

Revised and updated in: Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing. (Harvard University Press, 2001).

REFLECTING ON THE SUBJECT: A
CRITIQUE OF THE SOCIAL INFLUENCE
CONCEPTION OF DETERRENCE, THE
BROKEN WINDOWS THEORY,
AND ORDER-MAINTENANCE POLICING
NEW YORK STYLE

*Bernard E. Harcourt**

TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION | 292 |
| I. ORDER-MAINTENANCE POLICING: A CRITICAL DESCRIPTION | 301 |
| A. <i>Background</i> | 301 |
| B. <i>The Broken Windows Essay</i> | 302 |
| C. <i>The Social Influence Conception of Deterrence</i> | 305 |
| II. THE LACK OF SOCIAL SCIENCE EVIDENCE | 308 |
| A. <i>Replicating Skogan's Study</i> | 309 |
| B. <i>The Sampson and Cohen Study</i> | 329 |
| C. <i>New York City's Falling Crime Rates</i> | 331 |
| D. <i>An Alternative Mechanism of Order- Maintenance Policing: Enhanced Surveillance</i> .. | 339 |
| III. THE CATEGORIES UNDERLYING ORDER- MAINTENANCE POLICING | 343 |
| A. <i>Who Are the Disorderly?</i> | 343 |
| B. <i>Tracing the Problem Back to Social Theory</i> | 347 |
| C. <i>Emile Durkheim on Legitimation and Legal Regulation</i> | 348 |

* Associate Professor of Law, University of Arizona College of Law. A.B. 1984, Princeton; J.D. 1989, MA (Political Science) 1998, Ph.D. Candidate (Political Science), Harvard. — Ed. Special thanks for comments on earlier drafts to Seyla Benhabib, Thomas Ertman, Michael Gottfredson, David Golove, Travis Hirschi, Bonnie Honig, David Kennedy, Duncan Kennedy, Randall Kennedy, Toni Massaro, Tracey Meares, Frank Michelman, Martha Minow, Tanma Rostain, Carol Steiker, Richard "Back, Robert Williams; participants at the 1998 annual meetings of the American Political Science Association and the Law and Society Association; and my colleagues in the work-in-progress workshop at the University of Arizona. Special thanks for comments and assistance on the quantitative analysis to Gary King, Michael Tomz, and the Data Center staff at Harvard University; and for exceptional research assistance to Maureen Gannon, Jenna Karadbil and Dev Stahlkopf.

| | |
|--|-----|
| D. <i>The Problem of Subject Creation</i> | 352 |
| IV. MICHEL FOUCAULT AND SUBJECT CREATION | 354 |
| A. <i>Foucault on the Categories</i> | 356 |
| B. <i>Foucault on Law</i> | 365 |
| C. <i>The Implications for the Social Influence</i> <i>Conception of Deterrence</i> | 368 |
| D. <i>Subject Creation in Contemporary Criminal</i> <i>Law Scholarship</i> | 371 |
| V. REVISITING ORDER-MAINTENANCE POLICING | 377 |
| A. <i>Complaints of Police Brutality and the NYPD</i> | 311 |
| B. <i>Other Factors That Are Overshadowed by the</i> <i>Orderliness of Order-Maintenance Policing</i> | 381 |
| C. <i>Alternatives to Arrest</i> | 384 |
| CONCLUSION | 386 |

INTRODUCTION

In 1993, New York City began implementing the quality-of-life initiative, an order-maintenance policing strategy targeting minor misdemeanor offenses like turnstile jumping, aggressive panhandling, and public drinking. The policing initiative is premised on the broken windows theory of deterrence, namely the hypothesis that minor physical and social disorder, if left unattended in a neighborhood, causes serious crime- New York City's new policing strategy has met with overwhelming support in the press and among public officials, policymakers, sociologists, criminologists and political scientists. The media describe the "famous"¹ *Broken Windows* essay² as "the bible of policing" and "the blueprint for community policing."³ Order-maintenance policing has been called the "Holy Grail of the '90s."⁴ "There is little dispute that the theory works," says the ABA Journal.⁵ It has sparked "a revolution in American policing," according to the *Christian Science Monitor*, in an article captioned "One Man's Theory Is Cutting Crime in Urban Streets."⁶

1. See Robert Jones, *The Puzzle Waiting for the New Chief*, L.A. TIMES, Aug. 10, 1997, at B1 ("the now-famous magazine article 'Broken Windows'"); John J. Dilulio, Jr., "Windows' Puts New Light on Crime-fighting Efforts, Ideas, WASH. TIMES, NOV. 10, 1996, at B8.

2. James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29.

3. Kevin Cullen, *The Cornish*, BOSTON GLOBE MAG., May 25, 1997, at 12.

4. Jones, *supra* note 1.

5. Patricia G. Barnes, *Safer Streets at What Cost?: Oitics say the homeless and substance abusers are most likely to suffer when police crack down on petty offenses*, A.B.A. J., June 1998, at 24.

6. Christina Nifong, *One Man's Theory Is Cutting Crime in Urban Streets*, CHRISTIAN SCI. MONITOR, Feb. 18, 1997, at 1.

Even the recent *U.S. News & World Report* cover story on crime — a cover story that debunks nearly every hypothesis for the national decline in crime — makes a passing curtsy to the quality-of-life initiative: "dearly, smarter policing was spectacularly decisive in some cities like New York."⁷ Former Police Commissioner William Bratton, the principal architect of the quality-of-life initiative, credits the broken windows theory with falling crime rates in New York City. "These successes didn't just happen," Bratton contends. "They were achieved by embracing the concept of community policing."⁸ Wesley Skogan, a political scientist at Northwestern University, has conducted an empirical study of the broken windows theory and concludes that "[b]roken windows' do need to be repaired quickly."⁹ George Kelling, co-author of *Broken Windows* and of a recent book entitled *Fixing Broken Windows*, contends that Skogan "established the causal links between disorder and serious crime — empirically verifying the 'Broken Windows' hypotheses."¹⁰ In this euphoria of support, it is today practically impossible to find a single scholarly article that takes issue with the quality-of-life initiative.¹¹ It stands, in essence, uncontested — even in the legal academy.

7. Gordon Witkin, *The Crime Bust*, U.S. NEWS & WORLD REP., May 25, 1998, at 33. The one hypothesis that the cover story does not debunk is the crack hypothesis, namely the theory that the decline in crime is due to decreased crack consumption.

8. William J. Bratton, Editorial, *New York's Police Should Not Retreat*, N.Y. TIMES, Aug. 19, 1997, at A27.

9. WESLEY G. SKOGAN, DISORDER AND DECLINE; CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 75 (1990) [hereinafter SKOGAN, DISORDER AND DECLINE].

10. GEORGE KELUNO & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 24 (1996).

11. I have in fact found no published scholarship, with the exception of forthcoming, though as-of-yet unpublished, papers delivered at a recent conference convened by the *Journal of Criminal Law and Criminology* on the topic, *Why is Crime Decreasing?* See Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY (NO. 4, forthcoming 1998) (discussed *infra*, text accompanying notes 170-173 and 189-197); Richard Curtis, *The Improbable Transformation of Inner City Neighborhoods: Crime, Violence, Drugs and Use in the 1990's*, 88 J. CRIM. L. & CRIMINOLOGY (NO. 4, forthcoming 1998); Fox Butterfield, *Reason for Dramatic Drop In Crime Puzzles the Experts*, N.Y. TIMES, Mar. 29, 1998, § 1, at 14 ("Professor Curtis gives Mayor Giuliani's police little credit for this transformation, viewing their repeated sweeps through Brunswick and arrests of its residents as largely angering the young people."). A very recent student note in the Yale Law Journal also criticizes the broken windows theory. See Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998). To date, the principal published writings critical of the quality-of-life initiative consist of a handful of *New York Times* articles. See Michael Cooper, *You're Under Arrest*, N.Y. TIMES, Dec 1, 1996, § 13, at A1; Robert Lipsyte, *From Sidewalk Skirmish to Main Event*, N.Y. TIMES, NOV. 16, 1997, § 14, at A1; Matthew Purdy, *In New York, the Handcuffs Are One-Size-Fits-All*, N.Y. TIMES, Aug. 24, 1997, at A1; Deborah Sontag & Dan Barry, *Challenge to Authority: Disrespect as Catalyst for Brutality*, N.Y. TIMES, NOV. 19, 1997, at A1; see also Michael Massing, *The Blue Revolution*, THE NEW YORK REVIEW OF BOOKS, NOV. 19, 1998, at 32 (criticizing the broken windows theory and the quality-of-life initiative in relation

Dan Kahan, a leading social norm proponent in the area of criminal law, forcefully advocates order-maintenance policing and, in particular, New York City's quality-of-life initiative.¹² Kahan reports that order-maintenance policing "has been used with startlingly successful results in New York City."¹³ He contends that the social influence conception of deterrence "makes it plausible to believe that order maintenance has in fact reduced crime in New York."¹⁴ Kahan also suggests that "[t]he work of criminologist Wesley Skogan supplies empirical support for the 'broken windows' hypothesis."¹⁵ Other social norm proponents rely heavily on the broken windows theory and essentially endorse order-maintenance policing.¹⁶

In fact, order-maintenance policing is one of the leading recommendations along what Kahan calls "the new path of deterrence."¹⁷ The new path is a loosely grouped set of initiatives in the area of crime and punishment, ranging from order-maintenance policing to curfews, gang-loitering laws, informal public-space zoning, reverse stings, and shaming penalties.¹⁸ The new path seeks to revitalize

to the drug problem). Even the civil libertarians are hedging their position on the quality-of-life initiative. Norman Seigel, executive director of the New York Civil Liberties Union, very cautiously remarks that "[t]here is a dark side to this quality-of-life issue. In some New Yorkers' minds, this city is becoming increasingly authoritarian." Norimitsu Onishi, *Giuliani Crows as Theft Suspect Is Caught as a Jaywalker*, N.Y. TIMES, Feb. 21, 1998, at B1 (quoting Seigel).

12. See Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477,2488 (1997) [hereinafter Kahan, *New Path*]; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349,367-73 (1997) [hereinafter Kahan, *Social Influence*].

13. Kahan, *New Path*, *supra* note 12, at 2488.

14. Kahan, *Social Influence*, *supra* note 12, at 372.

15. *Id.* at 369; see also Kahan, *New Path*, *supra* note 12, at 2488 a62.

16. See Robert C EUickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE LJ. 1165, 1171-73, 1177-79, 1182 (1996) (discussing the broken windows theory and advocating informal public-space zoning administered by trustworthy police officers with significant discretion); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COUJM. L. REV. 551,581-91 (1997) (discussing the broken windows theory and advocating measures to manage police discretion in the context of the quality-of-life initiative); cf. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Cm. L. REV. 943,1039-40 (1995) (discussing one aspect of the quality-of-life initiative to illustrate a change in social meaning; however, he does not indicate one way or the other whether he supports that specific regulation of social meaning).

17. Kahan, *New Path*, *supra* note 12, at 2479.

18. See EUickson, *supra* note 16 (advocating informal public-space zoning administered by trustworthy police officers with significant discretion); Kahan, *New Path*, *supra* note 12 (advocating curfews, gang-loitering laws, order-maintenance policing, reverse stings, and shaming penalties); Kahan, *Social Influence*, *supra* note 12 (arguing for order-maintenance policing, gang-loitering laws, and alternative sanctions); Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. Cm. L. REV. 591 (1996) (advocating alternative sanctions like shaming penalties); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal*

the argument for deterrence by infusing it with cutting-edge social science. Social norm proponents locate the new path of deterrence between economics and sociology.¹⁹ The new path represents, according to Kahan, "a third way, one that combines the virtues of both economics and sociology without succumbing to the vices of either."²⁰ From economics, the new path appropriates the idea that individuals are rational actors maximizing their utility. From sociology, the new path appropriates the idea that individuals are influenced, and their conduct is shaped, by social phenomena. The new path of deterrence is presented as an application of social norm theory to criminal law.²¹

In this Article, I critically examine the empirical evidence and the social influence explanation supporting New York City's experiment with order-maintenance policing. At the empirical level, I replicate the principal social scientific study that has attempted to establish the disorder-crime nexus, namely Wesley Skogan's *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods*.²² I conclude that Skogan's data do not support the claim that reducing disorder deters more serious crime. As a preliminary matter, the data are missing a large number of values (thirty to forty percent, on average, of the relevant dependent and independent variables) for such a small sample of neighborhoods (at most, forty neighborhood observations). But even setting aside that problem, my replication of Skogan's study establishes that (a) certain types of crime like rape, purse snatching, and pocket-picking are not significantly related to disorder; (b) other types of crime like physical assault and burglary are not significantly related to disorder when neighborhood poverty, stability, and race are held constant; and (c) although robbery remains significantly related to

Procedure, 86 GEO. L.J. 1153,1160-66 (1998) (advocating "the new community policing," including anti-loitering laws and curfews); Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579 (1997) (advocating strengthening interdependent social networks and collective supervision of the community).

19. See Kahan, *New Path*, *supra* note 12, at 2477; see also Lessig, *supra* note 16, at 951 (social meaning "marries two traditions in social thought, one that we might call interpretive (anthropology, sociology) and the other, traditionally, noninterpretive (economics)"); cf. Kenneth Dan-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 W.B. L. REV. 389 (1997).

20. Kahan, *New Path*, *supra* note 12, at 2477.

21. I will refer to the "new path of deterrence" and to "the social influence conception of deterrence" interchangeably, as does Kahan. However, I distinguish both of these terms from social norm theory. The new path of deterrence is an *application* of social norm theory to the criminal law. The distinction is an important one.

22. SKOGAN, *DISORDER AND DECLINE*, *supra* note 9, at 75; see also Wesley G. Skogan, *Disorder and Community Decline: Final Report to the National Institute of Justice* (Mar. 31, 1987) [hereinafter Skogan, Final Report].

disorder, a cluster of five Newark neighborhoods exert excessive influence on the statistical findings. When those five Newark neighborhoods are set aside, the relationship between robbery victimization and disorder disappears. Accordingly, the data do not support the broken windows hypothesis.

Social norm proponents advance a second empirical argument in support of order-maintenance policing, namely the precipitous decline in crime rates in New York City.²³ The conventional explanations for the drop in crime, they argue, do not account for the magnitude of the drop in relation to other large cities. As we speak, however, there is a hotly contested debate raging among criminologists, legal scholars, policy-makers, journalists, and other experts over the causes of the decline in crime in New York City and nationally.²⁴ I review the various leading explanations and argue that it is far too simplistic to suggest that the quality-of-life initiative explains the extent of the decline of the crime rate in New York City.

The social influence conception of deterrence also does not withstand scrutiny at the theoretic level. The theory relies on a traditional sociological approach that does not sufficiently question the categories underlying the sociological analysis, or the relationship between its prescriptions and those categories. The theory's approach is similar to that of Emile Durkheim,²⁵ but ignores, I argue, some of the most insightful intellectual developments of the twentieth century. As a result, the set of policies emerging along

23. See Kahan, *Social Influence*, *supra* note 12, at 369.

24. See 88 J. CRIM. L. & CRIMINOLOGY, *supra* note 11 (containing articles discussing declining crime rate); Butterfield, *supra* note 11 (reporting on the conference). As a recent cover story in *U.S. News & World Report* acknowledges, "the national causes of the improvement remain mysterious." Witkin, *supra* note 7, at 28. The cover story rehearses the different explanations that have been offered for the national decline in crime — the economy, crime prevention programs, decline in battered wives, increased prison populations, new policing strategies — and ultimately argues that the decline in crack use is the leading factor contributing to the national decline. See also Geoffrey A. Campbell, *Putting a Crimp in Crime: Experts Differ Over Reasons for Falling Rates of Serious Offenses*, A.B.A.J., May 1997, at 24.

25. The strong resemblance between the social influence conception of deterrence and Durkheim's sociology is by no means accidental. Social norm proponents explicitly trace the notion of constructivism that underlies social meaning to modern social theory and the work of Emile Durkheim. See, e.g., Lessig, *supra* note 16, at 949. (Lessig appends the following footnote: "It is constructivism that defines modern social theory." *Id.* at 949 n.19. The footnote continues, "Emile Durkheim is one start: '[S]ocial reality is constructed by the operation of the society itself. . . . Social facts are the product of the group life of the total operation of a society.'" *Id.* (quoting JOSEPH BENSMAN & ROBERT LIUENFELD, CRAFT AND CONSCIOUSNESS 157 (1973) (alteration in original))). See also Kahan, *supra* note 18, at 594-96 (discussing the expressive dimension of punishment which explicitly traces back to the work of Emile Durkheim).

the new path of deterrence are too limited. The policies do not sufficiently challenge our narrow way of conceptualizing crime.

Running through the social influence explanation and the broken windows theory is a recurrent and pervasive dichotomy between, what we could call in vulgar terms, honest people and the disorderly, between "committed law-abiders"²⁶ and "individuals who are otherwise inclined to engage in crime";²⁷ between "families who care for their homes, mind each other's children, and confidently frown on unwanted intruders"²⁸ and "disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."²⁹ Hand-in-hand with this set of categories is another ubiquitous dichotomy between order and disorder, between "norms of orderliness"³⁰ and "[p]ublic drunkenness, prostitution, aggressive panhandling and similar behavior";³¹ between a "stable neighborhood"³² and "an inhospitable and frightening jungle."³³

The social influence conception of deterrence is grounded on these categories. The mechanisms of social influence assume these fixed identities because disorder operates on honest people and on the disorderly in *different* ways. Neighborhood disorder influences honest people to move out of the neighborhood or to lock themselves in their homes, but it influences the disorderly and especially criminals to move into the neighborhood and commit crimes.

These categories, however, do not have a pre-existent fixed reality, independent of the techniques of punishment implemented by the quality-of-life initiative. In other words, they do not pre-date the policing strategy. To the contrary, the category of the disorderly is itself a reality produced by the method of policing. It is a reality shaped by the policy of aggressive misdemeanor arrests. It is the product of a technique of punishment that combines several different historical modalities, including classical strategies of excessive force and modern disciplinary mechanisms like surveillance and spatial control. Michel Foucault's study, *Discipline and Pun-*

26. Kahan, *Social Influence*, *supra* note 12, at 371.

27. *Id.* at 371.

28. Wilson & Kelling, *supra* note 2, at 31.

29. *Id.* at 30.

30. Kahan, *Social Influence*, *supra* note 12, at 371.

31. *Id.* at 370.

32. Wilson & Kelling, *supra* note 2, at 31.

33. *Id.* at 31-32.

ish,³⁴ details these techniques of punishment, and it is there, I suggest, that we should turn to overcome the problems with the Durkheimian approach — first, by rehearsing Foucault's analysis, but second, and more importantly, by refining his analysis.

The techniques of punishment that comprise the quality-of-life initiative create the disorderly person as an object of suspicion, surveillance, control, relocation, micromanagement, and arrest. According to the unwritten rules of a Newark police officer enforcing order, "[d]runks 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 paper bags. Talking to, bothering, or begging from people waiting at the bus stop was strictly forbidden."³⁵ The fine art of policing creates the disorderly as a person with a full biography of habits, inclinations and desires. It simultaneously creates the disorderly as an object of surveillance and control.

The disorderly is closely analogous to the delinquent, in Foucault's work, the end product of the penitentiary system. But the disorderly also differs in important ways from the delinquent. He is not coddled, he is not reformed, he is not part of the psychotherapeutic project of rehabilitation. The disorderly is, instead, watched, controlled, relocated, and, ideally, excluded from the neighborhood. The disciplinary techniques captured by the quality-of-life initiative operate on an axis of order and disorder, rather than on the axis of psychotherapeutic rehabilitation.

Order-maintenance policing helps create the category of the disorderly and this, in turn, facilitates the very policy of aggressive arrests for minor disorderly conduct. Once the category is in place, there is little else to do but crack down on the disorderly. Who in their right mind, after all, would side with people who urinate in the street, break windows, aggressively accost passers-by, or vandalize other people's property? The category triggers an aggressive response, even absent evidence supporting the broken windows theory.

At the same time, the category overshadows the numerous costs associated with the new policing strategy. Order maintenance in New York City has been achieved, in large part, by means of a fifty percent increase in misdemeanor arrests — up from 133,446 in 1993

34. MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., 1979) (translation of MICHEL FOUCAULT, SURVEILLER ET PONIR (1975)).

35. Wilson & Kelling, *supra* note 2, at 30.

to 205,277 in 1996.³⁶ Those arrests can be quite an ordeal: being arrested, handcuffed, transported, booked, often strip-searched, and spending the night in jail is an experience that many of us, readers of this Article, have had the good fortune to avoid.³⁷ The quality-of-life initiative has been accompanied by a significant increase in the number of complaints of police brutality. The Civilian Complaint Review Board in New York City received 5,550 and 4,816 complaints of police brutality for 1996 and 1997, respectively, up from 3,580 complaints in 1993.³⁸ Moreover, a law enforcement strategy that emphasizes misdemeanor arrests has a disproportionate effect on minorities — not necessarily in relation to the racial composition of misdemeanor offenders but simply in relation to the racial composition of the community. The brute fact is that the *decision to arrest* for misdemeanors results in the arrest of many minorities. In cities in the United States, for example, 46.4% of persons arrested for vagrancy and 58.7% of persons arrested for suspicion in 1995 were black although the population inside metropolitan areas was approximately 13% African-American.³⁹ Order-maintenance policing may also delegate 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. And the costs of arrest and prosecution of minor misdemeanor offenses may add up to a considerable investment.⁴⁰ These are some aspects of order-maintenance policing that are not being heard in today's euphoria, in large part because of the category of the disorderly underlying the social influence conception of deterrence. They suggest that a much stronger empirical showing is needed before we proceed down the new path of deterrence.

36. See Letter from Michael Farrell, Deputy Commissioner, New York Police Department, to Jenna Karadibil (Apr. 13, 1998) (on file with author).

37. The ordeal of arrest has been described in Cooper, *supra* note 11; Lipsyte, *supra* note 11; Purdy, *supra* note 11; Sontag & Barry, *supra* note 11.

38. See Fax from Sherman Jackson of the CCRB to Author (June 17, 1998) (including statistics from the New York City Civilian Complaint Review Board).

39. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996, at 386 tbl.4.12 [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996] (listing racial breakdown of arrests in all cities, including cities with less than 10,000 inhabitants, *see id.*, app. 3 at 595); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS—UNITED STATES, at 7 tbl. 5 [hereinafter 1990 CENSUS OF POPULATION] (listing racial breakdown inside metropolitan areas, defined as including urbanized areas with a minimum population of 50,000, *see id.* at A-8).

40. See Deborah L. Rhode, *Who is the Criminal?*, NATL. L.J., Sept 25, 1995, at A22.

I should emphasize at the outset that I am extremely sympathetic with the motivation behind the new path of deterrence. Its primary motive, Kahan explains, is political, not conceptual. "By focusing on how law can be used to regulate norms, the new deterrence scholarship can be used to identify morally acceptable and politically feasible alternatives to the severe punishments that dominate contemporary criminal law."⁴¹ I share Kahan's motivation. New York City's quality-of-life initiative, however, does not fulfill that aspiration.

This Article is part of a larger project, a project with at least three important goals. The first is to explore critically the current application of social norm theory to the criminal law and offer an alternative to the new path of deterrence. My purpose here is not to critique social norm theory *tout court*. That would be a much larger enterprise. Instead, my more limited goal is to critique the specific application of social norm theory to the criminal law that characterizes the new path of deterrence.⁴² My second goal is to integrate social and political theory into the discussion of public policy. One of the great contributions of social norm proponents has been to integrate sociology into the public policy discussion of crime. What is still missing is a discussion of the theory underlying that sociology. Kahan's sociology, in my opinion, is not adequately theorized, and this accounts for the dissonance between his desire to find alternative policies to incarceration and his endorsement of

41. Kahan, *New Path*, *supra* note 12, at 2478.

42. I should say, in this context, that I have agonized over the question of whether to refer to Kahan as a "social norm proponent" and thereby to group him together with Lawrence Lessig, Robert Ellickson, and others. On occasion, I have been tempted to suggest, instead, that Kahan's writings on order-maintenance policing are simply at odds with social norm theory — that Kahan misappropriates the theory of social meaning by turning societal order into a natural, or necessary, or uncontested social understanding. As Lawrence Lessig has written, "The more they appear natural, or necessary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be." Lessig, *supra* note 16, at 960-61. I have been tempted, at times, to argue that social norm theorists, such as Lessig, would reject Kahan's argument about order-maintenance policing because it fails to appreciate the contingent and constructed nature of societal order, as well as the way in which the social meanings associated with societal order construct the population into law abiders and criminals, thereby naturalizing order-maintenance policing. But, for better or worse, I have resisted that temptation. I am not prepared to impute to Lessig or others, without a text, any opposition to the quality-of-life initiative and its policy of aggressive misdemeanor arrests. *See id.* at 1039-40 (Lessig discusses one aspect of the quality-of-life initiative to illustrate a change in social meaning. He does not, however, indicate one way or the other whether he supports that specific regulation of social meaning.) For that reason, I have instead respected the self-identified boundaries of the social norm movement and interpreted Kahan as applying social norm theory to the criminal law. Thus, I am not arguing here that Kahan is unfaithful to social norm theory. Nor am I critiquing social norm theory writ large. I am, instead, addressing the narrower issue of Kahan's *application* of social norm theory to crime and punishment. In other words, I am addressing the social influence conception of deterrence.

a straightforward policy of aggressive misdemeanor arrests and detention — between his aspiration to use *social norms* to regulate criminal behavior and his endorsement of police enforcement of *misdemeanor laws*. This Article seeks to remedy that deficiency by initiating a debate on the underlying social and political theory and relating that debate to concrete public policies. Third, this Article seeks to deploy constructively the writings of Michel Foucault. I suggest that he offers the most perceptive critique of Durkheim and a path to reconstruct public policy. Foucault's work is often vilified in the legal academy because of its association with the moment of deconstruction. This Article is a corrective. I propose here a reading of Foucault that affirmatively helps to transcend the limitations of the new path of deterrence. It is Foucault's critique of the sociological approach underlying the social influence conception of deterrence that exposes its limits and paves the way for a thicker concept of the subject. With this thicker concept, I propose an alternative approach to thinking about criminality and I suggest specific policy implications. My last goal, then, is to deploy Foucault for a positive public policy agenda.

L ORDER-MAINTENANCE POLICING: A CRITICAL DESCRIPTION

A. Background

Order-maintenance policing is a law-enforcement strategy that seeks to create public order by aggressively enforcing laws against public drunkenness, loitering, vandalism, littering, public urination, panhandling, prostitution, and other minor misdemeanors. It is one variation of community policing,⁴³ a variation that emphasizes po-

43. "Community policing," at its most abstract or general level, stands for the idea that police officers can prevent crimes by integrating themselves into the community, rather than by merely responding to emergency calls. Community policing comes in a number of different variations, ranging from the type of order-maintenance policing that emphasizes a strict (discussed in this Article) to the style of community policing that withholds enforcement as a way to build community contacts. See WESLEY SKOGAN, *COMMUNITY POLICING, CHICAGO STYLE* (1997); Jonathan Eig, *Eyes on the Street: Community Policing in Chicago*, 29 AMERICAN PROSPECT 60 (Nov.-Dec 1996). Community policing has largely revolutionized policing both in the United States and abroad over the past fifteen years. In a recent National Institute of Justice survey of police departments, more than 80% of police chiefs polled stated that they were either implementing or intended to implement some aspect of community policing. See TODD MCEWEN, NATIONAL INSTITUTE OF JUSTICE, NATIONAL ASSESSMENT PROGRAM: 1994 SURVEY RESULTS 27 (1995); see also Sean P. Murphy, *Community Policing Gaining Popularity*, BOSTON GLOBE, Dec 29, 1992, at 17. The popularity and success of community policing is attributable, in part, to the vagueness of the definition. Not all experiments with community policing, however, have met with equal success. See Wesley G. Skogan, *The Impact of Community Policing on Neighborhood Residents*, in THE CHALLENGE OF COMMUNITY POLICING 180 (Dennis P. Rosenbaum ed., 1994) ("There are ample examples of failed experiments and cities where the concept has gone awry.").

lice presence and arrests. Order-maintenance policing traces its origins to the broken windows theory, first articulated in James Q. Wilson and George L. Kelling's article, *Broken Windows*, which appeared in the *Atlantic Monthly* in 1982.⁴⁴ The hypothesis of the broken windows theory is that minor disorder in a neighborhood, if left unchecked, will result in increased serious crime, and, therefore, that eliminating minor disorder will have a deterrent effect on major crime.

Order-maintenance policing has been implemented in New York City during the administration of Mayor Rudolph Giuliani and has come to be known as "the quality-of-life initiative." It is a policy of zero tolerance toward minor misdemeanor offenses, or what are called "quality-of-life crimes." Former New York City Police Commissioner William Bratton, the principal architect of the quality-of-life initiative, cites the *Broken Windows* article as the main source of his ideas.⁴⁵

Order-maintenance policing is also one of the principal policy recommendations emerging along the new path of deterrence.⁴⁶ Social norm proponents specifically endorse New York City's quality-of-life initiative as a successful illustration of order-maintenance policing.⁴⁷ According to Dan Kahan, the success of New York City's strategy can be explained in terms of the social influence conception of deterrence. Kahan relies heavily on the broken windows theory,⁴⁸ suggesting that it is social influence in action.⁴⁹

B. *The Broken Windows Essay*

The *Broken Windows* essay is premised on the idea that "disorder and crime are usually inextricably linked, in a kind of develop-

44. Wilson & Kelling, *supra* note 2.

45. See William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 XL & POLY 447 (1995); see also Cullen, *supra* note 3, at 12; Fred Kaplan, *Looks Count*, BOSTON GLOBE, Jan. 19, 1997, at E1.

46. See, e.g., Kahan, *New Path*, *supra* note 12, at 2488; Kahan, *Social Influence*, *supra* note 12, at 368-73; see also Ellickson, *supra* note 16, at 1173, 1200-02, 1247-48 (arguing that a city's best approach to dealing with panhandlers and skid rows is to have an informal zoning system that is informally enforced by the police — "that is, to employ trustworthy police officers and to give them significant discretion"—in effect, similar to the quality-of-life initiative); cf. Livingston, *supra* note 16, at 581-91 (advocating implicitly measures to manage police discretion in the context of the quality-of-life initiative).

47. See, e.g., Kahan, *New Path*, *supra* note 12, at 2488; Kahan, *Social Influence*, *supra* note 12, at 368-73.

48. See Kahan, *Social Influence*, *supra* note 12, at 368-73. Other social norm proponents also rely extensively on the broken windows theory. See, e.g., Ellickson, *supra* note 16, at 1171-73, 1177-79, 1182; Livingston, *supra* note 16, at 581-91.

49. See Kahan, *Social Influence*, *supra* note 12, at 369.

mental sequence."⁵⁰ According to Wilson and Kelling, minor disorders (like littering, loitering, public drinking, panhandling, and prostitution) if tolerated, produce an environment that is likely to attract crime. They signal to potential criminals that delinquent behavior will not be reported or controlled — that no one is in charge. One broken window, left unrepaired, invites other broken windows. These progressively break down community standards, leaving the community vulnerable to crime.

In the essay, disorder breeds crime in a highly scripted manner: A stable neighborhood of families who care for their homes, mind each other's children, and confidently frown on unwanted intruders can change, in a few years or even a few months, to an inhospitable and frightening jungle. A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur. Litter accumulates. People start drinking in front of the grocery; in time, an inebriate slumps to the sidewalk and is allowed to sleep it off. Pedestrians are approached by panhandlers.

At this point it is not inevitable that serious crime will flourish or violent attacks on strangers will occur. But many residents will think that crime, especially violent crime, is on the rise, and they will modify their behavior accordingly. They will use the streets less often, and when on the streets will stay apart from their fellows, moving with averted eyes, silent lips, and hurried steps....

Such an area is vulnerable to criminal invasion. Though it is not inevitable, it is more likely that here . . . drugs will change hands, prostitutes will solicit, and cars will be stripped. That the drunks will be robbed by boys who do it as a lark, and the prostitutes' customers will be robbed by men who do it purposefully and perhaps violently.⁵¹

This script privileges order over disorder and this hierarchy is refracted throughout the essay. A typical community, for instance, is composed of citizens or "decent folk" on the one hand, and criminals and "disorderly people" on the other.⁵² The disorderly people include "disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."⁵³ They are closely associated with vices, like drinking, prostitution, littering, and begging: the "ill-smelling drunk" or the "importuning beggar."⁵⁴ They are also often

50. Wilson & Kelling, *supra* note 2, at 31.

51. *Id.* at 31-32.

52. *See id.* at 30.

53. *Id.*

54. *Id.* at 34.

associated with youth: the rowdy children, the fighting teenagers, the "unattached adults."⁵⁵

This opposition of orderly and disorderly people cuts across a further, pervasive insider-outsider dichotomy, in effect producing two categories of troublemakers, the disorderly insiders, who need to be controlled, and the disorderly outsiders, who need to be excluded. Schematically, the essay can be represented as follows:

| | REGULARS | STRANGERS |
|------------|----------------------|-----------|
| ORDERED | decent folk | visitors |
| DISORDERED | drunks and derelicts | criminals |

According to the essay, it is "outsiders"⁵⁶ or "strangers"⁵⁷ who commit crimes. "Regulars,"⁵⁸ on the other hand, tend not to cause real problems. So, for instance, the essay recounts the views of a patrol officer, fictitiously named Kelly, who is assigned a beat in downtown Newark in a controlled experiment regarding community policing:

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. 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 paper bags. Talking to, bothering, or begging from people waiting at the bus stop was strictly forbidden. If a dispute erupted between a businessman and a customer, the businessman was assumed to be right, especially if the customer was a stranger. If a stranger loitered, Kelly would ask him if he had any means of support and what his business was; if he gave unsatisfactory answers, he was sent on his way.⁵⁹

Kelly's task, as he saw it, was to regulate the disorderly regulars and exclude the disorderly strangers.

The insider-outsider dichotomy is also reflected by the recurring notion of "criminal invasion,"⁶⁰ reinforcing the idea that crime comes from outside the community- The essay manages to sustain

55. *Id.* at 32.

56. *Id.* at 36.

57. *Id.* at 30.

58. *Id.*

59. *Id.*

60. *Id.* at 32-33.

this fiction by excluding delinquents. The insider teenager, for instance, who lives in a housing project and becomes, a gang member, simply loses his insider status. Though he may continue to live in the projects, he is no longer a "project resident," no longer a "citizen," and no longer has a legitimate voice.⁶¹ He no longer has a claim to membership in the community — especially in the face of competing claims by orderly residents who are struggling to "reassert control over [their] turf."⁶²

Broken Windows is premised, then, on a number of shared understandings about the privilege of order over disorder, and insider over outsider; about the likelihood of criminal invasion in disorderly neighborhoods; and about the suspicious nature of the unattached adult. It is premised on categorical distinctions between disorderly people and law abiders. It reflects an aesthetic of orderliness, cleanliness, and sobriety. And, on the basis of these categories, it weaves a theory of deterrence. The message is clear, fighting disorder will deter serious crime.

C. *The Social Influence Conception of Deterrence*

The social influence conception of deterrence owes a lot to the broken windows theory. It borrows much of the sociological explanation. It also adopts the underlying categories of the disorderly and law abiders, and of order and disorder. To fully appreciate this, however, it is worth reviewing the social influence conception of deterrence in slow motion, so that all of its terms — social norm, social meaning, social influence, social construction — do not run into each other. Kahan writes that "[t]he effect of disorder on crime can be understood in terms of the effect that *social meaning* has on the mechanisms of *social influence*."⁶³ Let's take this frame by frame.

1. *Social Meaning*

The social meaning in question is the meaning of order and disorder. Order means that the community cares about its neighborhood and is prepared to enforce norms of orderliness. The corollary is that disorder means no one cares. So, for instance, Kahan writes that "[disorder is . . . pregnant with *meaning*: Public

61. *See id.* at 35.

62. *Id.* at 33. "What the police in fact do," the essay reads, "is chase known gang members out of the project" *Id.* at 35. The authors do the same when they exclude gang members from the category of "project residents."

63. Kahan, *Social Influence*, *supra* note 12, at 370 (emphasis added).

drunkenness, prostitution, aggressive panhandling and similar behavior *signal...* that the community is unable or unwilling to enforce basic *norms*."⁶⁴

Social norm proponents suggest that "[s]ome social meanings are constructed."⁶⁵ Those that are, are socially constructed through the interrelationship of action and context — the context being certain expectations or understandings that are often unquestioned. Social meanings are "the frameworks of understanding within which individuals live; a way to describe what they *take* or *understand* various actions, or inactions, or statuses to be; and a way to understand how the understandings change."⁶⁶ When these understandings are uncontested, the related social meanings acquire more power and appear unavoidable.⁶⁷

2. Social Influence

Social meanings can have social influence, which is to say that they can influence the behavior of individuals in society. In the broken windows context, the social meaning of disorder influences the disorderly to commit crimes and law abiders to leave the neighborhood. Conversely, the social meaning of order influences the disorderly not to follow their inclination to commit crime and law abiders to walk more freely in the streets at night. It is in this sense that Kahan writes, "Visible disorder . . . *tells* individuals that their own forbearance is unlikely to be reciprocated... The meaning of disorder can also *influence* the behavior of committed law-abiders in a way that is likely to increase crime."⁶⁸ Conversely, Kahan explains that "[w]hen citizens obey norms of orderliness — and when authorities visibly respond to those who don't — onlookers see that the community is intolerant of criminality. This message counteracts the inferences that point social influence in the direction of crime."⁶⁹

64. *Id.* (emphasis added).

65. Lessig, *supra* note 16, at 949; *see also id.* at 949 n.19.

66. *Id.* at 952 (emphasis omitted). Social meaning is somewhat similar, then, to what Clifford Geertz refers to as culture — the code through which we interpret each others' actions. *See* CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in TIM INTERPRETATION OF CULTURES 10-13 (1973).

67. "When these understandings or expectations become uncontested and invisible, social meanings derived from them appear natural, or necessary. The more they appear natural, or necessary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be." Lessig, *supra* note 16, at 960-61 (internal citations omitted).

68. Kahan, *Social Influence*, *supra* note 12, at 371 (emphasis added and omitted).

69. *Id.*

3. Social Norms

To take advantage of social influence, the social norm of orderliness has to be enhanced. The idea is, as the previous passage suggests, that social influence may sway citizens to "obey norms of orderliness."⁷⁰ The norm of orderliness operates through social meaning to influence the kind of good behavior on the part of disorderly and honest people that will reduce crime. Social influence then has a feedback effect on social norms, influencing people to act in a more orderly manner. In this way, changing a social meaning may change social norms.

Lawrence Lessig illustrates this point in his discussion of New York City's various approaches to panhandling. During the late 1980s and early 1990s, the city sought to ban panhandling by passing a law prohibiting loitering for the purpose of begging.⁷¹ That law was struck down by the federal courts under the First Amendment and, as a result, was not given the chance to change the social meaning associated with giving to panhandlers.⁷² The transit authority then took a different tack and, through an advertising campaign, communicated to passengers that it was wrong to give money to panhandlers because it made them less likely to go seek help. That campaign, Lessig reports, was effective and succeeded in changing the social meaning associated with giving to beggars. Lessig writes:

Before the Transit Authority started this poster campaign, the refusal of a passenger to give any money to a panhandler had a relatively unambiguous meaning — identifying the passenger as coldhearted, or cheap, or uncaring. Thus, the refusal to give was costly for the passenger. But the Authority's poster campaign ambiguated this meaning. Now, the refusal could either be because the passenger is coldhearted, etc., or because the passenger is concerned to do what is best for the panhandler. What is best for the panhandler is for the passenger to say no to the panhandler. Thus the posters succeeded in making it less costly for the passenger not to give to the panhandler by ambiguating the social meaning of a refusal to give.⁷³

70. *Id.* (emphasis added).

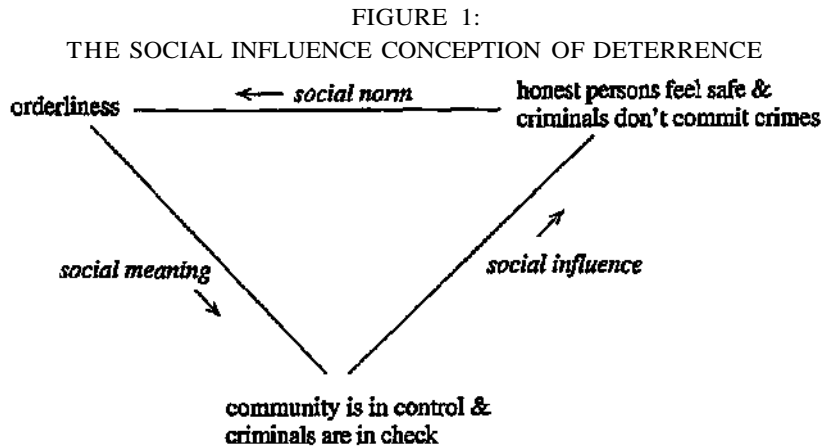
71. See Lessig, *supra* note 16, at 1039.

72. This account is somewhat simplified. In fact, there was a ban on panhandling in the subways. The federal courts upheld that ban, and it continued in effect throughout the period. See *Supreme Court Refuses to Hear Challenge to Anti-Begging Law*, N.Y. L.J., Nov. 27, 1990, at 1. Lessig does recognize this in a footnote. See Lessig, *supra* note 16, at 1040 n329. What it suggests, though, is that a full account of the change in social meaning would have to take into consideration whether it was the prohibition or the education campaign that affected the amount of panhandling. This fuller account would have to look at arrest rates for panhandling in the subways, deployment of police force in the subways and the effect of that deployment on the behavior of subway riders.

73. Lessig, *supra* note 16, at 1040.

By changing the social meaning (through ambiguation), the transit authority attempted to change the patterns of giving to panhandlers and thereby reduce the number of panhandlers.⁷⁴

The relationship between social meaning, social influence and social norms is illustrated in the following figure:



In the context of order-maintenance policing, this suggests that, by encouraging the social norm of orderliness, major crime may decline because (a) the social meaning of orderliness is that the disorderly cannot get away with crime and (b) this social meaning will favorably influence the behavior of the disorderly and law abiders. According to Kahan, this is the best explanation for the success of New York City's quality-of-life initiative.

II. THE LACK OF SOCIAL SCIENCE EVIDENCE

The broken windows theory and the social influence conception of deterrence — the two theoretic justifications underlying order-maintenance policing and, more specifically, the quality-of-life initiative — rest on a claim of deterrence. The theories suggest that, by eliminating minor misdemeanors and disorderly behavior, a neighborhood can deter serious crime. Claims of deterrence are, of course, empirical in nature. Proponents of order-maintenance policing principally deploy two arguments in support of the deterrence claim. The first is Wesley Skogan's study, *Disorder and Decline:*

74. In conversation, Toni Massaro suggested, correctly I believe, that the social meaning was always ambiguous, as evidenced by the fact that few people gave money before the media campaign anyway.

Crime and the Spiral of Decay in American Neighborhoods.⁷⁵ Kahan relies heavily on Skogan's study, arguing that it "supplies empirical support for the 'broken windows' hypothesis."⁷⁶ George Kelling, the co-author of *Broken Windows* and *Fixing Broken Windows*, similarly states that Skogan "empirically verified] the 'Broken Windows' hypotheses."⁷⁷ According to Kelling, Skogan demonstrated "a direct link between disorder and crime: in other words, 'disorder and crime problems go together in a substantial way."⁷⁸ The second argument in support of the deterrent effect is that crime in New York City has declined at a far greater pace than most anywhere else in the country, and, therefore, that the difference must be attributable to the new policing strategy. "The forces conventionally assumed to drive crime rates don't explain much," Kahan argues. "What has changed significantly is New York's law-enforcement strategy."⁷⁹ Neither of these two arguments, however, is persuasive. Skogan's study does not verify the broken windows hypothesis, and the causes of the decline in crime in New York City are far too contested to lend themselves to such simplistic analysis.

A. *Replicating Skogan's Study*

Working with Skogan's data, which is available through the Inter-University Consortium for Political and Social Research at the University of Michigan, I was able to assess his data and replicate his analysis.⁸⁰ I found that his data do not support the claim that crime is related to disorder. The data in fact suggest that certain crimes, like purse snatching, pocket-picking, and rape are not related to disorder at all. Certain crimes, like physical assault and burglary, are significantly related to disorder; however, the statistical relationship vanishes when neighborhood poverty, stability, and race are taken into account. Finally, robbery is also significantly

75. SKOGAN, DISORDER AND DECLINE *supra* note 9, at 75; Wesley G. Skogan, *Disorder and Community Decline in Forty Neighborhoods of the United States, 1977-1983*, in INTER-UNIVERSITY CONSORTIUM FOR POL. AND SOC. RES. (ICPSR NO. 8944) (1988) [hereinafter *ICPSR Codebook*]; Skogan, Final Report, *supra* note 22.

76. Kahan, *Social Influence*, *supra* note 12, at 369. See also Kahan, *New Path*, *supra* note 12, at 2488 & n.62.

77. KELLING & COLES, *supra* note 10, at 24.

78. *Id.* at 25.

79. Kahan, *Social Influence*, *supra* note 12, at 368.

80. I thank and commend Wesley Skogan for making his data publicly available through the ICPSR, without which it would be nearly impossible to replicate his work. See Wesley G. Skogan, *Disorder and Community Decline in Forty Neighborhoods of the United States, 1977-1983* (last modified Apr. 20, 1998) <http://www.icpsr.umich.edu/cgi/ab/prl?file=8944> [hereinafter Skogan's Data].

zation on the level of disorder taking into account the level of poverty, residential stability, and the racial composition of the neighborhoods.

a. The Disorder-Robbery Regression Analysis

With regard to the simple regression of robbery victimization on the level of disorder, Skogan finds that "levels of crime victimization were strongly related (+.80) to levels of disorder in the 30 areas for which robbery victimization was measured."⁸⁶ Skogan does not report his coefficients, but does include a graph showing the regression line running through the observations on a scatter-plot (x-axis level of disorder; y-axis percent victims of robbery).⁸⁷ The scatter-plot communicates a positive relationship between disorder and robbery victimization.

b. The Other-Explanatory-Variables Analysis

Skogan then conducts further analysis to take into account the effect of neighborhood poverty, stability, and race. The measures of poverty and stability are indices composed of weighted factors like average length of residence, percent rental dwellings, and percent incomes over \$20,000.⁸⁸ Race is measured by the variable corresponding to respondents' answers about their race, and reflects the percentage of minorities in the community.⁸⁹ Skogan finds that the correlation between robbery victimization and disorder remains high (+.54) even when these three other explanatory variables are taken into account.⁹⁰

c. Skogan's Conclusion

Skogan prefaces his findings with a significant caveat. In effect, he begins by saying that the data shed little light on the causal relationship. He writes:

Ironically, the data from the 40 neighborhoods cannot shed a great deal of light on the details of the relationship between disorder and crime, for the measures all go together very strongly. With only 40

86. Skogan, Final Report, *supra* note 22, at S3; *see also* SKOGAN, DISORDER AND DECLINE, *supra* note 9, at 73.

87. *See* SKOGAN, DISORDER AND DECLINE, *supra* note 9, at 74 fig.4-2. I replicate and reproduce this scatter-plot *infra*.

88. *See id.* at 192 tbLA-3-1; Skogan, Final Report, *supra* note 22, at 22 fig.4.

89. *See ICPSR Codebook*, *supra* note 75, at 14; Skogan, Final Report, *supra* note 22, at 25-29.

90. *See* SKOGAN, DISORDER AND DECLINE, *supra* note 9, at 73-74; Skogan, Final Report, *supra* note 22, at 53.

Disorder," but did not include them in his index for two reasons. First, with regard to the commercial sex variables, Skogan discovered that they were independent measures of disorder. Skogan writes:

At the individual level, reactions to these problems [prostitution and smut] formed a separate factor in every area in which they were included. A separate index of the extent of *commercial sex problems* was formed, but — as the status of the items as a separate factor hints — it was correlated only +.18 with the summary disorder measure and was not related to other neighborhood factors in the same fashion as either social or physical disorder. As a result, this cluster of (very interesting) problems will not be considered in any detail in this report.¹¹⁵

Second, Skogan suggests that the questions were asked in too few cases. Neither of these reasons for excluding the commercial sex variables from the index of disorder is compelling. The fact that the commercial sex variables are independent of the other indices of disorder is not a reason to ignore those variables. The broken windows theory includes prostitution in its conception of disorder. In fact, the *Broken Windows* essay repeatedly refers to prostitutes and street prostitution — they are an integral part of the disorderly and of disorder. The fact that these very interesting — I would say, fascinating¹¹⁶ — findings about commercial sex are at odds with the broken windows theory is not a reason to discard the variables, particularly when testing the theory's validity. Moreover, the "smut" and "prostitution" variables contain sixteen observations each, which is the same number as, for instance, "litter," "public drinking" or "vandalism." The "dogs" and "garbage" variables are only missing two more values.¹¹⁷ I therefore would not exclude those variables.

c. Selecting the Dependent Variable

Another reservation concerns the selection of the dependent variable. Skogan is interested in measuring the impact of disorder on *crime* and, throughout his book, he claims to be studying the rela-

115. Skogan, final Report, *supra* note 22, at 19.

116. This is a fascinating finding. What Skogan found was that there is an independent commercial sex factor distinct from social and physical disorder, that these measures of disorder do not hang together. Using the data, I find that the correlation between prostitution and robbery victimization is -.10; and that there is no statistically significant relationship (p-value of .712). Smut and robbery victimization are correlated at -.27 and the regression produces a p-value of .304. This is a fascinating challenge to the broken windows theory and puts into serious question the essay's emphasis on prostitutes.

117. See Skogan's Data, *supra* note 80.

victimization is the *only* variable that remains related to disorder if we take socioeconomic factors into account. The coefficients are reproduced in the following table:

TABLE 4: COEFFICIENTS FOR SKOGAN'S INDEX OF DISORDER AND INDIVIDUAL CRIMES HOLDING CONSTANT NEIGHBORHOOD POVERTY, STABILITY, AND RACE

| | SKOGAN'S INDEX OF DISORDER | | | | |
|------------------|----------------------------|----------------|---------|--------------------|-------|
| | Coefficient | Standard Error | P-value | 95% Conf. Interval | |
| CRIME | | | | | |
| Purse snatching | -0.013 | 0.027 | 0.639 | -0.072 | 0.046 |
| Physical Assault | 0.014 | 0.019 | 0.459 | -0.025 | 0.054 |
| Burglary | -0.006 | 0.035 | 0.875 | -6.078 | 0.066 |
| Robbery | 0.038 | 0.012 | 0.004 | 0.014 | 0.062 |
| Sexual Assault | 0.006 | 0.006 | 0.341 | -0.007 | 0.019 |

As this table demonstrates, it would be improper to conclude from the data that, as a statistical matter, general levels of *crime* — or *common crime* — and disorder are related. Even setting aside all the problems with the data set, the data suggest that *one particular crime, namely robbery*, may be statistically related to disorder.

Skogan justifies using robbery victimization exclusively as an index of local levels of crime for the following reasons: "methodological research suggests it is reliably measured; it tends to correspond better than many other victimization measures with comparable official crime statistics; aggregate city-level studies indicate it is linked to fear of crime; and comparable measures of robbery victimization were included in 30 of the areas surveyed."¹²² On close scrutiny, however, these reasons are not entirely persuasive. The reasons, in part, touch on a hotly contested area in criminology and it is somewhat daunting, in this respect, to criticize Skogan given that he is a recognized expert in the area of victimization surveys. As Gove, Hughes, and Geerken suggest in their 1985 article, "[t]he person who has perhaps done the most work with the victimization surveys is Skogan."¹²³ Nevertheless, there are reasons to be skeptical of the arguments.

First, robbery victimization is not the only measure that corresponds well with comparable official crime statistics. Burglary does

122. SKOOGAN, DISORDER AND DECLINE, *supra* note 9, at 195 n.1 (Ch. 4) (internal citations omitted); Skogan, Final Report, *supra* note 22, at 52 n.7 (internal citations omitted).

123. Walter R. Gove et al., *Are Uniform Crime Reports a Valid Indicator of the Index Crimes? An Affirmative Answer with Minor Qualifications*, 23 CRIMINOLOGY 451, 468 (1985).

too.¹²⁴ This is generally explained by the fact that the most powerful predictor of whether a crime is reported to the police appears to be the seriousness of the offense.¹²⁵ Second, with regard to rape and physical assault, victimization surveys substantially underreport incidences among acquaintances, friends, and relatives,¹²⁶ and they therefore measure very different things than the Uniform Crime Reports.¹²⁷ But this does not address the *cross-jurisdictional reliability* of victimization surveys for rape or physical assault. The same biases might affect cross-jurisdictional comparisons of victimization surveys and of official crime statistics.¹²⁸ In sum, the issue presented here is not the comparability of victimization surveys and official crime statistics, which is what Skogan discusses. The issue is the comparability of victimization surveys across neighborhoods. It is the cross-jurisdictional reliability of victimization surveys.¹²⁹

Moreover, as a technical matter, there are *no* missing values for burglary victimization in the data, whereas there are ten missing values for robbery — and there are as many missing values for robbery as there are for physical assault.¹³⁰ This would militate in favor of using burglary as the dependent variable. This is especially true given that it appears, from the *Final Report* and the *Codebook*, that the measure of robbery victimization is *not* neighborhood-specific. Whereas the typical purse-snatching question¹³¹ and assault question¹³² specifically referred the interviewee to acts committed "in the neighborhood where you live now," and whereas the typical burglary question is by definition neighborhood specific, the

124. *See id.* at 479.

125. *See id.* at 468.

126. *See id.* at 464-65.

127. *See id.* at 465.

128. *See id.* at 466.

129. Skogan's 1981 article, *On Attitudes and Behaviors*, does not address the cross-jurisdictional reliability of victimization surveys either. *See* Wesley G. Skogan, *On Attitudes and Behaviors*, in *REACTIONS TO CRIME* 19 (pan A. Lewis ed., 1981).

130. *See* Skogan's Data, *supra* note 80.

131. "During the past year, *in the neighborhood where you live now*, has anyone picked your pocket or taken a bag or package directly from you without using force or threatening you?" *ICPSR Codebook*, *supra* note 75, at 13 (emphasis added); Skogan, *Final Report*, *supra* note 22, at 115 (emphasis added).

132. "During the past year, *in the neighborhood where you live now*, has anyone physically attacked you or has anyone threatened or tried to hurt you even though they did not actually hurt you?" Skogan, *Final Report*, *supra* note 22, at 115; *ICPSR Codebook*, *supra* note 75, at 13.

robbery question¹³³ and the rape question¹³⁴ apparently did not specify the location of the attack. In other words, it is possible that the robbery and rape questions could have been interpreted by the interviewee as referring to incidents that happened *outside* their neighborhood. This militates even more in favor of using the burglary variable.

Skogan's arguments do not fully address these concerns.¹³⁵ In my opinion, if we are going to draw conclusions about the effect of disorder on common crime or general levels of crime, it may be more conservative to look at each substantive crime for which we have data and make a more nuanced assessment of the disorder-crime relationship.¹³⁶

d. The Newark Effect

As noted above, all of the statistically significant relationships between disorder and the individual substantive crimes vanish when neighborhood poverty, stability, and race are held constant, *except robbery*. The only reason robbery remains statistically significant, it turns out, is Newark. If you look at Skogan's Figure 4-2, you will notice that the five Newark neighborhoods, in contrast to the other city neighborhoods, are clustered together.¹³⁷ If you put your hand over those five Newark observations and look only at the other twenty-five neighborhoods, the relationship between disorder and robbery victimization seems much less obvious. And, in fact, it is. Holding constant the same three explanatory variables (poverty, stability, and race), *there is no significant relationship between disorder and robbery victimization when the five Newark neighborhoods are excluded*. I call this the Newark Effect and it is summarized in the following table:¹³⁸

133. "Since the first of this year, has anyone stolen something directly from you by force or after threatening you with harm? PLUS: Other than that, has anyone tried to take something from you by force even though they did not get it?" *ICPSR Codebook*, *supra* note 75, at 13; Skogan, Final Report, *supra* note 22, at 115.

134. "Has anyone sexually attacked you, or tried to, since the first of this year?" *ICPSR Codebook*, *supra* note 75, at 13; Skogan, Final Report, *supra* note 22, at 115.

135. See *supra* note 122 and accompanying text

136. This is, incidentally, what Sampson and Cohen do. See *infra* note 146 and accompanying text. They look at both burglary and robbery and publish their findings about burglary, even though those findings do not support their position. See Robert Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L. & SOC'Y. REV. 163,175-79 (1988).

137. See SKOOGAN, DISORDER AND DECLINE, *supra* note 9, at 74 fig.4-2.

138. I am indebted to Mike Gottfredson for this insight. Gottfredson eye-balled Skogan's Figure 4-2 and immediately suggested to me that the correlation likely was almost entirely due to Newark.

the available values, we will obtain a good indicator of the relative level of disorder in each neighborhood. In addition, the use of standardized values essentially substitutes for multiple imputation, insofar as it does similar work as the algorithms commonly used for imputation.

5. The Corrected Results Using Skogan's Data

a. The Corrected Disorder-Crime Regression Analysis

Looking only at "corrected disorder" and the various crimes, it appears that the corrected disorder variable continues to be statistically significantly related to three of the five crimes: physical assault, burglary, and robbery. At this preliminary stage, however, we can already conclude that purse-snatching/pocket-picking and rape are not significantly related to disorder. This is reflected in the following table:

TABLE 7: REGRESSION COEFFICIENTS FOR CORRECTED DISORDER AND INDIVIDUAL CRIMES

| CRIME | CORRECTED DISORDER | | | | |
|------------------|--------------------|------|-------|--------------------|------|
| | Coef | SE | P-val | 95% Conf. Interval | |
| Purse snatching | -.05 | .03 | .126 | -.125 | .017 |
| Physical Assault | .11 | .03 | .001 | .053 | .17 |
| Burglary | .14 | .05 | .011 | .033 | .34 |
| Robbery | .11 | .01 | .000 | .077 | .137 |
| Sexual Assault | .001 | .007 | .901 | -.013 | .015 |

b. The Other-Explanatory-Variables Analysis

"With the single exception of robbery, however, these statistically significant relationships between individual crimes and disorder simply disappear when the socioeconomic factors are taken into account.¹⁴⁵

Physical Assault: using Skogan's indices for poverty, stability, and race, and holding these variables constant, neighborhood disorder is no longer statistically significantly related to the number of residents victimized by physical assault in their neighborhood. When we hold these three variables constant, a one unit increase in corrected disorder tends to increase physical assault by .007 on average, with a standard deviation of .04. The ninety-five percent confidence interval therefore has a lower bound of -.08 and an up-

¹⁴⁵. With regard to purse-snatching, if stability alone is held constant, the p-value is 0.978.

TABLE 10: THE NEWARK EFFECT: COEFFICIENTS FOR ROBBERY AND OTHER EXPLANATORY VARIABLES EXCLUDING NEWARK NEIGHBORHOODS

| EXPL. VARIABLES | ROBBERY | | | | |
|--------------------|---------|------|-------|-------------------|------|
| | Coef | SE | P-val | 95% Cont Interval | |
| Corrected Disorder | .06 | .04 | .141 | -.022 | .141 |
| Poverty | -.000 | .003 | .988 | -.006 | .006 |
| Stability | .001 | .003 | .794 | -.006 | .008 |
| Race | .014 | .008 | .089 | -.002 | .03 |

6. Conclusion

My findings using the corrected disorder index essentially track my earlier replication using Skogan's index for disorder. They suggest that, in the final analysis, there are *no* statistically significant relationships between disorder and purse-snatching, physical assault, burglary, or rape when other explanatory variables are held constant, and that the relationship between robbery and disorder also disappears when the five Newark neighborhoods are set aside. In the end, the data do not support the broken windows hypothesis.

B. The Sampson and Cohen Study

When pushed on the details of Skogan's analysis, social norm proponents cite one other quantitative study, Robert Sampson and Jacqueline Cohen's *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*.¹⁴⁶ This study, however, is by no means a silver bullet for the social influence conception of deterrence. To the contrary, the study takes a far more nuanced approach and, in the end, supports the argument that the social scientific evidence for the broken windows theory is still lacking.

Sampson and Cohen acknowledge that research on the relationship between disorder and crime is "sparse"¹⁴⁷ and that the results thus far have been "mixed."¹⁴⁸ Their study focuses on two possible mechanisms — only one of which is the broken windows hypothesis — by which aggressive, proactive policing strategies might relate to lower crime rates. The first mechanism, which they refer to as "indirect," operates by increasing the arrest/offense ratio.¹⁴⁹ Aggres-

146. Sampson & Cohen, *supra* note 136. Tracey Meares brought this study to my attention; Dan Kahan also refers to the study in his work. See Kahan, *Social Influence*, *supra* note 12, at 372 & n.82-83.

147. See Sampson & Cohen, *supra* note 136, at 167.

148. See *id.* at 166.

149. See *id.* at 164.

preliminary matter, the authors observe that New York's decline in homicides is the third highest decline for major cities in the United States, behind the decline in Pittsburgh and equal to that in Houston.¹⁹⁰ The major finding of the study is that the trend in homicide rates has been different for firearm and nonfirearm homicides. Whereas firearm homicides first increased in the late 1980s and early 1990s and then declined sharply, nonfirearm homicides have steadily declined since 1987.¹⁹¹

The study suggests that the new policing initiative in New York City may not have affected the category of nonfirearm homicides. The authors indicate that the explanation for the long-term decline in nongun killings may lie elsewhere than in post-1990 interventions.¹⁹² It is worth emphasizing that nonfirearm homicides is not a trivial category of major crime. In 1995, there were 675 nongun killings, in contrast to 834 firearm homicides.¹⁹³

With regard to firearm homicides, the study is less conclusive. The authors observe that "[t]he temporal fit between policing [strategy] changes and gun homicide declines is a good one."¹⁹⁴ The authors suggest a number of factors that may also have contributed to the decline, including a certain amount of regression from peak rates in 1990, an increase in the police force, and social trends. The primary competing explanation for the sharp decline in gun killings is regression from abnormally high rates.¹⁹⁵ Nevertheless, the authors write, "while the entire gun homicide drop of 1991 to 1996 is within the boundaries of regression possibility, the more prudent view is to regard the convergence of cyclical variation, social trends in risk and exposure, and law enforcement changes as jointly responsible" for the decline.¹⁹⁶ Overall, the authors conclude on a cautionary note:

190. See *id.*

191. *See id.* ("What the gun trends obscure is the steadiest long-term trend in New York City — a downward movement in homicides by all means other than gun that begins after 1986 and gathers momentum steadily throughout the late 1980s and early 1990s.")

192. *See id.* ("Changes in policing were unrelated to the long-term decline in non-gun homicides. This is a secular trend whose explanations lie beyond the hypotheses raised here about post-1990 interventions."); *id.* ("The consistent decline in nongun homicide . . . starts too early and continues too evenly throughout the period under study to have any plausible linkage to changes that come into the city two or three years into the 1990s."); *id.* ("The nongun declines are in all probability not the consequence of policing changes or any other process that was not in effect until the 1990s.")

193. See *id.*

194. See *id.*

195. See *id.*

196. *Id.* A further complication, the authors point out, is that there have been many changes in policing, not just aggressive enforcement. Other changes include "gun interven-

An alternative mechanism of order-maintenance policing then may be the enhanced power of surveillance offered by a policy of aggressive misdemeanor arrests and identification. What order-maintenance policing gives law enforcement is a legitimate reason to seize, search, and run checks on persons committing or suspected of committing minor offenses, which may have important consequences for the detection and prevention of crime. This was powerfully demonstrated in the now-famous case of John Royster. Royster is accused of fatally beating a flower shop owner on Park Avenue — as well as several brutal assaults on women, including an infamous assault on a piano teacher in Central Park that left her severely impaired. Royster was fingered, literally, when he was arrested for turnstile jumping in the New York subways. Upon arrest, Royster was fingerprinted and a computer matched his prints with fingerprints left at the scene of the Park Avenue murder.²⁰⁸

The first quality-of-life experiment in the New York subways demonstrated early on the benefits of aggressive misdemeanor arrests. "As it turned out, many of those caught committing these small crimes were also guilty of larger crimes. One out of seven fare evaders had prior warrants out for their arrest. One out of 21 was carrying a handgun."²⁰⁹ With misdemeanor arrests up more than fifty percent in New York City and with routine fingerprinting and record checking, order-maintenance policing has "led to a 39 percent increase in arrests on outstanding warrants."²¹⁰

Misdemeanor arrests may also be used as a way to take custody of a suspicious person where there may not otherwise be sufficient cause. This occurred recently when police officers arrested a suspicious person for jaywalking. Since he was not carrying identification, he was transported back to the police station, where he was put in a lineup and identified by two robbery victims.²¹¹

Order-maintenance policing also enhances surveillance by facilitating the transfer of information. Having patrol officers walk a beat makes it easier for citizens to pass information on to them.

208. See Purdy, *supra* note 11, at A1 (Royster "was identified by a fingerprint taken when he was arrested for jumping a subway turnstile.").

209. Kaplan, *supra* note 45, at E1.

210. Purdy, *supra* note 11. Mayor Giuliani in fact recalls this well. "Very shortly into our program of dealing with squeegee operators — and I remember this — after the first group of arrests, Police Commissioner Bratton came back to me and said that some very large percentage — I don't remember the exact percentage — of the squeegee operators had warrants for other crimes, a number of them being violent crimes." See Onishi, *supra* note 11 (quoting Mayor Giuliani at a press conference on February 20, 1998).

211. See Onishi, *supra* note 11.

toughs, and arrest on suspicion.²¹⁹ On close inspection, the desired order and regularity depend on irregularity and brutality.

"'We kick ass.' Project residents both know and approve of this," the essay contends. "None of this is easily reconciled with any conception of due process or fair treatment,"²²⁰ the authors concede. It is, however, vital to the order-maintenance function. That function, after all, harkens back to the 1950s, when police officers assisted neighborhoods in asserting control over delinquency "sometimes violently."²²¹ It looks back to a time when "[y]oung toughs were roughed up, people were arrested 'on suspicion' or for vagrancy, and prostitutes and petty thieves were routed. 'Rights' were something enjoyed by decent folk, and perhaps also by the serious professional criminal, who avoided violence and could afford a lawyer."²²²

The order-maintenance strategy also depends on arresting people on meaningless charges. What makes the system work is the availability of broad criminal laws that allow the police to take someone off the streets because they look suspicious. "Until quite recently in many states, and even today in some places, the police make arrests on such charges as 'suspicious person' or 'vagrancy' or 'public drunkenness' — charges with scarcely any legal meaning," Wilson and Kelling write. "These charges exist not because society wants judges to punish vagrants or drunks but because it wants an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed."²²³ In these situations, the desire for order excuses the questionable legality of the arrests. Returning to police officer Kelly on the Newark beat, the authors state: "Sometimes what Kelly did could be described as 'enforcing the law,' but just as often it involved taking informal or extralegal steps Some of the things he did probably would not withstand a legal challenge."²²⁴ These are, after all, euphemisms for the word "illegal."

The essay refers to many rules, especially the "informal but widely understood rules" of police-civilian encounters.²²⁵ The text seems to privilege regularity, but, in fact, it is irregularity that un-

219. *See id.* at 33.

220. *Id.* at 35.

221. *Id.* at 33.

222. *Id.*

223. *Id.* at 35.

224. *Id.* at 31.

225. *Id.* at 30.

changes in the way that we judge others. Whereas Durkheim treats punishment as evidence of the function of other social phenomena, like the social division of labor, Foucault instead sets out to explore discipline as the object itself of a Durkheimian functional analysis. By explicitly citing only Durkheim and by appropriating Durkheim's concepts, like the "repressive" and the "social function," Foucault readily acknowledges Durkheim's preeminent place in the tradition. But when Foucault prescribes, as the first tenet of his method, "regard punishment as a complex social function," Foucault is essentially claiming to turn Durkheim's enterprise on its head.²⁶⁶ The principal deficiency of Durkheim's work, according to Foucault, is the failure to take account of the enabling effects of punishment on the subject. This critique may apply with equal force to the social influence conception of deterrence.

A. Foucault on the Categories

Foucault's genealogy of the prison addresses both strands of Durkheim's analysis. With regard first to the categories, Foucault's discussion of the role of the delinquent in the modern carceral society illuminates, by analogy, the role of the disorderly in the social influence conception of deterrence. The delinquent and the disorderly have much in common and it is, for this reason, crucial to rehearse Foucault's analysis. But the categories are also different in important ways. Whereas delinquency correlates with treatment, psychotherapy, and correction, the category of the disorderly is more closely associated with a militaristic method of rectification. The broken windows theory by no means advocates the more rehabilitative or psychotherapeutic remedies that characterize certain of the institutions described in *Discipline and Punish*. The broken windows theory borrows instead from the classical method of deterrence through excessive punishment, as well as the drill sergeant model of discipline.

²⁶⁶ Recall that Durkheim was very careful to differentiate the concept of *function* from that of *effects* or results and that he set out to investigate *the Junction* of the division of labor. See DURKHEIM, *supra* note 240, at 11. He writes:

We cannot use "aim" or "purpose", and speak of the goal of the division of labour, because that would suppose that the division of labour exists *for the sake of results* that we shall determine. To use "results" or "effects" cannot satisfy us either, because so idea of correspondence is evoked. On the other hand, the term "role" or "function" has the great advantage of implying that idea, but in no way prejudices the question of knowing how that correspondence has been established, or whether it arises from some intended and preconceived adaptation or from some adjustment after the event.

Id. Durkheim realizes his project — to investigate the *Junction* of the division of labor — by treating law (and punishment) within the category of *effects*. Foucault flips this by treating, as his principal object of study, the function of punishment.

For this reason, the category of the disorderly offers an opportunity to refine Foucault's diagnosis of the modern carceral society. Insofar as we are living today — inescapably, at present — within a paradigm of the penitentiary, the differences between the delinquent and the disorderly open a window into the different subtypes of possible disciplinary practices. The social influence theory attempts to normalize the offender along the axis of order and disorder. However, if there is no evidence to support this axis of normalization, then it might be better to reform along a different axis, such as, for instance, poverty or stability. By refining Foucault's analysis, we may be able to draw its policy implications.

Foucault's description of the modern carceral society draws on a number of different mechanisms of disciplinary practice — for instance, discipline in the hospital, army, workplace, school, court, or home — and his discussion benefits from grouping these strategies together and highlighting their kinship. However, the consolidation may detract from a more nuanced discussion of the different modalities of discipline that characterize modern penalty — the differences precisely between discipline in the hospital and discipline in the workshop. By selecting from those different approaches within the larger rubric of discipline, we can begin to differentiate between ways of disciplining, between techniques of punishment. This may allow us to evaluate the quality-of-life initiative.

First, however, let me turn to the details of Foucault's analysis. In *Discipline and Punish*, Foucault explores three very different ways in which punishment has created the subject — how punishment has fundamentally altered the subject's self-understanding, habits, emotions, and desires. The three different modalities correspond to three different stages in the history of punishment: first, the brutal, torturous corporal punishments of the seventeenth and early eighteenth centuries; second, the representational and theatrical aspirations of the eighteenth century reformers; and third, the disciplinary mechanisms of spatial, temporal, and bodily control that capture the modern carceral system. Foucault suggests that these three modalities are not entirely distinct. Certain techniques from earlier historical periods are incorporated into later modalities.²⁶⁷ Foucault also suggests that the three mechanisms share important features. They each operate on the body of the convicted: the body is the intermediary between society and the subject.²⁶⁸ They each relate, idiosyncratically, to truth formation: they each

267. See *infra* note 283 (discussing Mettray).

268. Foucault writes:

The three modalities differ as techniques, as arts of punishment.²⁹⁰ In their trilogy, they comprised: "[T]he sovereign and his force, the social body and the administrative apparatus; mark, sign, trace; ceremony, representation, exercise; the vanquished enemy, the juridical subject in the process of qualification, the individual subjected to immediate coercion; the tortured body, the soul with its manipulated representations, the body subjected to training,"²⁹¹

It is within this framework that we can begin to assess New York City's quality-of-life initiative. The policy of aggressive misdemeanor arrests bears a close resemblance to the juridical model in a number of respects. First, it bears the mark of sovereign excess. The idea of subjecting someone who has been, for instance, drinking in a public space to several hours in a cramped police van, to a strip search, to overnight detention, and to a criminal record bears the trappings of that imbalance between the subject and the sovereign that marked the more brutal punishments of the seventeenth century. The theory of punishment mirrors the early seventeenth century reliance on dissymmetry. Second, it has the trappings of the juridical — rather than normalizing — judgment: an all or nothing, guilty or innocent dichotomy. Discipline and normalization operate by creating a spectrum of comparison along which individuals can be differentiated, classified, and compared. In contrast, the classical juridical model was binary. As Foucault explains, the essential function of classical juridical penalty

is to refer, not to a set of observable phenomena, but to a corpus of laws and texts that must be remembered; [it] operates not by differentiating individuals, but by specifying acts according to a number of general categories; not by hierarchizing, but quite simply by bringing into play the binary opposition of the permitted and the forbidden; not by homogenizing, but by operating the division, acquired once and for all, of condemnation.²⁹²

The quality-of-life initiative is, in this sense, the quintessential penal mechanism at the core of the disciplinary process. It is the juridical element in the panoply of disciplinary techniques, the juridical model embedded in a cluster of discipline. Foucault writes, "At the

290. See, e.g., *id.* at 257 (translation of FOUCAULT, *SURVEILLER ET PUNIR*, *supra* note 34, at 261) ("The transition from the public execution, with its spectacular rituals, its art mingled with the ceremony of pain, to the penalties of prisons buried in architectural masses and guarded by the secrecy of administrations, is not a transition to an undifferentiated, abstract, confused penalty; it is the transition from one art of punishing to another, no less skilful one. It is a technical mutation.").

291. *Id.* at 131 (translation of FOUCAULT, *SURVEILLER ET PUNIR*, *supra* note 34, at 134).

292. *Id.* at 183 (translation of FOUCAULT, *SURVEILLER ET PUNIR*, *supra* note 34, at 185).

heart of all disciplinary systems functions a small penal mechanism."²⁹³ The quality-of-life initiative is precisely that mechanism.

At the same time, however, the quality-of-life initiative feeds into the disciplinary project by producing a subject to normalize — the disorderly. By normalizing along the axis of disorder, the quality-of-life initiative breaks down and blends together the line between disorder and crime. Disorder becomes a degree of crime: breaking a window, littering, jumping a turnstile become grades along a spectrum that leads to homicide. The analogy, from Foucault, is to the penitentiary technique;

This vast mechanism established a slow, continuous, imperceptible gradation that made it possible to pass naturally from disorder to offence and back from a transgression of the law to a slight departure from a rule, an average, a demand, a norm—You will end up in the convict-ship, the slightest indiscipline seems to say; and the harshest of prisons says to the prisoners condemned to life: I shall note the slightest irregularity in your conduct²⁹⁴

Just like the category of the delinquent, the category of the disorderly breaks down the lines between minor infraction, minor disorder, and major offense. Moreover, as we saw earlier, the quality-of-life initiative also feeds into the disciplinary project of surveillance.

To say, however, that the quality-of-life initiative is part of the disciplinary project is to say too little — everything is today, since we live, according to Foucault, in a disciplinary society. Until such time as another paradigm presents itself, what we have to do today is compare the different genres of discipline. It is here that we can refine Foucault's analysis for there are many things that the quality-of-life is not. It is not modeled on the rehabilitative ideal central to many disciplinary projects, especially that of the mental hospital, welfare, and social work institutions. It does not feed into the psychotherapeutic. It does not coddle the disorderly. It does not aim so much to reform the disorderly as it does to punish them and to exclude them in the sense of getting them off the street. Insofar as the strategy does seek to influence their behavior, it does not employ the traditional rehabilitative methods. Nor does the quality-of-life initiative incorporate the concept of examination — the call-

293. *Id.* at 177 (translation of FOUCAULT, *SURVEILLER ET PUNIR*, *supra* note 34, at 180).

294. *Id.* at 298-99 (translation of FOUCAULT, *SURVEILLER ET PUNIR*, *supra* note 34, at 306).

ing card of school discipline. These are different subtypes of disciplinary techniques.²⁹⁵

New York's order-maintenance policing seems to draw more heavily both on the juridical model and the military form of discipline: the juridical insofar as it utilizes punishment that may seem somewhat excessive; military in the sense that it is normalized along an axis of disorder with a type of military observation, inspection, and exercise. Military discipline is captured in the ideal model of the military camp: "In the perfect camp," Foucault writes, "all power would be exercised solely through exact observation."²⁹⁶ The military space is designed "to act on those it shelters, to provide a hold on their conduct, to carry the effects of power right to them, to make it possible to know them, to alter them."²⁹⁷

Under this analysis, the weakness of the quality-of-life initiative is that it normalizes in a militaristic way along an axis of disorder even though there is inadequate empirical support. The disorderly may be the wrong target — or at least, there is not sufficient evidence to suggest that they are the right target. As we saw earlier, Skogan's data suggests that poverty, stability, and race — rather than disorder — may account for the discrepancies in neighborhood crime levels. This hypothesis needs to be further operationalized and verified. If it is true, however, then our normalizing, disciplinary practices should be reoriented along the axes of income, employment, and stability — and the issue of race should be directly addressed. If true, our policing and enforcement strategies should focus on workshop discipline, rather than on the juridical or military models — regardless of the fact that workshop discipline is a target of Foucault's critique.

Foucault's contribution is to shed light on how the techniques of punishment associated with the quality-of-life initiative create the category of the disorderly. The quality-of-life initiative focuses on the biography of the disorderly, rather than on the criminal act. It too judges the soul of the disorderly. It shapes the subject not simply by giving the individual a criminal record, and not simply by convicting the person. It shapes the subject by turning the individual into someone that needs to be policed, surveyed, watched, relo-

295. See Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449,455 (1996), for a somewhat similar interpretation of the different disciplinary technologies that Foucault deploys.

296. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 171 (translation of FOUCAULT, SURVETILLER ET PUNIR, *supra* note 34, at 173).

297. *Id.* at 172 (translation of FOUCAULT, SURVETILLER ET PUNIR, *supra* note 34, at 174).

cated, and controlled. It is in this sense that Foucault writes, regarding the analogous delinquent, that

[i]t is said that the prison fabricated delinquents; it is true that it brings back, almost inevitably, before the courts those who have been sent there. But it also fabricates them in the sense that it has introduced into the operation of the law and the offence, the judge and the offender . . . the non-corporal reality of the delinquency that links them together and, for a century and a half; has caught them in the same trap.²⁹⁸

To say that the quality-of-life initiative shapes the disorderly subject is not to say that it promotes more disorderly conduct by labeling the individual as disorderly — whether or not that is true. It is, instead, to suggest that the theory of deterrence and punishment focuses on the whole biography of the disorderly person, rather than the criminal act, and thereby facilitates a policy of surveillance, control, relocation, and exclusion of the "disorderly."²⁹⁹ In other words, the category of the disorderly is the product of the quality-of-life initiative and it promotes and facilitates a policy of aggressive arrest and detention.

B. *Foucault on Law*

Foucault's writings also offer an alternative interpretation of the role of legal order — an antithesis to the second prong of Durkheim's work. Whereas, for Durkheim, ordered legal regulation produces healthy moral cohesion (through the intermediary of the division of labor), for Foucault it is the disciplines that enforce moral cohesion under the cover of legal order. As a result, Foucault's writings on law are critical to appraise the social influence conception of deterrence.³⁰⁰

298. *Id.* at 255 (translation of FOUCAULT, *SURVEILLER ET PUNIR*, *supra* note 34, at 258).

299. The relationship and important differences between labeling theory in criminology and subject creation theory are complex and, clearly, beyond the scope of this Article. For present purposes, it is enough that subject creation theory, in contrast to labeling theory, does not necessarily suggest that the category of the disorderly creates more disorderly behavior on the part of the disorderly persons. *Cf.* HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 34 (1963) (Treating a person as though he were generally rather than specifically deviant produces a self-fulfilling prophecy. It sets in motion several mechanisms which conspire to shape the person in the image people have of him."). The focus of my deployment of subject creation theory here is instead on the apparatuses of punishment and discipline that naturally flow from the category of the disorderly. For a classic expression of labeling theory, see *id.* at 31-35; *THE OTHER SIDE* (Howard Becker ed., 1964).

300. A number of scholars suggest that Foucault lacks a theory of law. Duncan Kennedy, in his essay *The Stakes of Law, or Hale and Foucault!*, criticizes Foucault for not taking law seriously enough. He argues that Foucault has an antiquated, pre-realist view of juridical power — "a typically European but utterly misconceived picture of the legal system as a domain governed by rules (as opposed to standards), by individualist (as opposed to altruist)

For Foucault, law and discipline are very different from each other, and the tension between them gives rise to the modern carceral system and a new form of law, *te pouvoir normalisateur*. Discipline is a form of counter-law,³⁰¹ of dissymmetry and inequality, that operates beneath the discourse of juridical power to make possible claims of equality and universal rights. Just as the discipline of the workshop molded men into workers and thereby enabled the industrial revolution to take place,³⁰² general discipline shapes individuals into ordinary citizens, non-delinquents, and thereby makes it possible to speak about universal rights. At the same time, juridical discourse about human rights serves as a cover that allows disciplinary power to grow.

The democratization of rights discourse—resulting in claims of equality, humanity, and universality—has fueled the growth of disciplinary power. Equality permeates the idea of one carceral punishment for all, with different lengths of time measured according to

definitions of legal rights, and by deductive (as opposed to 'policy-oriented') reasoning." Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, in *SEXY PRESSING, ETC.* 83, 118 n.* (1993). According to Kennedy, "law and legal discourse play superstructure and mystificatory roles in Foucault's disciplinary society analogous to their roles in Marx's political economy." *Id.* at 122. Similarly, Alan Hunt and Gary Wickham, in their recent book *Foucault and Law*, charge that "Foucault does not have a theory of law" and that he "tends to expel law from any major role in modern forms of government." ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW* viii, 22 (1994). Hugh Baxter agrees. "A straightforward reading of Foucault's writings on power suggests, as Hunt and Wickham observe, that Foucault tends to 'expel law from any significant role' in modern society." Baxter, *supra* note 295, at 461. Baxter continues: "Foucault's conception of law as sovereign command is too crude a tool for understanding modern law." *Id.* at 464.

Law, however, is by no means an untheorized concept for Foucault. To the contrary, law is at the heart of Foucault's project. In fact, in Foucault's stated purpose — "a genealogy of the present scientific-legal complex from which the power to punish derives its bases, justifications and rules," *FOUCAULT, DISCIPLINE AND PUNISH*, *supra* note 34, at 23 (emphasis added) (translation of *FOUCAULT, SURVEILLER ET PUNIR*, *supra* note 34, at 27) — law and knowledge play equally important roles. The discussion in text will bear this point out. *See also id.* ("Instead of treating the history of penal law and the history of the human sciences as two separate series... see whether there is not some common matrix or whether they do not both derive from a single process of 'epistemologico-juridical formation.'" *Id.* (translation of *FOUCAULT, SURVEILLER ET PUNIR*, *supra* note 34, at 28)).

301. Scholars have suggested that this idea of discipline as counter-law represents the expulsion of law in Foucault's work. *See, e.g.*, Baxter, *supra* note 295, at 454 ("The opposition between law-as-sovereign-power, on one hand, and disciplinary power, on the other, is one of the key themes of Foucault's work on power. It will also turn out to be essential to Foucault's 'expulsion of law' from modernity."). However, as discussed *infra*, it is precisely this opposition that fuels both legal and disciplinary power. Law thus provides a critical mechanism in modernity.

302. *See* *FOUCAULT, DISCIPLINE AND PUNISH*, *supra* note 34, at 221 (translation of *FOUCAULT, SURVEILLER ET PUNIR*, *supra* note 34, at 222) (discussing the industrial revolution). Foucault suggests that the infusion of disciplinary power in the industrial complex made possible the industrial revolution by shaping the modern worker. Foucault refers in a footnote to Marx's *Das Kapital*, and thereby indicates some economic implications of his study of disciplinary power.

the delinquency of the individual. Humanity also permeates the idea of incarceration as reflected in the notion that "the penalty must be nothing more than the deprivation of liberty."³⁰³ And the claim of universality justifies the power to punish. Together, these juridical claims have empowered and facilitated the growth of the carceral system. Legal discourse has allowed the disciplines to flourish.

Foucault describes this interplay between juridical and disciplinary power in his *Two Lectures* as follows:

{T}he theory of sovereignty, and the organization of a legal code centred upon it, have allowed a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights. The juridical systems — and this applies both to their codification and to their theorization—have enabled sovereignty to be democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.³⁰⁴

Modern society, for Foucault, is defined then by this conjunction of legal discourse — rights talk — and disciplinary coercion. The carceral system is constructed within a space constituted by both.³⁰⁵ The confrontation produces a new tendency, a process of normalization that simultaneously creates the delinquent and justifies the power to punish.³⁰⁶ This normalizing power defines and categorizes

303. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 248 (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 251).

304. MICHEL FOUCAULT, *TSVO Lectures*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977, at 78,105 (Colin Gordon et al. trans., Pantheon Books 1980) [hereinafter FOUCAULT, *Two Lectures*]- Foucault makes the same point in FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 221-22 (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 223-24). This passage represents the crux of my difference with Hunt, Wickam, and Baxter. While these scholars dismiss this discussion, see HUNT & WICKHAM, *supra* note 300, at 61-62; Baxter, *supra* note 295, at 462-63, I believe that it is at the center of Foucault's discussion of law.

305. See FOUCAULT, *TWO Lectures*, *supra* note 304, at 104-08. The powers of modern society are exercised through, on the basis of, and by virtue of, this very heterogeneity between a public right of sovereignty and a polymorphous disciplinary mechanism." *Id.* at 106.

306. Foucault writes:

With this new economy of power, the carceral system, which is its basic instrument, permitted the emergence of a new form of "law": a mixture of legality and nature, prescription and constitution, the norm. This had a whole series of effects: the internal dislocation of the judicial power or at least of its functioning; an increasing difficulty in judging, as if one were ashamed to pass sentence; a furious desire on the part of judges to judge, assess, diagnose, recognize the normal and abnormal and claim the honour of curing or rehabilitating.... The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the "social-worker*-judge ____ The carceral network, in its compact or disseminated forms, with its

the delinquent, surveys all aspects of his existence and gives rise to the human sciences whose object is that individual. This normalizing power is neither wholly disciplinary, nor entirely juridical. It is a mixture. It contains both elements,³⁰⁷ and it justifies the power to punish.³⁰⁸

C. The Implications for the Social Influence Conception of Deterrence

This reading of Foucault challenges us to rethink the social influence conception of deterrence. I will summarize here in brute simplicity the concrete implications. First, the quality-of-life initiative may create the category of the disorderly. Second, the category of the disorderly may facilitate a policy of aggressive arrests, with the possibility of attendant brutality, even though such a policy is unlikely to have the slightest effect on crime rates. Third, the interplay of the norm of orderliness (discipline) and the ideals of justice (law) may succeed in blinding us to the disorder that accompanies the quality-of-life initiative.

The social influence theory of deterrence concentrates on the construction of social meaning,³⁰⁹ but fails to pay enough attention to the way that social meaning constructs the subject and to the way that our understanding of the subject fosters certain forms of disciplinary strategies. It does not pay enough attention to the way that social meaning allows us to treat the disorderly as deviant and outside the realm of our legal ideals, or to the way that social mean-

systems of insertion, distribution, surveillance, observation, has been the greatest support, in modern society, of the normalizing power.

FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 304 (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 31041).

307. It is important for Foucault that both juridical and disciplinary power be part of the new law. Thus, Foucault writes in *Two Lectures*:

I believe that the process which has really rendered the discourse of the human sciences possible is the juxtaposition, the encounter between two lines of approach, two mechanisms, two absolutely heterogeneous types of discourse: on the one hand there is the re-organisation of right that invests sovereignty, and on the other, the mechanics of the coercive forces whose exercise takes a disciplinary form. And I believe that in our own times power is exercised simultaneously through this right and these techniques and that these techniques and these discourses, to which the disciplines give rise invade the area of right so that the procedures of normalisation come to be ever more constantly engaged in the colonisation of those of law. I believe that all this can explain the global functioning of what I would call a *society of normalisation*.

FOUCAULT, *Two Lectures*, *supra* note 304, at 107.

308. See FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 224 (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 225) ("Ce qui generalise alors le pouvoir de punir, ce n'est pas la conscience universelle de la loi dans chacun des sujets de droit, c'est l'etendue reguliere, c'est la trame finement serree des procedes panoptiques.").

309. SecKahan, *Social Influence*, *supra* note 12, at 370-71; Lessig, *supra* note 16, at 962-72.

ing allows us to implement a policy of aggressive misdemeanor arrests *without noticing it*. This reading of Foucault explains how. In discussing modern society, Foucault writes:

[P]erhaps the most important effect of the carceral system and of its extension well beyond legal imprisonment is that *it succeeds in making the power to punish natural and legitimate, in lowering at least the threshold of tolerance to penalty*. It tends to efface what may be exorbitant in the exercise of punishment.³¹⁰

This may explain why we so easily ignore what it would actually be like to be arrested, handcuffed, booked, transported, strip-searched, jailed, and given a criminal record for a minor misdemeanor offense. We have so internalized the norm of orderliness that even those among us who favor social norms and seek alternatives to incarceration disregard the fact that the quality-of-life initiative relies so extensively on law enforcement, arrest, and incarceration. We are blinded because, after all, the people being arrested are disorderly — they have committed crimes.³¹¹

This reading of Foucault differs from that of social norm proponents. Lawrence Lessig writes: "Michel Foucault's work is another example [of the evolution of social meaning], though his is an account focused less on meaning, and more on the 'meticulous observation of detail' constructing structures of power and discipline in social life."³¹² Under my reading, Foucault is not so much concerned with the evolution of social meaning for its own sake, though the evolution of social meaning is crucial to his enterprise. Foucault is primarily concerned with the way that social meaning shapes the subject; his ultimate focus is not on social meaning, but on the subject. That is the sense in which he famously stated that all his writings were not about power, but rather an attempt "to

310. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 301 (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 308). "It does this by playing the two registers in which it is deployed — the legal register of justice and the extra-legal register of discipline — against one another." *Id.* at 301-02 (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 308).

311. After all, criminals continue to be, today, a class of people that many feel entitled to hate and exclude. See KATHLYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND (1995) (empirical data regarding public opinion about criminal justice); BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF PUNISHMENT 126-61 (1993) (Rawls excludes criminality from the original position and thereby marginalizes the criminal); Richard Posner, *Emotion versus Emotionalism in Law*, Paper Delivered Before the Conference on Emotions and the Law (May 23, 1998) ("I do not consider it immoral to hate criminals, philanderers, braggarts, or even beggars (who in today's America are mainly a species of con man).").

312. Lessig, *supra* note 16, at 962:

create a history of the different modes by which . . . human beings are made subjects."³¹³

Now, to be sure, the new path of deterrence does overlap somewhat with subject creation. Under the social influence conception, law and the social environment affect — maybe even shape — the individual's conduct. "The decisions of individuals to commit crimes," Kahan writes, "are influenced by their perception of others' beliefs and intentions; the law shapes information about what those beliefs and intentions are."³¹⁴ But social meaning influences persons *differently* depending on their category, and the difference is crucial to the social influence explanation: honest people *leave* the neighborhood, whereas the disorderly *invade*. Social influence operates on pre-existing categories.

The relationship between social influence theory and the critique that I have offered here can be illustrated in the following diagram. At the heart of the diagram is the social influence theory (from Fig. 1 *supra*). Superimposed over the social influence theory is my critique, with its three principal moments. Those moments are (1) subject creation: how the norm of order may create the categories of honest and disorderly; (2) facilitation: how the categories may promote a policy of arrest, despite the lack of evidence of deterrence; and (3) overpowering: how the interplay between discipline and law may blind us to disorder.

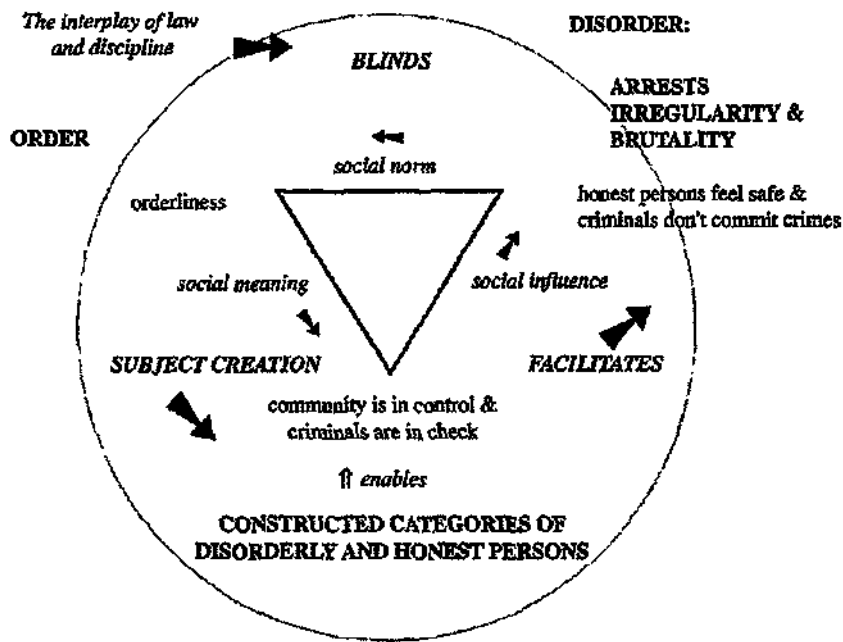
313. Michel Foucault, *The Subject and Power*, *Afterword* to HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 208 (2d ed. 1983). Foucault makes this point, in fact, in the passage quoted by Lessig, where Foucault writes:

A meticulous observation of detail, and at the same time a political awareness of these small things, for the control and use of men, emerge through the classical age bearing with them a whole set of techniques, a whole corpus of methods and knowledge, descriptions, plans and data. *And from such trifles, no doubt, the man of modern humanism was born.*

FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 141 (emphasis added) (translation of FOUCAULT, SURVEILLER ET PUNIR, *supra* note 34, at 143).

314. Kahan, *Social Influence*, *supra* note 12, at 351.

FIGURE 3:
CHALLENGING THE CATEGORIES UNDERLYING THE SOCIAL
INFLUENCE CONCEPTION OF DETERRENCE



The diagram attempts to incorporate the principal implications and show how they relate to — and in effect enable — the social influence conception of deterrence. These implications, of course, raise a number of questions. Is it true, in fact, that the categories facilitate a policy of aggressive arrests? Is there evidence of police brutality? Are there alternatives to arrest?

D. Subject Creation in Contemporary Criminal Law Scholarship

Before answering these questions and suggesting policy implications, it may be worth pausing, for a moment, to see how this critique of Durkheim's sociological approach — and, correspondingly, of the social influence conception of deterrence — is reflected in contemporary scholarship in criminal law. While some scholars explicitly deploy subject creation theory,³¹⁵ I would like to focus here

315. See, e.g., Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 *TUL. L. REV.* 1945 (1993); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419 (1991); Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 *YALE J.L. & HUMAN.* 75 (1998); Robert Weisberg, *The New York Statute as Cultural Document— Seeking the Morally Optimal Death Penalty*, 44 *BUFF. L. REV.* 283 (1996); Jonathan A.

on two articles that rely on different intellectual traditions to show how pervasive the insight of subject creation is in the criminal law. The two articles are John Griffiths's *Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process*³¹⁶ and Carol and Jordan Steiker's *Sober Second Thoughts: Reflection on Two Decades of Constitutional Regulation of Capital Punishment*³¹⁷ This discussion may help illustrate how subject creation theory can be deployed in the context of the social influence conception of deterrence.

In *Ideology in Criminal Procedure*, John Griffiths challenges the categories of the criminal and the committed law abider. Griffiths approaches this task from a different intellectual tradition, namely from the tradition of critical theory of the Frankfurt School. His article was published in 1970, several years before the publication of *Discipline and Punish*, yet it reflects, in a number of ways, Foucault's critique.³¹⁸

Griffiths's article is a critique of ideology in the traditional critical theory sense.³¹⁹ His challenge to the underlying categories is framed as an attack on a certain form of ideology in criminal procedure.³²⁰ Griffiths's project is to expose the prevailing ideology in order to make possible alternative conceptions that are presently foreclosed by the operative categories that dominate present thinking. "American thought about criminal procedure," Griffiths writes, "is confined within a prevailing ideology. By describing an

Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years, 1962-1987*, 37 AM. U. L. REV. 41 (1987).

316. John Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE LJ. 359 (1970).

317. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357 (1995).

318. This discussion touches upon the larger issue of the relationship between Foucault and Critical Theory, a fascinating and complex topic that is beyond the scope of this Article. For entry into that discussion, see Habermas's dialogue with Foucault in CRITIQUE AND POWER: RECASTING THE FOUCAULT/HABERMAS DEBATE (Michael Kelly ed., 1994); see also AXEL HONNETH, THE CRITIQUE OF POWER (Kenneth Baynes trans., 1991).

319. See Griffiths, *supra* note 316; see also RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 22-26 (1981).

320. Griffiths explains:

I use the word [ideology] to refer to that set of beliefs, assumptions, categories of understanding, and the like, which affect and determine the structure of perception (not only of physical phenomena, like causation, which has consumed the interest of philosophers, but also, and most particularly here, of social facts, relationships and possibilities). Ideological beliefs are pre-logical because they determine the structure of perception and consciousness and therefore are enmeshed in the factual and linguistic premises of argument. It is only self-consciousness concerning the existence and nature of ideology which permits an appreciation of the extent to which it determines the contents of the world of experience and possibility. Self-consciousness is therefore the primary intellectual virtue.

Griffiths, *supra* note 316, at 359 n.1.

alternative, I shall seek to illustrate that our present assumptions are not the inevitable truths they often seem to be."³²¹

Griffiths describes the prevailing ideology of criminal procedure as premised on the assumption of an irreconcilable conflict between the state and the individual defendant. He calls this the "Battle Model" and suggests that it encompasses both of Herbert Packer's famous models of criminal process — both the Due Process Model, which insists on the priority of the individual and the limits on official power, and the Crime Control Model, which privileges law enforcement and speedy and efficient resolution of charges. The Battle Model, though, has built-in constraints. Like any other ideology, it reinforces certain categories that ultimately limit possible outcomes. So Griffiths writes:

[W]e can clearly see the ideological limits within which [Packer's] conception of two Models is confined: despite his intention to lay bare the entire spectrum of procedural possibility, the two Models in fact give us only that which is relevant to a particular and limited conception of the substantive function of criminal law — prevention and retribution.³²²

As an alternative to the Battle Model, Griffiths offers an approach to criminal procedure based on the ideology of the family.³²³ Instead of assuming, as Packer does, "disharmony, fundamentally irreconcilable interests, a state of war" between the individual and the State, Griffiths proposes to "start from an assumption of reconcilable — even mutually supportive — interests, a state of love."³²⁴

Under a "Family Model," Griffiths suggests, there would be an entirely different conception of the criminal. Rather than the criminal being viewed as someone to be deterred or incapacitated, the Family Model would look upon him or her as a wayward son or daughter in need of guidance. The Family Model would trigger

acceptance of the idea that criminals are just people who are deemed to have offended — that we are all of us both actual and potential criminals — that "criminals" are not a special kind and class of people with a unique relation to the state. So adherents to the Family Model would not talk (or think) about "offenders," or "criminals," or "people who commit crimes," as if these words referred to people in any other aspect than their exposure to the criminal process.³²⁵

321. *Id.* at 359-60.

322. *Id.* at 366.

323. Griffiths's writings on the Family Model resonate strongly in contemporary criminology. See, e.g., BRANTHWAITE, *supra* note 244, at 56-57; see generally MICHAEL R. GOTTFREDSON & TAVIS HANSAN, A GENERAL THEORY OF CRIME (1990).

324. Griffiths, *supra* note 316, at 371.

325. *Id.* at 374.

Griffiths draws attention to a number of implications. For example, the role of the criminal defense attorney would fundamentally change. Defense counsel would no longer stop representing their clients at sentencing, but would instead remain involved throughout the incarceration and during the transition back into the free world.³²⁶

Griffiths's article shares two central theses with subject creation theory: first, he suggests that, in the traditional Battle Model, the categories of criminals and honest persons are unexamined and pre-logical conceptions that have broad and, again, unexamined, consequences for policymaking; and, second, that these categories are themselves constructed and reinforced by legal ideology. There is a self-reinforcing nature to the relationship between the categories and public policies. The public policies assume the categories, reinforce the categories, but also follow from the categories.

There are, of course, significant differences between Griffiths and Foucault, not the least of which concern the method of exposition. As noted earlier, Griffiths proposes, but disavows the Family Model. He claims to deploy it merely as a technical device.³²⁷ The underlying assumption is that, confronted with an alternative way of conceptualizing the world, the reader will become conscious of the limitations of the prevailing ideology. It is, in a sense, a shock therapy. The juxtaposition is supposed to jump-start our imagination.³²⁸ His method differs from Foucault's intricate genealogical enterprise, but his critique of the categories plays a very similar role.

Griffiths's work is not primarily concerned with the interrelationship between discipline and law.³²⁹ This concern is reflected in

326. *See id.* at 380, 383.

327. *See id.* at 359-60 ("By describing an alternative, I shall seek to illustrate that our present assumptions are not the inevitable truths they often seem to be. The alternative presented is not especially novel, nor is it one to which I necessarily subscribe. My purpose is merely to explore the problem of ideology in criminal procedure, and to that end the self-conscious posing of an alternative is justified by its heuristic value."). One does get the impression, though, that Griffiths favors the Family Model. This is perhaps most clear in his conclusion. *See id.* at 410-17.

328. Griffith explains:

This brings me to my ultimate conclusion, which is that speculation about fundamental change in criminal procedure must begin with the development of ideological self-consciousness and speculation about the possibilities of ideological change.... [i]t seems to me that very little substantial [sic] progress is to be made in thinking about criminal procedure until we address ourselves to the ideological underpinnings of our thought. The first step in doing that is simply to set our minds free to wonder.

Id. at 417.

329. Griffiths does, though, address the disciplinary aspects of legal ideology, in particular the effect of criminal procedure on the different classes in society. *See id.* at 414-16.

Carol and Jordan Steiker's work on capital punishment, especially their most recent article, *Sober Second Thoughts*.³³⁰ The authors explore there the development of death penalty law over the past two decades. They suggest that today's intricate Eighth Amendment jurisprudence is deeply flawed in that it fails to offer substantive protection against arbitrariness or to fulfill the original aspirations of fairness, individualization, reliability, and just desert. They question why such a deeply flawed body of law would persist, despite its tragic failure as a regulatory mechanism, and come up empty handed. Ultimately, the authors conclude that they were simply asking the wrong question: "Instead of asking why the Court's doctrine has persisted despite its failure as regulation, perhaps we should be asking whether that doctrine has any effect *besides* its failure as regulation."³³¹ The effect, it turns out, is legitimation.³³² The authors explain:

Perhaps the Justices have retained current death penalty doctrine despite its failings as a house because at some level they appreciate its success as a facade. The Court's doctrine can be said to work as a facade to the extent that it is successful — and we argue below that it is — at making participants in the criminal justice system and the public at large more comfortable with the death penalty than they otherwise would be or should be.³³³

Drawing on the Weberian tradition of legitimation and the writings of Antonio Gramsci, Carol and Jordan Steiker explore how legitimation theory might explain, as an unintended consequence, the persistence of death penalty jurisprudence. The authors conclude that "[t]he Supreme Court's death penalty law, by creating an impression of enormous regulatory effort while achieving negligible regulatory effects, effectively obscures the true nature of our capital sentencing system" and thereby "legitimizes the imposition of capi-

330. Steiker & Steiker, *supra* note 317.

331. *Id.* at 437.

332. Duncan Kennedy has contributed importantly to the tradition of legitimation theory. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997), where Kennedy develops what he calls "Pink Theory," or a chastened version of legitimation. See *id.* at 293 ("What is legitimated is the status quo, rather than capitalism or the relations of production understood as a structure. The status quo is an incoherent hodgepodge of heterogeneous elements, without a system logic. Whatever it may be at any given moment, that's what gets naturalized by the denial of the ideological element in judicial law making."). For an earlier contribution, see David M. Thibet, *Complexity and Contradiction in the Legal Order. Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & SOC. REV. 529 (1977), where Trubek sketches a critical-socio-legal theory premised on a similar concept of legitimacy. According to Trubek, it is the myth of judicial neutrality that allows the modern soul to mediate the ideal of equality with the reality of inequality. So Trubek writes, "As members of a liberal society, we embrace the ideals and yet are aware of their negation. The idea of law offers the possibility of escape from this contradiction." *Id.* at 541.

333. Steiker & Steiker, *supra* note 317, at 429.

tal punishment both for participants in the legal system and for the public at large."³³⁴

Carol and Jordan Steiker's thesis has a lot in common with Foucault's writings on law, even though it traces to a very distinct intellectual tradition. In their article, law is a cover for the underlying micro-processes of politics. Like Foucault, law is the medium that allows the disciplines to thrive. Law is what reconciles participants to the reality of inequity despite shared ideals of equality and freedom. In sum, the authors suggest, law serves to bridge the gap between the coercive and inequitable micro-processes of discipline and the legal ideals of equality and fairness.

The Griffiths and Steiker articles bear a strong family resemblance to subject creation and, together, they make moves very similar to the two principal critiques discussed earlier: the critique of the underlying categories and the critique of law. These examples of contemporary criminal law scholarship suggest that subject creation is perhaps a more widely shared insight than commonly recognized. I have chosen two illustrations, but there are many other examples of criminal law scholarship that share this insight even though they may come from entirely different traditions, such as the emerging field of Therapeutic Jurisprudence³³⁵ or the writings of Elizabeth Schneider on the battered woman syndrome.³³⁶ Subject creation has significant implications for the criminal law. It is to

334. *Id.* at 436.

335. Therapeutic Jurisprudence is an interdisciplinary approach to law developed by David Wexler and Bruce Winick. *See generally* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS *in* THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY]. It is premised on the idea that "whether we realize it or not, law functions as a therapeutic agent, bringing about therapeutic or antitherapeutic consequences." **Bruce J. Winick**, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY, *supra*, at 645,648. The following questions are representative of the issues that Therapeutic Jurisprudence addresses:

Can a judge's colloquy with a criminal defendant at a plea hearing influence the defendant's acceptance of responsibility? Can a judge conduct a sentencing hearing in a manner likely to increase a criminal defendant's compliance with conditions of probation? Is "sentencing bargaining" less likely to interfere with later efforts at offender rehabilitation than "charge bargaining"? Can "teen courts" increase empathy in delinquent youths by having those youths serve as attorneys for victims in teen court proceedings? *Id.* at 650. Allison Sniff and David Wexler's discussion of teen courts, a relatively recent development in the juvenile court system dating back to about 1983, is a good illustration of the possible overlap of subject creation theory and the Therapeutic Jurisprudence approach. *See Allison R. Sniff & David B. Wexler*, *Teen Courts: A Therapeutic Jurisprudence Perspective*, in LAW IN A THERAPEUTIC KEY, *supra*, at 287,293.

336. *See Elizabeth M. Schneider*, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213,232-34 (1992) (discussing how the battered woman syndrome can be deployed against women by placing them in the category of crazy, helpless, or both).

these implications in the context of order-maintenance policing that I shall now turn.

V. REVISITING ORDER-MAINTENANCE POLICING

We are left with a disarming theory without empirical support — with a type of aesthetic policing that focuses on the disorderly. The social influence conception of deterrence and the broken windows theory appropriate the aesthetic of order and sobriety, and, at the same time, empower the police as the only rival to the disorderly. By commandeering the aesthetic categories, the theory leaves most of its interlocutors speechless. Very few contest the policing strategy — even though the broken windows theory, especially as implemented in New York City, leads to a false choice. No one in their right mind would choose the gangs, the criminals, or the disorderly. No reasonable person would advocate disorder, littering, panhandling, or prostitution. No one seriously would come out in favor of breaking windows — even if, as the *Broken Windows* essay playfully suggests, "It has always been fun."³³⁷

In the previous sections, I traced the problem back to the underlying category of the disorderly and suggested how that category is the product of the punitive strategy and simultaneously facilitates the law enforcement policy. I suggested that the category of the disorderly may blind us from seeing the irregularities that accompany the quality-of-life initiative — from seeing the disorder in the order. But what is the order masking?

A. *Complaints of Police Brutality and the NYPD*

The aesthetic of order has overshadowed, in New York City, a sharp increase in complaints of police brutality. At a theoretic level, this may not be entirely surprising. After all, the *Broken Windows* essay betrays itself. In place of the struggle between order and disorder, the text reveals two competing sources of power, two competing forces of social-control. The "police view," according to Wilson and Kelling, is that "the cops and the gangs are the two rival sources of power in the area, and that the gangs are not going to win."³³⁸ This bears a striking resemblance to former Commissioner Bratton's statement that "criminals are our competition."³³⁹ Bob Herbert of the *New York Times* reports a chilling ex-

337. Wilson & Kelling, *supra* note 2, at 31.

338. *Id.* at 35.

339. See Beiser, *supra* note 199, at 39.

change between a police officer from the Bronx and a commission investigating police misconduct:

"Did you beat people up who you arrested?"

"No. We'd just beat people in general. If they're on the street, hanging around drug locations. It was a show of force."

"Why were these beatings done?"

"To show who was hi charge. We were hi charge, the police."³⁴⁰

In New York City, complaints of police brutality have been on the rise since the inception of the quality-of-life initiative. According to the *New York Times*, "from 1994 to 1996, the city received 8316 court claims of abuse by officers, compared with 5,983 for the three previous years." In addition, the *Times* reports, "from 1994 to 1996, the city paid about \$70 million as settlements or judgments in claims alleging improper police actions — compared with about \$48 million in the three previous years."³⁴¹ The *Times* also reports that "accusations of misconduct filed with the Civilian Complaint Review Board have risen sharply during much of Mayor Giuliani's tenure."³⁴² Although the number of complaints filed with the CCRB fell by twenty-two percent in the first six months of 1997,³⁴³ the number appears to be on the increase again in 1998. Complaints lodged with the CCRB are up twenty percent for the first five months of 1998: the CCRB received 2,176 complaints against police officers for the period January through May 1998, hi contrast to 1,818 complaints during the same period last year.³⁴⁴ The trend is reflected in the following table:³⁴⁵

TABLE 14: CCRB COMPLAINTS AND ALLEGATIONS,
1993 -1998

| | <u>1993</u> | <u>1994</u> | <u>1995</u> | <u>1996</u> | <u>1997</u> | <u>Jan - May 1998</u> |
|-------------|-------------|-------------|-------------|-------------|-------------|-----------------------|
| Complaints | 3580 | 4877 | 5618 | 5550 | 4816 | 2176 |
| Allegations | 5597 | 8060 | 9356 | 9390 | 7183 | n/a |

340. Bob Herbert, *Connect the Dots*, N.Y. TIMES, Aug. 24,1997, § 4, at 13.

341. Purdy, *supra* note 1L

342. *Id.*

343. *See id.*

344. *See Complaints Against Police Rise*, N.Y. TIMES, June 11,1998, at A25 (Digest The New York Region) ("[A]ccording to the statistics released yesterday by the CCRB").

345. *See id.*; Fax from Sherman Jackson of the CCRB, *supra* note 38, at 4 (June 17,1997) (on file with author); *see also* New York Civil Liberties Union, *NYCLU Report: A Fourth Anniversary Overview of the Civilian Complaint Review Board, July 5,1993 - My 5,1997* tbU (1997) [hereinafter *NYCLU Report*] (presenting data on the CCRB's disposition of complaints from July 1993 to December 1996).

These trends are corroborated by a controversial report issued by Amnesty International in June 1996 entitled, *Police Brutality and Excessive Force in the New York City Police Department*³⁴⁶ Some have questioned the accuracy of Amnesty's reporting;³⁴⁷ however, for the very limited purpose of this Article, Amnesty's report merely lends further support to the already well documented increase in complaints of police brutality. Amnesty reported that complaints of police brutality in New York City "have been rising steadily for some years."³⁴⁸ According to Amnesty's statistics, "the number of people bringing claims for police misconduct against the City of New York has increased substantially in recent years, from 977 in 1987 to more than 2,000 in 1994." Furthermore, "[t]he amount paid out by the city each year in settlements or judgments awarded to plaintiffs in police abuse cases has also risen," from around \$13.5 million in 1992 to more than \$24 million in 1994.³⁴⁹ Amnesty also found an increase in complaints lodged with the CCRB, as well as racial disparities among complainants.³⁵⁰

Police officials suggest that the increase in complaints of police brutality may be due to the increase in the number of arrests associated with the quality-of-life initiative. Former Commissioner Bratton minimizes the significance of the numbers, suggesting that "complaints always rise after there is a large influx of new police officers."³⁵¹ Police Commissioner Safir attributes the most recent upsurge in complaints filed with the CCRB in 1998 to the fact that the Abner Louima case has brought increased attention to the question of police brutality.³⁵² Perhaps these explanations are cor-

346. Amnesty International, *United States of America: Police Brutality and Excessive Force in the New York City Police Department* (AI Index AMR 51/36/96 1996), available at <<http://www.amnesty.org/ailib/airpub/1996/AMR/25103696.htm>> (hereinafter Amnesty Report).

347. Tracey Meares has suggested to me that the report may be unreliable; however I have not located any published scholarship challenging the methodology of the report

348. Amnesty Report, *supra* note 346, at 14.

349. *Id.* at 3, 14.

350. *See id.*, ("The CCRB reported that it received 4,920 new complaints in 1994, an increase of 37.43% over the previous year. While the CCRB takes complaints covering a range of alleged abuses from deadly force to discourtesy, 1,670 complaints (the largest proportion) were for excessive force and these had also risen proportionately from 1993."). Amnesty also reports that "the large majority of the victims of police abuses are racial minorities, particularly African-Americans and people of Latin American or Asian descent. Racial disparities appear to be especially marked in cases involving deaths in custody or questionable shootings." *Id.* "Three-quarters (75.9%) of the people who lodged complaints with the CCRB from January to June 1995 were African-American (50.3%) and Latino (25.6%), while the remainder were either white (21.2%) or 'other' (2.8%), including Asian." *Id.*

351. Bratton, *supra* note 8.

352. *See Complaints Against Police Rise*, *supra* note 344.

rect; however, there are some reasons to be somewhat skeptical. The CCRB reported to Amnesty delegates that "most of the complaints arose from encounters with patrol officers that did not involve arrests or persons receiving summonses."³⁵³ Moreover, the CCRB also reported that "most complainants had no prior complaint history, thus discounting suggestions that many of those lodging complaints were 'chronic' complainers."³⁵⁴ In addition, although rookie police officers may account, in some part, for the rise in complaints of police brutality, the complaints seem to have increased at a greater pace than the rate of increase of incoming officers.³⁵⁵ In this regard, it would be crucial to determine empirically whether the increase in complaints involves new police officers.

I am not arguing, nor have I attempted to establish, that there is a causal link between the quality-of-life initiative and the increase in complaints of police brutality. Nor have I argued that there is an empirical link between order-maintenance policing and police brutality. The fact that order-maintenance policing in New York City has coincided with an increase in complaints of police brutality does not, in itself, establish a causal relationship. The possible explanations for the increase in the number of complaints are far too complex to lend themselves to such a conclusion. Moreover, even if such a causal relationship were empirically verified, it does not necessarily militate against order-maintenance policing. It could be that order-maintenance policing can be implemented without the attendant increase in complaints of police brutality. Or it could be that we are prepared to pay the price of police brutality for the benefits of the policing strategy.

What I am suggesting, though, is that the issue of increased complaints of police brutality may be overshadowed by the rhetoric of order and cleanliness surrounding the quality-of-life initiative. Why is it, after all, that the issue of police brutality and the causes of brutality are not on the research agenda along the new path of deterrence?³⁵⁶ Why is it that the police disorder within order-maintenance policing is minimized in the *Broken Windows* essay?

353. Amnesty Report, *supra* note 346, § 2.9.

354. *Id.*

355. See, e.g., *NYCLU Report*, *supra* note 345, at 4 n4 ("The 27 percent increase in the NYPD's complement of sworn officers in recent years (from approximately 30,000 to 38,000) does not begin to explain a 60 percent increase in police misconduct complaints.").

356. See, e.g., Kahan, *Social Influence*, *supra* note 12, at 367-73 (no mention).

B. *Other Factors That Are Overshadowed by the Orderliness of Order-Maintenance Policing*

It would be crucial to further investigate the potential link between the policy of aggressive arrests and police brutality. Short of a causal link, the arrests themselves are a serious ordeal. "Handcuffed, fingerprinted and often strip-searched, defendants spend as much as a day in jail before seeing a judge, who generally considers that punishment enough,"³⁵⁷ According to the *New York Times*, as recently as November 1996, "some people were held in cells for more than 60 hours waiting to see a judge for crimes like fare-beating, sleeping on park benches and drinking beer in public."³⁵⁸ Transportation to the precinct, if by van, can take up to four or more hours.³⁵⁹ In addition, arrest creates a criminal record that may haunt people on future job and school applications.

The *New York Times* recently published a short self-help manual for dealing with arrest. The article chronicled the likely course of events and offered some tips. "While being handcuffed, cross one hand over the other. It's more comfortable." "Carry valid 3D. It increases your chances of being released with an appearance ticket, instead of being held overnight." "If you are worried about being assaulted while in custody, sit near the front of the cell where guards can see you."³⁶⁰ The ordeal of arrest can be a harrowing experience. A sample of cases reported in the papers illustrate this well. Chris C. was at the wrong place at the wrong time. Looking for a friend's name on the mailbox in the lobby of an apartment building in the East Village, Chris fell into the hands of officers hunting drug activity. Accused of trespass, Chris was arrested, handcuffed, taken to jail, strip-searched, and held for nineteen hours; his case was dismissed two months later.³⁶¹ Nancy T. was pulled over and arrested in Chinatown, handcuffed, taken to the station house, strip-searched, and locked up till early next morning, for driving without her license and talking back to a police officer ("failure to comply with an order").³⁶² Max M., a twenty-one-year-old college student "was accused of drinking a beer on the street on

357. Puidy, *supra* note 11.

358. Cooper, *supra* note 11.

359. *See uL*

360. *Id.* Note that, in light of the NYPD's new policy regarding checking identification by means of fingerprints, the second recommendation may no longer be that useful.

361. *See Purdy, supra* note 11.

362. *See Sontag & Barry, supra* note 11.

the Upper West Side and spent a day in jail."³⁶³ To be sure, these are just stories reported in the *New York Times*, but they help us to see what we so badly want to ignore. Misdemeanor arrests affect real people, not just statistics.

Misdemeanor arrests also have a disparate impact on minorities. The demographic breakdown of misdemeanor arrests reflects that a disproportionate number of minorities are arrested for misdemeanors — disproportionate in relation to the percentage of minorities in the population, though not necessarily in relation to the racial breakdown of persons committing misdemeanor offenses. The point is not that the police are disproportionately targeting black versus white misdemeanants. The point is that more blacks are arrested for misdemeanors than whites given their proportion in the overall population. The decision to arrest misdemeanants — rather than not arrest them — is a policy that has a disparate impact on minorities.

In cities throughout the United States, a high percentage of persons arrested for misdemeanors are black. This is reflected in the following table, which compiles the racial break-down for arrests in cities in 1995.³⁶⁴

TABLE 15: DEMOGRAPHIC BREAK-DOWN OF MISDEMEANOR ARRESTS FOR CITIES IN 1995

| | Percent White | Percent Black |
|--------------------------|---------------|---------------|
| Population (132,911,000) | | |
| Misdemeanor Arrests: | | |
| Disorderly conduct | 61.2% | 36.9% |
| Drug abuse | 58.7% | 40.3% |
| Drunkenness | 79.4% | 17.7% |
| Prostitution | 59.9% | 37.7% |
| Suspicion | 40.9% | 58.7% |
| Vagrancy | 50.9% | 46.4% |
| Vandalism | 71.0% | 26.3% |

The table reveals how misdemeanor arrests disproportionately impact blacks. It is particularly striking in the case of arrests for suspicion — where 58.7 percent of persons arrested are black. It is also striking in most other categories, given that the 1990 Census reported that African-Americans make up only 13% of the popula-

363. Purdy, *supra* note 11.

364. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996, *supra* note 39, at 386 tbl.4.12 (listing racial breakdown of arrests in all cities, including cities with less than 10,000 inhabitants, *see id.*, app. 3 at 595). I used the more conservative numbers of total arrests rather than the numbers for arrests 15 and older. It appears that adult misdemeanor arrests are even more skewed against blacks.

tion inside metropolitan areas.³⁶⁵ A policing strategy that *targets* misdemeanors is likely to have a disproportionate effect on minorities. Such a strategy may also have a disproportionate impact on the homeless who, almost by definition, violate misdemeanor laws against loitering and public drinking.³⁶⁶

Moreover, the policy may facilitate an uncomfortable delegation of the power to define community standards. Recall, for a moment, police officer Kelly in Newark. One of his rules of order-maintenance was that "[i]f a dispute erupted between a businessman and a customer, the businessman was assumed to be right, especially if the customer was a stranger."³⁶⁷ There is reason to suspect, however, that this unwritten rule might not reflect the voice of all members of the community. It may in fact reflect none. The businessman may himself live in a completely different neighborhood.

Clyde Haberman of the *New York Times* recently asked, slightly facetiously, "a humble question" on the quality-of-life initiative: "Whose life is it, anyway, that we're talking about?"³⁶⁸ Referring to the campaign against squeegee men, Haberman remarked to himself,

Wait a minute, dummy, you don't own a car. No squeegee man ever mined *your* day. And you know what? The same is true for most New Yorkers, since the city's Transportation Department says that 56 percent of them do not have access to a car, let alone even occasional contact with curbside window washers.³⁶⁹

Haberman's amusing comments must be taken in perspective; the quality-of-life initiative has also targeted the subway system and other pedestrian venues. But the humble question is still an important one. How do we define minor disorder? Clearly, we are not talking about arresting those who pay their house keeper in cash to knowingly benefit from IRS underreporting, or who pay their nannies under the table. The quality-of-life initiative focuses instead on the type of minor offenses — loitering, fare-beating, and panhan-

365. See 1990 CENSUS OF POPULATION, at 7 tbl. 5 (listing racial breakdown inside metropolitan areas, defined as including urbanized areas with a minimum population of 50,000, see *id.* at A-8).

366. I thank my colleague Andrew Silverman, who has worked extensively on issues of homelessness, for alerting me to this problem. See also Barnes, *supra* note 5, at 24-25 (reporting on a study in Austin, Texas, that found that "[a] third of the arrests for public order offenses were of repeat offenders, of whom two-thirds were homeless").

367. Wilson & Kelling, *supra* note 2, at 30.

368. Clyde Haberman, *Better Quality of Life Found Behind Wheel*, N.Y. TIMES, Jan. 16, 1998, at B1.

369. *Id.*

dling — that affect the poorer members of society, which, tragically, include a disproportionate number of minorities. Who gets to define disorder? By handing over the informal power to define deviance to police officers and some community members, we may be enabling the repression of political, cultural, or sexual outsiders in a way that is antithetical to our conceptions of democratic theory or constitutional principles.³⁷⁰

Arrests and prosecutions are also very expensive. A typical prostitution prosecution — one of the offenses targeted by the quality-of-life initiative — costs upwards of \$2,000.³⁷¹ That is a lot of money for a law-enforcement strategy unsupported by empirical evidence. Finally, a policy of arrest may have unintended consequences. Someone arrested for turnstile jumping may be fired from Ms job for missing work; and strained police-civilian relations can create friction between the community and the police force that may be detrimental to solving crimes.³⁷²

C. Alternatives to Arrest

Alternatives to a policy of aggressive misdemeanor arrests may exist. Instead of arresting turnstile jumpers, for instance, we can — and New York City has begun to — install turnstiles that cannot be jumped. This is an approach similar to "target-hardening" or "access control," methods of situational crime prevention that are commonly discussed in criminology.³⁷³ Instead of arresting prostitutes, we could investigate the possibility of licensing prostitution. It turns out, in fact, that prostitution may be related to crime in a more direct way than the broken windows theory immediately suggests. Deborah Rhode has recently compiled some relevant statistics. "Recent research estimates that two-thirds to three-fourths of streetwalkers are raped or beaten an average of four to 15 times a

370. Ibis is not to suggest — one way or the other — that African-American communities like or dislike order-maintenance policing. Broken windows proponents rightly mock liberals who suggest that the black community should be opposed to order-maintenance policing, see Kahan, *New Path*, *supra* note 12, at 2482; Wilson & Kelling, *supra* note 2, at 35-36, although these proponents often fell prey to exactly the same fallacy. See, *eg.*, Kahan, *New Path*, *supra* note 12, at 2482 (referring to inner city residents as "the very citizens" who support "public-housing building searches, curfews, and gang-loitering laws"). 7b suggest anything about the position of the black community would be both reductionist and essentialist.

371. See Rhode, *supra* note 40.

372. As my colleague Henry Ruth suggests, "it is witnesses that solve crimes, not police officers."

373. See, *eg.*, Ronald V. Clarke, *Situational Crime Prevention*, in BUILDING A SAFER SOCIETY (Michael Tonry & David P. Farrington eds., 1995).

year."³⁷⁴ Studies suggest that decriminalizing prostitution (in the case of the Netherlands) and/or legalizing prostitution (in the case of eleven counties in Nevada) has resulted in lower crime rates against prostitutes, as well as lower rates of sexually transmitted diseases.³⁷⁵ A full exploration of these alternatives is beyond the scope of this Article and, to be sure, decriminalizing or licensing prostitution may not eliminate an underground black-market in prostitution. It is, however, an alternative *worth investigating*. After all, aggressive arrests have not eliminated prostitution in New York City. The *New York Times* reports that "while prostitution may be less visible in the city, it is no less prevalent. The Internet, pagers, cellular phones and subterfuges like escort services have enabled more discreet forms of prostitution to thrive beyond the reach of the street-level crackdown, the authorities and prostitutes themselves say."³⁷⁶

How can we discourage aggressive panhandling and other forms of street economies? Instead of arrest, perhaps we should explore the possibility of work programs for people living on the street. The programs could target cleaning up abandoned buildings, creating public parks out of vacant lots, creating space for public art projects, or maintaining public spaces. If the programs were flexibly designed to facilitate changing work schedules, they might offer a substitute to panhandling and window-washing. As for the financing, we could investigate the possibility of taxing owners of abandoned property or using proceeds from the sale of abandoned properties, as well as a tax on emissions, or fines for littering. There are endless ways of resolving the problem of panhandling if we let our imaginations roam within a realistic and practical realm.

The mayor of Bogota, Columbia, Antanas Mockus, hired mimes to follow and imitate jaywalkers crossing the street in an effort to

374. Rhode, *supra* note 40; see also Charles Clark, *Prostitution*, CQ RESEARCHER, June 11, 1993, at 514; Jessica N. Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INTL. L. 201,207-08 (1996); Eleanor M. Miller et al., *The United States*, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES 300,320 (Nanette J. Davis ed., 1993).

375. See Drexler, *supra* note 374, at 228, 230; see also Linda M. Rio, *Psychological and Sociological Research and the Decriminalization or Legalization of Prostitution*, 20 ARCHIVES OF SEXUAL BEHAV. 205, 212-14 (1991); Claire Sterk-Elifson & Carole A. Campbell, *The Netherlands*, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES, *supra* note 374, at 191, 200-02; James R. Stout & Thomas S. Tanana, Note, *Could California Reduce AIDS by Modeling Nevada Prostitution Law?*, 1 SAN DIEGO JUST. J. 491,498 (1994).

376. Kit R. Roane, *Prostitutes on Wane In New York Streets But Take to Internet*, N.Y. TIMES, Feb. 23, 1998, at A1. It may be fair to say that, in this case, order on the streets has been achieved by means of disorder in cyberspace.

curb jaywalking.³⁷⁷ Mockus also gave motorists "cards with a thumb-downs sign that they could hold up, like soccer referees, to signal that another driver had committed a foul."³⁷⁸ It's a different approach, but the point is, even if we set out to create order, we should consider how we are going to go about it. We need to critically examine what effect the policies will have on individuals in society, how the policies construct the subject and how that construction reinforces the very strategies we are justifying.³⁷⁹ The issue is not just social influence on behavior. The pertinent questions are, first, how do our strategies of policing and the mechanisms of punishment transform the subject? Second, how does our understanding of the subject influence the policing strategy under consideration? And third, how do these effects relate to the goal of reducing crime? The answer, in the context of order-maintenance policing is that the quality-of-life initiative creates the disorderly, which in turn reinforces the policing strategy and overshadows the costs of that strategy, without sufficient evidence that the order-disorder axis affects crime.

CONCLUSION

Let's return for a moment to January 22, 1840, the official opening of Mettray, a juvenile prison *qua* home, school, military compound, and factory described in chilling detail by Michel Foucault in *Discipline and Punish*,³⁸⁰ Consider for a moment the policy at Mettray, as reported by Ducp6tiaux in 1852: "The least act of disobedience is punished and the best way of avoiding serious offences

377. See John Tierney, *Civil Obedience*, N.Y. TIMES, Apr. 19, 1998, § 6 (Magazine), at 26.

378. *Id.*

379. The example of prostitution, again, provides a useful illustration. Licensing prostitution might have a very different effect on the subject than aggressively arresting mostly female prostitutes. It would likely have less of a marginalizing effect on the women and men that engage in prostitution. Persons engaged in sex work would likely receive more protection from our sexual assault laws. Prosecutors' charging decisions may be affected. Sex workers might acquire a voice in the debate about whether and how to change the social meaning and social practice of prostitution. Sex workers likely would have a greater amount of control over their identities. And there may be corresponding effects on persons who are not engaged in acts of prostitution, on sexual relationships, and on the construction of sexuality in society more generally. This is just the very beginning of the type of inquiry that subject creation theory calls for. The point here is not to resolve that inquiry in the case of prostitution or any other specific misdemeanor offense, but rather to illustrate the type of questions that we should be asking. Excellent work is being done in this particular area by Lisa Sanchez. See Lisa E. Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship, and Community in a Local Sexual Economy*, 22 L. & Soc INQUIRY 543 (1997); see also Kennedy, *supra* note 300, at 126.

380. FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 34, at 293-96.

is to punish the most minor offences very severely."³⁸¹ It is eerie how much this resembles the social influence conception of deterrence. Perhaps the new path of deterrence is not so new after all.

Order-maintenance policing is extremely popular these days. "With crime rates plummeting in New York City, few if any are foolish enough to take issue with the quality-of-life initiative. Most people praise it, especially elected officials and policy-makers who, by doing so, can take full credit for the decline in crime."³⁸² But the new policing in New York City overestimates the role of disorder in the production of crime. By overestimating disorder, it creates a false choice between the police and the disorderly — a choice that may facilitate a policy of aggressive arrests despite the lack of empirical evidence supporting the claim of deterrence. The ironic consequence is that the social influence conception of deterrence — touted as an alternative to "the severe punishments that dominate contemporary criminal law"³⁸³ and presented as an application of social norm theory — falls back on a law enforcement strategy that relies principally on arrest and incarceration.

What then is hidden beneath the new path of deterrence? I think we see it best in the *Broken Windows* essay. The text suggests that reducing crime is simply a question of minor details, of fixing broken windows, of sweeping up litter, of hiding the street people. It neglects the numerous and complex factors that contribute to crime. Recall the description in the *Broken Windows* essay about neighborhood decline:

A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in. Teenagers gather in front of the corner store. The merchant asks them to move; they refuse. Fights occur. Litter accumulates.³⁸⁴

This description may tell us a few things about litter and public drinking. But there is also lurking in that description a much more complex story about urban decay, with complicated race, wealth, class, and ethnic dimensions, to name only a few. The more complex story would raise questions about property values, the quality of neighborhood public schools, racial demographics, environmental pollution, public transportation, access to business loans and

381. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 294 (quoting Ducp&iaux 1852,377).

382. See Bratton, *supra* note 8.

383. Kahan, *New Path*, *supra* note 12, at 2478.

384. Wilson & Kelling, *supra* note 2, at 32.

mortgages, and zoning laws. The life cycle of a neighborhood is not as simple as the essay suggests.³⁸⁵

Many readers may simply respond: "But what about all the New Yorkers who feel safer in the new, orderly New York? Aren't their feelings entitled to some weight in the analysis?" The simple answer is that New Yorkers are feeling safer because they *are* safer. Crime rates have tumbled in New York City. There is every reason to feel safer. The longer response is that their feelings are central to the analysis presented here — an analysis that focuses, after all, on the way that subjects are created by means of the norm of orderliness.

Some readers may nevertheless persist and call attention to the social scientific studies that suggest that people feel safer in more orderly neighborhoods.³⁸⁶ "New Yorkers are feeling safer not only because of the lower crime rates," they may argue, "but also because of the additional order." There are, again, two answers. The simple answer is that these feelings of safety are most likely explained by the level of crime in the neighborhood.³⁸⁷ The longer answer is that this come-back is really about aesthetic preferences — a discussion that is beyond the scope of this Article.

This offers a good opportunity to emphasize what I have *not* argued in this Article. First, I have only addressed the social influence justification for order-maintenance policing. I have only addressed the claim that deterrence justifies the quality-of-life initiative. There may be other justifications. Some may argue that we should arrest minor misdemeanants because their conduct is morally reprehensible. Others may suggest that the conduct is aesthetically unpleasant. I have not directly addressed those claims of moral theory or aesthetic preferences. This Article is limited in scope to the justification based on deterrence. It may have implications for moral theory or aesthetics, but those implications should not be mistaken for a full-blown discussion. Second, this Article does not challenge community policing. Community policing comes in far too many varieties to draw any conclusions here about community policing writ large. Order-maintenance policing New York style is just one of many different approaches to community policing. It focuses on arrests. There are, however, other types of

385. Wesley Skogan acknowledges and discusses this point in his study, *see* Skogan, Final Report, *supra* note 22, at 77, and, I believe, would agree with this criticism of the *Broken Windows* essay.

386. *See, e.g.*, SKOGAN & MAXFIELD, *supra* note 100.

387. *See* SKOGAN, DISORDER AND DECLINE, *supra* note 9, at 77.

community policing, some of which even emphasize police cooperation with disorderly people.³⁸⁸ Finally, this Article does not address the strategy of increasing the number of police officers on the street. There is reason to believe that integrating more police officers into the community will help fight crime. I have limited myself to the policy of aggressive misdemeanor arrests to deter serious crime.

In conclusion, the categories of the disorderly and law abiders, of order and disorder, limit our horizon. When we attempt to thinV about reducing violent crime — about, in effect, transforming society — we need to question these categories and, if we find them limiting, offer alternative understandings that lead to more innovative policies. My goal in this Article has been to dig beneath the new path of deterrence in order to expose some alternatives. If we want more order on the streets, there may be alternatives to misdemeanor arrests. Overall, we should refocus our attention on the numerous forces that contribute to declining neighborhoods, poverty, and crime, and that are masked by the aesthetic and rhetoric of orderliness. The statistical analysis presented here suggests that disorder may mask the role of neighborhood poverty, stability, and race in relation to crime. The same may be true of the social influence conception of deterrence.

388. Under some approaches, police officers use their power to withhold enforcement of misdemeanors as a way to integrate into the community. *See, eg.,* Eig, *supra* note 43 (discussing community policing in Chicago). Eig reports that his officer-informant "rarely writes tickets." *Id.* at 63. Eig explains:

For one thing, she rarely writes tickets. While we are out on patrol one night, a car rolls through a four-way stop sign without even pausing. The driver sees the police car, puts an upturned palm out his window and shouts, "Sorry, T-Bone!" Black [the officer] just shakes her head. Another time, she spots a man who is wanted for a parole violation. He does not run when Blade approaches-[H]e and Black agree that she will pick him up the next day.... Black is confident he'll keep his word. She understands that respect and goodwill benefit her more than force. Once, when a suspect resisted arrest and began punching her, neighborhood gang members rushed to her defense and helped subdue the man.