rights jurisprudence under American constitutional law, which allows “the state” to infringe the rights of individuals in exceptional cases, but only upon proof that doing so would advance a compelling societal interest of some sort and that the burdening of rights towards that end is no greater than necessity demands. Under this approach, much more than speculative claims about impending catastrophe is demanded. Rather, the state bears the burden of demonstrating the compelling interest, which, as Husak contends, is nothing less than what ought to be expected in a “free and just society.” Unlike Kelling’s curious notion that critics bear the burden of demonstrating that there is nothing to the theory and practice of Broken Windows, both the fundamental rights framework, as well as Husak’s approach, would place the burden squarely upon those who are making the case that “unjust” exercises of state power are necessary to demonstrate as much. Under this type of approach, the standard of scrutiny would be far more exacting than the enormously deferential standard that proponents of quality-of-life policing campaigns commend, such that evidence of “[m]ere public intolerance or animosity” would not suffice to “justify the deprivation of a person’s physical liberty”\footnote{Sherry F. Colb, “Freedom from Incarceration: Why Is This Right Different from All Other Rights?,” New York University Law Review 69, no. 4 and 5 (October–November 1994): 789 (arguing that the “strict scrutiny” standard that the U.S. Supreme Court has long applied to review state action that burdens or deprives individuals of their fundamental rights should be used to assess the legitimation of incarceration).}—which is, among other things, precisely what is at stake, not just with incarceration and other forms of “legal punishment,” but also with policing tactics that are part and parcel of the kind of order-maintenance policing that Broken Windows Theory urges.

B. THIS IS NO ORDINARY HARM: THE VIOLENCE OF POLICING AND PUNISHMENT

Even under draconian standards of punitive pasts gone by (e.g., lex talionis), “[a]rresting a single drunk or a single vagrant who has harmed no identifiable person” and did not intend to do harm to anyone is “unjust” in the “sense” that it entails intentionally and directly doing harm to an individual for actions that neither “harmed,” nor were undertaken with the intent to do harm to another. In this scenario, the drunk or vagrant “has taken nothing in a physical sense—neither an eye nor a tooth”—so why should anything be taken from him (or her)?\footnote{Randall Collins, Violence: A Micro-Sociological Theory (Princeton: Princeton University Press, 2009): 2 (arguing that “statistical correlations” between poverty and violence indicate a causal connection between the two variables only to the extent that violence is defined as encompassing “particular categories of illegal or highly stigmatized violence”).}

The harm done to an arrestee, particularly if the individual is jailed for the offense, is, moreover, no ordinary harm. As Harcourt’s analysis reveals, harm is a weak term. The more apt, and potent, term in this context is violence.

Few if any concepts are reducible to singular or uncontroversial definition. Yet, lest we fall prey to the error of letting “conventional social categories get […] in the way of sociological analysis,”\footnote{Butler, “Retribution for Liberals,” 1885.} we should readily recognize that violence, from just about any normative perspective,
can be good or bad, justified or unjustified, and everything in between. Viewed in this way, much of what is done under the mantle of criminal justice, including much policing and certainly hard penal sanctions like jail and prison sentences, clearly constitutes violence—even when it is perfectly justified, legally and otherwise. Under this conceptualization of the term, the police do violence, not merely when they overstep their legal authority or carry out schemes of crime control that fail to comport with particular standards of justice and fairness; but in every instance in which they exercise or threaten physical force through actions that we would surely see as violence if they were carried out by anyone else for any other purpose. Even the most peaceably-executed arrest necessarily entails doing things to a person that, if executed by someone other than a duly-authorized law enforcement official, would constitute a myriad of violent felonies, including aggravated assault and kidnapping that would likely be charged and punished with special severity (and little controversy) if they were committed by an individual while in possession of a firearm or any one of a number of other weapons that police officers routinely carry on their person. Even actions that are widely seen as charitable exercises of authority—such as when police exercise their discretion to “educate” or “scold” those who purportedly offend the public order—are nonetheless executed through the leverage they enjoy from the threat of force with the capacity to “restrain, immobilize, maim, or kill.”

This is not a polemical point. Rather, as irony would perhaps have it, the notion that much of what the police do on a routine basis constitutes violence—including perfectly lawful stops, detentions, and arrests—logically follows from no more controversial a definition of violence than that which is reflected in the criminal laws that officers are charged with enforcing. There is much more to be canvassed regarding this most fundamental point regarding the nature of criminal law enforcement. The aim for now is simply to put into perspective just what is at stake in the debates over order-maintenance policing. The argument here certainly does not resolve the question of whether order-maintenance policing is appropriate as general matter. Rather, this article has conceded that there may, in some settings, be something to the notion that disorder can lead to calamity, yet in a “free and just society,” surely it will not do to merely make assertions to this effect. Nor will it do to simply say that public order by way of policing certain varieties of “disorder” is “intrinsically good” or that it somehow serves to justify itself. Indeed, this manner of thinking is arguably an affront to a long-established and deeply-held vision of social order in which the power of the state is limited, sometimes at considerable cost, to safeguard the lives, liberties, and property of individuals against the dangers of governmental excess.

161 Ibid.
162 See Jeffrey Reiman, “Should We Reform Punishment or Discard It? Rethinking Imprisonment,” *Punishment & Society* 11, no. 3 (June 2009): 395 (“The American philosopher, Charles Sanders Peirce, once described philosophy as the study of things that are so obvious that we don’t even notice them. The need to justify the punishment of criminals is such a thing. Punishment of criminals seems so normal that we rarely even think it needs a justification. But, after all, acts of punishment are acts that, if done by one private citizen to another, would be crimes. If I executed you, I would be committing murder. If I imprisoned you, I would be guilty of kidnapping. If I fined you, I would be a thief. And so on. Indeed, punishment shares the worst feature of serious crimes, namely, it amounts to intentionally harming someone. Since it is one of the few policies in which the State does what is otherwise normally thought to be evil, punishment is very much in need of philosophical reflection.”).
164 See ibid; see also Alice Ristroph, “Criminal Law in the Shadow of Violence,” *Alabama Law Review* 62, no. 3 (2010): 571–621; Reiman, “Should We Reform Punishment or Discard It?”
C. A Brief Case for a Normative Case Study

Aside from this article’s critiques of Thacher’s account, he is surely to be credited with moving the debate over Broken Windows Theory beyond the mostly futile back-and-forth about the merits of its empirical claims towards what ought to have been the fundamental concern of the debate all along: the normative validity of the approach to policing it counsels. In other work, Thacher makes a very strong case for using “normative case studies” that “combine” ethnographic research “with normative assessment” to analyze “thick ethical concepts” and “to clarify, elaborate, or even fundamentally revise” “the ends, not just the means, of government action.”

Notwithstanding its much-discussed (though hardly unique) limitations, ethnographic case study research of the sort that Thacher urges would be especially well-suited to determining whether these criteria are met. The goal of such research, consistent with Thacher’s prescription, would partly be to bring the lived experiences of order and disorder into dialogue with normative theories of social order, towards the end of making concretely-informed, but principled, assessments of which sorts of disorderly behaviors “clearly should be permitted” and which “call for police attention.” The crucial difference is that, while ethnographic case studies under Thacher’s approach would aim at the outset to distinguish “‘types of order maintenance policing which are good and should be encouraged from those which are bad and should not,’” the starting point for the analytical framework that this article urges would instead condition the implementation of order-maintenance policing on the ethnographic investigation into the necessity and justice of resorting to methods of social control that are often out-of-proportion with the disorder that they aim to curb.

There is another important and closely related way in which ethnographic research can inform debates over how to contend with disorder: findings from the study of spaces in which disorder does not engender serious crime, or otherwise lead to similarly catastrophic consequences, can serve as a guide to how order can be achieved without resort to policing. While proponents of the Broken Windows approach have been keen to note that disorderly behavior can play out very differently across contexts and have very different implications for policy, they have yet to take the obvious next analytical step of attempting to discern the concomitants of order sans order-maintenance policing. For example, rather than merely pointing out that a space like Harvard Square as well as other less affluent areas (such as Journal Square), can countenance substantial degrees of deviance without much consequence, focused ethnographic case research in such spaces can instead work to inform efforts to devise strategies of maintaining some semblance of social order without the intrusions upon liberty and disproportionate penalties necessarily entailed in even the most modest of order-maintenance policing schemes.

As my own research suggests, even if police are necessary to maintain order in some public spaces at particular points in time, this does not necessarily mean that they need to engage in the

166 See Small, “How Many Cases do I Need?”
167 Thacher, “Order Maintenance Reconsidered.”
kinds of policing strategies and tactics that are commonly associated with the Broken Windows Theory. However much these strategies have been mischaracterized over the years as adding up to a posture of “zero-tolerance,”\(^{171}\) they afford policymakers and frontline patrol officers a great deal of latitude to deprive people of liberties and otherwise penalize them well beyond any harm that they caused, or intended to cause.

At a minimum, the Broken Windows approach to policing is distinctive insofar as it counsels “proactive” efforts by police to curb disorder. Such efforts were rarely on display in my observations in the square. Rather, to the extent the police operated to maintain order in the square, it was primarily the product of their mere presence in the square, not part of a conscious or proactively-pursued, order-maintenance strategy.

My observations in the square also suggest that order-maintenance policing might prove counterproductive to the goal of public safety.\(^{172}\) One of the ironies that inspired me to conduct my research in the square was what Broken Windows theorists would surely be inclined to regard as the persistent presence of a large population of “disorderly” people—including “more than its share of street people, hustlers, and aggressive panhandlers”\(^{173}\) rather brazenly engaging in illegal conduct in a space with a large police presence and video surveillance at virtually every turn. These facts flew in the face of more than one theory—including accounts that posit that the American penal state functions to systematically remove and exclude people like the regulars from a “prime” space like the square.\(^{174}\) Similarly, more than one prominent ethnographic account in recent years has suggested that poor, disorderly-seeming people—especially homeless men and

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\(^{171}\) It is not just apologists for Broken Windows Theory who acknowledge the nuances of the theory and who avoid the error of conflating it with the concept of zero tolerance. In a rare departure from the general tendency of liberal scholars to misread and oversimplify the account, Jock Young offered this careful dissection of the theory:

> Wilson and Kelling's insight was that the control of minor offenders and disorderly behaviour which was not criminal was as important to a community as crime control. Incivilities, “quality of life” crimes caused a major part of the citizens’ feeling of unease in the city. And to this absolutely spot-on insight they added two more contentious propositions. Namely, that the police who were ineffective in the control of serious crime would be easily effective against disorderly behaviour. Indeed that that was their traditional role. And that control of incivilities would, so to speak, kick-start the community out of despair and disintegration and such a revitalized community through informal controls and citizens’ vigilance would in time reverse the spiral of decay and reduce the incidence of serious crime. I do not want to enter into a critique of this philosophy; my point is that it is scarcely a programme of zero-tolerance against all crime which believes that the police are the key actors in the creation of orderly society and which views the ‘sweeping up’ of the streets as producing miraculous and immediate results. It is a more subtle theory, it has a more marginal role for the police and it situates the wellspring of social order in more fundamental parts of the social structure. Finally, it talks not of zero-tolerance but of discretion bordering on realpolitik.


\(^{172}\) Cf. Philippe Bourgois and Jeffrey Schonberg, Righteous Dopefiend (Berkeley: University of California Press, 2009): 4 (noting how the homeless “regularly sought refuge” in the dangerous “nooks and crannies” underneath and around highway in San Francisco to stay “out of the eye of law enforcement”); Alice Goffman, On The Run: Fugitive Life in an American City (Chicago: University of Chicago Press, 2014) (chronicling the dangers encountered by men with warrants out for their arrest as they structured their lives to avoid contact with the police).


women like the square’s regulars—as well as individuals with warrants out for their arrest, as was the case with most of the regulars on any given day, are in the habit of studiously avoiding both prime spaces and the police for some rather obvious reasons.¹⁷⁵ These expectations were not borne out at any point in my research—certainly not in the wholesale manner that is frequently claimed in the relevant academic literatures. Several months into my research, a surprising explanation for this empirical puzzle began to emerge in my research: the regulars sought refuge in the square precisely because of the relative degree of safety they felt in the space, a fact that they readily attributed to the presence of the police and video surveillance.¹⁷⁶

For reasons that are beyond the scope of this article to explore, the police in the square largely countenanced, not just the presence of the regulars, but also their disorderly deeds. All else being equal—if the police had instead engaged in proactive efforts to curb disorder and to “remove” the regulars from the square through the sorts of tactics that Broken Windows Theory counsels, rather than effectively tolerating their presence and disorderly deeds—the regulars would presumably have been inclined to seek out refuge in other much less safe spaces, including settings in which they had been victimized in the past. In terms of public safety, the overall net effect in this counterfactual scenario would have been negative.¹⁷⁷

This is but a very brief, but hopefully sufficiently suggestive, snapshot of the sorts of findings and insights ethnographic case studies can supply if undertaken with the aim of bringing “grand ideals” and the facts on the ground into conversation in a way that is all too rare in either the social sciences or philosophy.¹⁷⁸ Such is the brilliance of Thacher’s normative case-study approach. Indeed, it is an approach that is perhaps, as Thacher suggests, so very vital to avoiding the dangers of abstraction on the one hand, and particularism on the other, that it ought to be undertaken prior to endorsing efforts to maintain order through potentially unnecessary, or even counterproductive, measures which implicate nothing less than liberty, justice, and possibly, as the killing of Eric Garner tragically illustrated, even life itself.¹⁷⁹


¹⁷⁶ For a more extensive discussion of this finding and its implications, see Rowan, “Regulating the Destitute.”

¹⁷⁷ Arguably, though, one way of seeing this result, as it pertains to the macro-level social order, is not so much as disorder, but as one of many manifestations of a radically inequitable order, which is characterized in substantial part by the concentration of poverty and the myriad of negative effects—including vulnerability to criminal victimization—that tend to go hand-in-hand with it. See Jeffrey D. Morenoff, Robert J. Sampson, and Stephen W. Raudenbush, 39 “Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence,” Criminology 39, no. 3 (August 2001): 517–558.

¹⁷⁸ Thacher, “The Normative Case Study,” 1660–1661 (noting that “social science cases bring several distinctive advantages” to moral-philosophical investigation including “verisimilitude” rather than the “standard practice” of drawing on “hypothetical or even deliberately unrealistic cases”).

Much has been canvassed in this article that is undoubtedly in need of more critical attention, contemplation, and debate. In the short run, the hope is that, like Thacher’s efforts, as well as recent ethnographic research on policing that has yielded the very kind of “thick description” that Thacher calls for, the analysis in this article will at least help to set right what has been proved thus far to be one very disorderly debate. Particularly when one considers the enormity of its stakes, whether order is ultimately brought to the debate—and, if so, the precise shape it comes to take—may say as much, or more, about the social order in which we presently find ourselves.

March 9, 2018 (contrasting the type of policing that prevailed in “the square” with the kind of policing that led to Garner’s death and noting that the former approach “worked primarily through establishing relationships with people, through understanding, through tact, and through negotiation”). Given what we know about our biases, those bodies will almost always be brown.”); see also 180 See, e.g., Forrest Stuart, Down, Out, and Under Arrest: Policing and Everyday Life in Skid Row (Chicago: University of Chicago Press, 2016); see also Issa Kohler-Hausmann, “Misdemeanor Justice: Control without Conviction,” American Journal of Sociology 119, no. 2 (September 2013): 351–393.