PLSC 252: Crime and Punishment
Professor Gregory Huber
Teaching Fellow: Jeremy Kaplan Lyman

By submitting this essay, I attest that it is my own work, completed in accordance with
University regulations. —Aseem Mehta

<u>Reconsidering *Broken Windows*: A Critique of Moral and Pragmatic Justifications</u>

by Aseem Mehta

In "*Broken Windows,*"[1] James Wilson and George Kelling make the case for a policing
strategy that increases the visibility and discretion of officers in neighborhoods, and emphasizes
a punitive crackdown on disorderly behavior. Based on Wilson and Kelling's analysis, "law and
order" policing is motivated by a need to respond to psychological feelings of fear caused by low
level disorder, activities like panhandling, public drunkenness and loitering. In their view, such
policing constitutes justifiable state action on two levels: first, the sensation of fear invoked by
disorderly conduct is harmful to the wellbeing of citizens and the greater social cohesion of the
neighborhood. Second, the conditions that accrue over time if disorderly conduct goes
unpunished create an environment conducive to more egregious and violent criminal behavior,
thus requiring state action as a preventative measure.

However, we ought to be skeptical of Wilson and Kelling's advocacy for "law and order"
policing. By elevating the subjective emotion of "fear" to imply "societal harm," Wilson and
Kelling make a dangerous defense for public policy that sets a precedent for a radical
overstepping of the bounds of state interference in private affairs. Wilson and Kelling's argument
that "law and order" policing deters escalating criminal behavior is a more compelling defense
based on an appeal to the state to address tangible physical harms. Unfortunately, this
justification is a specious claim because it is unsupported by empirical data, and fails to take into

---

[1] James Wilson, George Kelling. *Broken Windows (1982).*

account adverse and unintended consequences of a "law and order" approach on crime. In short, "law and order" policing as a comprehensive strategy for police departments ought to be reconsidered given that it unjustifiably allows irrational societal fears to drive state action, increases police authority at the expense of individual rights, and is largely ineffective according to real-world evidence.

This paper will respond to Wilson and Kelling's advocacy for "law and order" policing by showing first, that the "fear" standard they use to define "harm" is an inappropriate justification for state interference and impunity. Drawing from contemporary political science theories, I will show that extending the "fear" principle into a model for state action is intuitively unjust, as it arbitrarily transforms the irrational fears of some into motivation for state force, and unfairly authorizes wide police discretion. Finally, this paper will address Wilson and Kelling's speculative "future harm prevention" argument in favor of law and order policing, showing that such a stance is unsupported and actually unintentionally backfires while leaving the larger problems which plague communities untouched.

From the viewpoint of private citizens, the fundamental role of police in our liberal society is to enforce laws that maintain the safety and wellbeing of a community. In order for police to be able to function in this capacity as effective enforcers of laws, citizens entrust officers with the authority to monitor some individual actions and levy punishments upon violators of societal laws. However, there is a limit to the extent to which law enforcement authorities can legitimately exercise their power. Specifically, police officers may legitimately interfere in private citizen affairs to the extent to which they are responding to or directly preventing societal "harm." Yet, this standard provides little clarity; depending on ideological preferences, the notion of what constitutes "harm" can be extended or restricted to include or exclude conceivably any activity. Somewhere along the spectrum ranging from lawlessness to a

police state, policymakers designate a set of actions that give rise to societal harms that justifiably invoke police intervention. The key question to understanding Wilson and Kelling's defense of "law and order" policing is, *what constitutes the harm that justifies state action in response to low-level disorder*?

Wilson and Kelling offer two answers: the harms to society as a result of disorder and low-level transgressions are fear in the minds of citizens, and the creation of conditions that foster more serious crimes. On the topic of "fear," they posit, "Many citizens, of course, are primarily frightened by crime, especially crime involving a sudden violent attack by a stranger…But we tend to overlook another source of fear – the fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers" (29). Indeed, societal harm, as argued by Wilson and Kelling, has little to do with tangible outcomes like physical degradation, theft, violence, or even law breaking. Instead harm comes in the form of negative societal attitudes, like fear and annoyance. They contend that while there may be a difference in the scope and magnitude of highly publicized violent crimes and low-level disorder, "outside observers should not assume that they know how much of the anxiety endemic in many big-city neighborhoods stems from a fear of "real" crime and how much from a sense that the street is disorderly" (30).

Wilson and Kelling's argument mirrors the contention of Lord Patrick Devlin that criminal law exists to uphold and maintain a public morality. Devlin posits, "What makes a society of any sort is a community of ideas, not only political ideas, but also ideas about the way its members should behave and govern their lives[2]" (32). The notion that disorderly conduct projects a violation and therefore disrespect for a set of "societal morals," as Wilson and Kelling

---

[2] Lord Patrick Devlin, *"Morals and the Criminal Law" (1971)*

argue, justifies state action to rectify this attack on societal norms. Wilson and Kelling fully endorse Devlin's view that a thriving community requires shared beliefs, ideas and norms. All three authors would seem to agree that the formal statutes of the legal system are only symbolic conventions for outlining the norms and expectations of a society and ought to be flexible to the discretion of those who actually implement them on the ground, i.e., police officers, in order to maximize the goal of upholding these norms. Devlin believes, "it is not possible to set theoretical limits on to the power of the State to legislate against immorality" (36). From Devlin's point, taken in conjunction with his deeper analysis that the fundamental role of criminal law is to define and project a public morality, it seems reasonable to extrapolate that Devlin views law as a malleable tool to serve greater societal values. Thus, Devlin's stance is analogous to Wilson and Kelling's explanation that "The police make arrests on such charges as 'suspicious person' or 'vagrancy' or 'public drunkenness' – charges with scarcely any legal meaning. 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" (35). Wilson, Kelling and Devlin each defer to the discretion of law enforcement authorities over the written clauses of statutory law as the ultimate source for choices on the ground.

Yet, can subjective, immeasurable and capricious *emotions (*fear and annoyance) really give rise to a legitimate justification for police intervention? On an intuitive level, it seems unjust and completely inappropriate for police to arrest, monitor or harass individuals simply because they are seen as "disreputable," "obstreperous" or "unpredictable" (29). First, equating "fear" with "societal harm," as Wilson and Kelling do, legitimizes the irrational or even discriminatory "fears" that society voices. If we derive our standard for "safety" from quelling "fear," how do we know which fears count when the state makes decisions how to act? From history, we learn

that the answer to this question is inherently political (and often times, irrational). Drawing on "fears" of a communist revolution within the United States, radical politicians "justified" egregious acts of state coercion during the First and Second Red Scares in 1920 and in the decade following World War II. Richard Nixon and Henry Kissinger alleged to have been reacting to "fears" of a global devolution into fascism and communism when justifying their secret bombings in Cambodia. And right-wing politicians following the September 11 attacks in New York have been accused of 'fear-mongering' to justify commencing war in Iraq and for antagonizing Muslim-Americans in the United States as threats to safety. When deciding which "fears" count as harms or threats to community safety, in many ways, the ones that make the cut are the ones that are most politically salient to the lawmakers who are involved.

The negative impact of such a system is clear – unwarranted violations of civil liberties, uncurbed and abusive exercises of state power, and the consolidation of control in an executive or police force that is inherently undemocratic. Whatever the alleged "fear" may be – whether it is the threat of communism, terrorism, or simply "disorder" – there is no doubt that legitimate "fears" justifying state action favor those with power or influence. The "fear" which victims of increased state authority experience, whether they are accused "terrorists," "communists" or "disreputable characters," is not taken into account when the state attempts to respond to fear in order to maintain safety. Douglas Hay, in an essay titled "*Property, Authority and the Criminal Law,*" affirms the way in which opinions of only a few in society can become enforced by the state in his analysis of draconian punitive measures in 18th century England, concluding, "A ruling class organizes its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies. Loyalties do not simply *grow* in complex societies: they are twisted, invoked and often consciously created.[3]"

---

[3] Douglas Hay. "*Property, Authority, and the Criminal Law*" (1975)

While the historical examples mentioned previously deal with broad national security cases with an innate political dimension, we can also understand the way in which elevating "fear" to the status of "harm" unfairly marginalizes entire populations at the hands of a majority opinion. Put simply, we do not require manipulative politicians for 'fear-mongering' to begin. Grassroots "Nativist" movements in both the early 1800s and 1900s called for violence and terror against immigrant populations in urban areas to respond to the "fear" that these outsiders threatened national prosperity. According to Wilson and Kelling, such clamoring from the public would justify state action targeted at breaking down immigrant communities in order to respond to such a pervasive "public fear." Social issues that consist of pure intolerance and bigotry by majority populations, such as discrimination against minorities, gay and lesbians, and even women, could all legitimately invoke state force in order to quell "public fear" under Wilson and Kelling's logic.

Indeed, it is not difficult to imagine the way in which irrational fears are translated into state action through "law and order" policing. Targeting "disorder" effectively enforces punitive measures against the homeless because citizens "fear" their annoying presence, or against teenagers on a city block because citizens "fear" what they may be up to. The "fears" that community police officers may respond to, as voiced by community members, can become very personal, down to targeting specific families or certain groups of people. Profiling, as officers must do to response to such "fears," encodes racial biases and perpetuates stereotypes, especially in communities with class and racial tensions. Such conduct certainly constitutes state enforced marginalization, a clear and unacceptable harm stemming from "law and order" tactics.

Second, on an ideological level, using the ambiguities of fear as an impetus for punitive action by state force provides grounds for a manipulative and coercive police state. "Law and order policing" deviates from standard law enforcement practice in that it grants officers wide

discretion to act without restrictions and to interfere in the actions of private citizens, often without a legal basis. Without any type of statutory or hierarchal oversight on their conduct, there is no formal officer accountability. Further, because the goal of "law and order" policing is to quell the subjective fears and emotions of neighborhood members there exists no quantifiable nor objective standard to assess the quality or success of the conduct of officers on "law and order" assignments. "Law and order" policing contradicts the legal system's affirmation to uphold civil liberties and to fairly and equitably treat all citizens.

Further proof that "law and order" policing offers too much discretion to police officers comes from Stuart Scheingold's study of the politicization of street crime. Scheingold concludes that political candidates and legislators choose to emphasize the importance of "cracking down on crime" in periods when street crime is either comparatively low or on the decline in the first place, confirming that the issue is a tool for garnering political support rather than for achieving tangible goals[4]. Scheingold's conclusion supports the claim that "law and order" policing indefinitely sanctions authority to police officers. Without an end-goal and with constant "threats" to order, politicians can and do perpetually rely upon "law and order" policing as a fallback political point to gain public support. Rather than implementing means-tested, results-driven solutions for making communities safer, "law and order" policing is both politically convenient and has no strict mechanisms for evaluation or review, making it the ultimate tool for politicians while also indefinitely yielding extreme power to individual police officers.

Wilson and Kelling themselves acknowledge the way in which community policing can become a tool for police abuse, pondering, "How do we ensure that the police do not become the agents of neighborhood bigotry?' (36). Their response is hardly encouraging: "We can offer no wholly satisfactory answer to this important question. We are not confident that there is a

---

[4] Stuart Scheingold. *"The Politics of Street Crime and Criminal Justice." (1982)*

satisfactory answer except to hope that by their selection, training and supervision, the police will be inculcated with a clear sense of the outer limit of their discretionary authority." Thus, Wilson and Kelling concede that considerations about the unlimited sanctions to police authority and the lack of oversight make "law and order" policing a dangerous prospect subject to abuse.

Having made this concession, the author's maintain that "law and order" policing has value because it can function as an indirect deterrent against crimes of greater seriousness. Wilson and Kelling cite psychological studies in which buildings with unattended broken windows or cars with visible damage are quickly destroyed as evidence that allowing social disorder to fester gives rise to greater social harm. They posit that while "arresting a single drunk or a single vagrant who has harmed no identifiable person seems unjust…failing to do anything about a score of drunks or a hundred vagrants may destroy an entire community" (36). They argue that failing to punitively and aggressively deal with disorder "leads to the breakdown of community controls" painting a dystrophic situation in which "a stable neighborhood of families who care for their homes, mind each other's children, and confidently frown on unwanted intruders can change to an inhospitable and frightening jungle" (31). However, Wilson and Kelling fail to provide anything more than spurious anecdotal support for this claim and also fail to consider the adverse consequences which community policing has on crime, further fueling our skepticism for their defense of "law and order" policing.

Statistical evidence does not confirm the preventative value of "law and order" policing. Wilson and Kelling cite a review conducted by the Police Foundation of the impact of the policy implementation in Newark, New Jersey five years after its start. The review found no change in crime rates. On a larger scale, former Mayor Rudy Giuliani of New York initiated a "broken windows" approach to policing in the early 1990s, which was followed by a corresponding drop in city crime rates. However, perplexing to criminologists, social scientists and lawmakers alike,

during the same time period cities across the United States experienced similar drops in crime rate whether or not they implemented a "broken windows" strategy[5]. In spite of such data, Wilson and Kelling allege that neighborhoods with "law and order" policing were indeed safer, as indicated by the fact that "residents of the foot-patrolled neighborhoods seemed to feel more secure than persons in other areas" and "tended to believe that crime had been reduced" (29). Perhaps this is unsurprising. It is appropriate that Wilson and Kelling, who rely upon the ambiguous sensation of "fear" as a justification for "law and order" policing would also rely upon similarly ambiguous "community attitudes" to support the use of the same policy. Unfortunately, ambiguous metrics with no measurable or quantifiable standard simply can't compare to hard data that shows that the same program that clearly impinges upon fundamental liberties also fails to impact the rate of criminal conduct in our communities.

In light of the lack of empirical data supporting the unique impact of "law and order" policing on a diminishing crime rate, attitudes among community members that they are indeed safer suggests that "law and order" policing has the adverse effect of masking larger problems within the community. If a neighborhood "feels" safer when in fact crime rates are unchanged, then it would seem to imply that community members believe that "law and order" policing is satisfactorily responding to the crimes that occur in that community, when they are in fact not. Such a guise of progress can easily make community members and law enforcement officials become complacent with their policing strategies, as they exist, without actually addressing the root causes of crime in a community. Indeed, "law and order" policing may exist solely for its "metaphorical symbolism of its latent meanings" as Joseph Gusfield contends in *Law as Public Culture*[6], as a means for showing societal distaste for certain actions. However, the latent meaning behind "law and order" policing is a message discouraging behaviors that the public

---

[5] Professor Gregory Huber, PLSC 252, Lecture 7
[6] Joseph R. Gusfield. "*The Culture of Public Problems: Drinking-Driving and the Symbolic Order*" (1981)

views as a nuisance – not the more substantive, harmful and destructive behaviors that underlie *actual* crimes.

"Law and order" policing sends the wrong message to community members. Punitively responding to perceived threats like panhandling, graffiti, or public drunkenness diverts attention and resources from actually curing the neighborhood of these "vices." Such annoyances that were once present on a street and are not any longer after the introduction of "law and order" policing suggests that the problems have been resolved, when in actuality they were indicators that the community might need to invest in greater services for the homeless, resource centers for youth, or public health clinics for addicts. On the flipside, the larger crimes which Wilson and Kelling are so concerned with, drug trafficking, prostitution, gang-war, are largely unaffected by "law and order" policing. At best, these organizations are less visible to the public because police are patrolling outdoors, making them less of a draw. More likely, such nefarious activities simply move indoors, away from the gaze of police officers where they operate unimpeded.

In examining the proposition of "law and order" policing as set forth by Wilson and Kelling in *Broken Windows,* it seems difficult to accept their contentions that such a policy can be justified on grounds of responding to community "fears" or for its preventative value. Perhaps the strongest argument Wilson and Kelling present is that "law and order" policing enhances positive relationships between law enforcement officials and community members. Yet, even this claim is not strong enough to justify a policing policy without statistical evidence for success that sanctions unrestricted police authority to act outside of the bounds of their legal purview. Achieving better relations between police departments and the neighborhoods they serve is a critically important goal, but need not be pursued via an unfair and ineffective program like "law and order" policing. A successful "law and order" program requires a recalibration of priorities

in order to identify and address the underlying causes of community disorder (such as poverty

and poor social services), rather than punitively responding to their manifestations.