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RESTORING LOST CONNECTIONS: LAND USE, POLICING, AND URBAN VITALITY

Nicole Stelle Garnett*

INTRODUCTION

Justice William Brennan rightfully reminded all of us that state constitutional law is too often neglected in our courtrooms and our classrooms.¹ State constitutions, to borrow from the late Chief Justice William Rehnquist, ought not to be “relegated to the status of a poor relation” in our constitutional legal structure.² They differ in important ways from the federal law Constitution—and those differences provide the space within which our democratic experiment flourishes. And I am sure if Justice Brennan were here with us today, he would agree that we also should not neglect the study of the state and local policies that that experiment generates. As I am constantly reminding my students, the state and local governments—and the laws that they make and enforce—have a far greater daily impact on our lives than the federal-law policies that take center stage in most law school classrooms.

Specifically, I would like to focus my remarks, which I am honored to have been asked to give, on local governments and the laws and policies that they make and enforce. As Richard Briffault has observed, the discourse in the legal academy on local government law generally proceeds from an assumption of local powerlessness.³ And, it is the case,

* Professor of Law, Notre Dame Law School. This speech was delivered as the 2010 Brennan Lecture at the Oklahoma City University School of Law on April 8, 2010. I am honored by the invitation to give the 2010 Brennan Lecture and grateful for the thoughtful feedback I received on my ideas during my visit to OCU. Portions of my speech, and this essay, were adapted from my book, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* (2010).

1. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

3. Richard Briffault, *Our Localism: Part I—The Structure of Local Government*

that as a matter of legal theory, local governments exist by the grace of—and at the whims of—state governments.⁴ In reality, however, local governments exercise considerable autonomy to shape policies that affect, in profound ways, our daily lives. In particular, states entrust local governments with three important, indeed essential, powers—law enforcement, land use regulation, and education.⁵ This lecture focuses primarily on law enforcement and land use regulation, and in particular on the often overlooked connections between these two important spheres of local autonomy. In closing, however, I will say a tiny bit about education policy as well.

My interest in the connections between policing policy and land use regulation was sparked—as most of my interests and ideas are—by a student's comment. (Students, in my experience, have all the best ideas.) About a decade ago, soon after I entered the legal academy, I began teaching a seminar on urban-development policy. The seminar is structured around two *big ideas* that have revolutionized thinking about urban policy in the past few decades. The first big idea is Jane Jacobs's assertion that mixed-land-use urban neighborhoods, and the vitality that they foster, are superior to the single-land-use *suburban* neighborhoods mandated by prevailing land use regulations.⁶ The second big idea is James Q. Wilson and George Kelling's *broken windows hypothesis*, which posited that uncorrected manifestations of urban disorder—even minor ones like broken windows—set off a spiral of urban decline that leads inevitably to serious crime in a community.⁷ Both of these ideas have come to be increasingly reflected in legal policy reforms—the former in urban development strategies promoting “hipness” and urban vitality and in mixed-use zoning laws and the latter in a multiplicity of policing strategies aimed at suppressing disorder and restoring the quality of life in our urban neighborhoods. And, at the end of my first semester teaching this course, one puzzled student asked whether these two ideas were not in tension with one another. Was it the case, the student wondered, that land use regulators were coming to demand less

Law, 90 COLUM. L. REV. 1, 1 (1990).

4. See generally Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

5. See Briffault, *supra* note 3, at 3.

6. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

7. See James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY, Mar. 1982, at 29.

order in our cities, and police reformers more?

The question, I must admit, stumped me at the time. It was one of those deer-in-the-headlights moments that every young professor has. But, more importantly, the question stuck with me after I blinked and blurted out a half-coherent answer to the class. It proved to be the spark that led to my recent book, *Ordering the City: Land Use, Policing, and the Restoration of Urban America*,⁸ from which many of the ideas in this essay are drawn. And it has taken me about a decade to formulate an answer to the student's excellent question that, I think, is *actually* coherent and explains why the demand for less-ordered land uses in our cities is not inconsistent with a demand for more-orderly cities. And my explanation, which I will test out on you here today, turns on the connections between land use policies, policing policies, and urban vitality. In my view, a greater understanding on the part of urban officials of these connections helps explain—and will help sustain—the apparent comeback of many cities over the past two decades.

To direct my exploration of these important and often overlooked policy synergies, I would like to borrow a formula developed by Joel Kotkin in a wonderful little book called *The City: A Global History*. In this book, Kotkin argued that all great cities have three core characteristics: They are *sacred*, they are *safe*, and they are *busy*.⁹ I think that Kotkin's formula has it about right—or, at the least, is a useful starting point for a meditation about city life. And I am sure that Kotkin will forgive my artistic license if I take these characteristics out of order.

I. SAFETY

I would like to begin with safety, which is the core goal of law enforcement policy. Few would argue with Kotkin's assertion that cities fail unless they keep their citizens safe. City life has long depended upon two kinds of security—the protection from invading outsiders and from deviant insiders. Until quite recently, urban civilizations' very existence depended upon the ability to repel invaders. As Kotkin observed, the rise of city walls marked the beginnings of an urban society. In fact, when large walled towns first appeared in China three thousand years ago, the

8. NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* (2010).

9. JOEL KOTKIN, *THE CITY: A GLOBAL HISTORY*, at xix–xxii (2005).

characters for “wall” and for “city” were identical. Even during the Pax Romana, when unprecedented security enabled the free movement of people, goods, and ideas, many cities—especially on the frontier—depended upon the protection of walls and legionaries. The return of urban life to Europe in the centuries after the fall of Rome was similarly marked by the “erecting [of] a defensive perimeter.”¹⁰ Protecting inhabitants from invading outsiders is, thankfully, no longer a primary function of cities. There was a time, after 9/11, that some commentators feared that it would be,¹¹ but that, thankfully, has not come to pass (except, of course, on the TV series 24).

Still, local governments must continue to guarantee their residents’ security by adopting and enforcing the rules necessary to protect them from deviant insiders. As Kotkin observed, many cities in the developing world are crippled by a lack of internal security. In these places, many citizens who can afford to do so retreat into guarded, walled, suburban enclaves or emigrate abroad. Many of those who cannot live lives of terror—facing crime or the threat of crime on a daily basis. Not long ago, many people expected American cities to suffer, in time, a similar fate. Crime rates rose dramatically during the 1960s and 1970s and then remained at unprecedented levels despite increases in police expenditures. Nationwide, between 1973 and 1991, violent crime increased by 82%—murder by 5.4%, rape by 73%, robbery by 50% and aggravated assault by 118%.¹² And, as the crime rate rose, so did fear of crime, especially in urban areas. Along with the high crime rates, other factors—including the decriminalization of “victimless” public-order crimes and the deinstitutionalization of the mentally ill—contributed to a crippling fear of crime and urban disorder.¹³ By the end of the 1980s, many Americans who could do so chose simply to avoid urban public

10. *Id.* at 32–33, 66.

11. See Edward L. Glaeser & Jesse M. Shapiro, *Cities and Warfare: The Impact of Terrorism on Urban Form*, 51 J. URB. ECON. 205 (2002).

12. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, J. ECON. PERSP., Winter 2004, at 163, 166.

13. See also George L. Kelling & Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in COMMUNITY POLICING: RHETORIC OR REALITY 3, 15 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (“Citizens abandoned parks, public transportation, neighborhood shopping centers, churches, as well as entire neighborhoods.”); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1211–12 (1996).

spaces. Around this time, I remember hearing my grandmother tell my mother not to take her purse to downtown Kansas City, Missouri, because it would almost certainly be snatched by a deviant thug as soon as she got out of the car.

Now, my grandmother was not a city girl—she grew up in southeast Kansas—and her rural roots undoubtedly influenced her opinions of city life. Still, her expression of concern was not so far out of line with the prevailing sentiments about city life. As Paul Grogan and Tony Proscio have observed, “Out-of-control crime was the nearly universal expectation for the inner city. Any other positive trend there . . . was sharply hemmed in by the prospect of continued crime and, just as important, an all-but-unshakable fear of crime.”¹⁴ By the late 1980s, any informed observer might have reasonably concluded that our cities were falling apart at their seams and that any reasonable person would have cause to abandon them.

Fortunately, however, that did not come to pass. Instead, beginning in the early 1990s, crime declined dramatically everywhere in the United States—and especially in major cities. Nationwide, between 1991 and 2001, violent crime decreased by 33.6%—homicide by 42.9%, rape by 24.8%, robbery by 45.8%, and aggravated assault by 26.7%.¹⁵ In major cities, some declines were even more dramatic. In Chicago, for example, between 1991 and 2002, robbery declined by 58%, rape by 45%, murder by 30%, aggravated assault by 41%, burglary by 46%, and motor vehicle theft by 47%.¹⁶ Public perceptions of the crime also improved during this time period. In Chicago, to give just one example, African American and white residents reported that crime fell sharply between 1991 and 2002.¹⁷ Importantly, African American perceptions of the crime problem, which were historically the most pessimistic, began to converge with the perceptions of white residents.¹⁸

Few would dispute that declining crime rates are a good thing for cities and the people who live in them, especially for people who are trapped by life circumstance in the poorest, most dangerous urban

14. PAUL S. GROGAN & TONY PROSCIO, COMEBACK CITIES 152 (2000).

15. Levitt, *supra* note 12, at 166.

16. CHI. CMTY. POLICING EVALUATION CONSORTIUM, COMMUNITY POLICING IN CHICAGO, YEAR TEN: AN EVALUATION OF CHICAGO'S ALTERNATIVE POLICING STRATEGY, at iv (2004).

17. *Id.* at 54–55.

18. *Id.* at 66–71.

communities. The difficulty is that everyone seems to dispute *why* crime plummeted. Explanations—all plausible, and some more controversial than others—range from the waning of the crack epidemic to rising incarceration rates to the legalization of abortion.¹⁹ Perhaps the most intense of these debates focuses on whether crime declined because police departments across the United States, beginning in the mid-1980s, began to focus on controlling physical and social disorder and reregulating our urban public spaces. A major impetus for this strategic shift in policing priorities was the publication, in 1982, of the *Broken Windows* essay.²⁰ In *Broken Windows*, Wilson and Kelling argued that the deregulation of our urban public spaces—and the decriminalization of, or disregard for, minor “victimless” crimes like vagrancy and public drunkenness—helped catalyze a precipitous decline in our urban neighborhoods. They reasoned that disorder signals that a community is out of control—that it cannot, or chooses not to, control social deviancy. In Wilson and Kelling’s words, “[O]ne unrepaired broken window is a signal that no one cares,” they wrote, “and so breaking more windows costs nothing.”²¹ The logic, in other words, is that a single broken window has a multiplier effect: “[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.”²² In the same way, according to Wilson and Kelling, social disorder—or “‘untended behavior’ also leads to the breakdown of community controls.”²³ But Wilson and Kelling did not stop there. They further argued that disorder causes serious crime. “[D]isorder and crime,” they asserted, “are usually inextricably linked, in a kind of developmental sequence. . . . If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place.”²⁴

Broken Windows was not the only impetus for what has come to be known as the *order-maintenance* revolution in policing policy. On the contrary, just about everyone was becoming frustrated with the law-enforcement *status quo* by 1982—but its influence can hardly be

19. See Levitt, *supra* note 12, at 176–83.

20. See Wilson & Kelling, *supra* note 7, at 29.

21. *Id.* at 31.

22. *Id.* (emphasis omitted).

23. *Id.*

24. *Id.* at 31, 34.

overstated. Today, one would be hard-pressed to find a police department in a major U.S. city that does not purport to focus on curbing disorder, empowering communities to help set policing priorities by identifying neighborhood problems, and restoring the quality of life in urban neighborhoods.²⁵ I have not been able to find one. Many major cities have completely restructured their police departments to focus on these things—pulling officers out of police cars and putting them on foot or on bikes, holding hundreds of community policing meetings each year, refocusing efforts on “minor” “victimless” crimes like prostitution, aggressive panhandling, and misdemeanor drug possession, and—in an effort made famous by Rudy Giuliani in New York City—clearing city streets of hustlers and “squeegeemen.”

Broken Windows and the policing reforms that flow from it have prompted intense academic debates about the wisdom, justice, and efficacy of order-maintenance strategies. I would like to focus on one of those debates—the debate about the causal connection between disorder and crime. (I leave to one side the second, and equally important, debate about whether order-maintenance policies threaten to undermine civil liberties.²⁶) The purported causal connection between disorder and crime has been tested in various ways—some scholars have sought to measure whether more disorderly neighborhoods are more dangerous;²⁷ others have sought to measure whether disorder-control efforts curb serious crime.²⁸ These debates have turned into a bit of a scholarly shouting

25. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 577 (1997).

26. For an accessible overview of this debate, see generally TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES (1999).

27. See WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 65–84 (1990) (finding a causal connection between disorder and robbery rates); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 128–30 (2001) (challenging Skogan’s findings); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 612–29 (1999) (finding disorder was correlated with robbery but questioning a causal connection between disorder and serious crime).

28. GEORGE L. KELLING & WILLIAM H. SOUSA, JR., CTR. FOR CIVIC INNOVATION, DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY’S POLICE REFORMS, CIVIC REPORT NO. 22 (2001) (attributing the dramatic decline in crime in New York City to an aggressive misdemeanor arrest policy); Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 262 (2005) (analyzing data from New York and finding that an aggressive misdemeanor arrest policy led to a decrease in

match—with some scholars claiming to prove that disorder causes serious crime, and that disorder-control efforts prevent it, and others vigorously challenging their findings.

Now, I must admit that while I have read all the studies, I am not an empiricist. And, since I cannot check the math, it is difficult to know what to think. It seems likely to me that certain kinds of order-maintenance policing techniques do “work”—that is, that they do reduce crime. But these reductions may or may not have something to do with curbing disorder. For example, when New York City began an aggressive campaign of arresting turnstile jumpers, it discovered that many turnstile jumpers had outstanding felony arrest warrants. The resulting incarceration of felons might have reduced serious crime—regardless of whether the disorder of turnstile jumping causes serious crime. The *vibe* of the studies also suggests to me that, at the very least, disorder seems to be linked to higher robbery rates. This is the most consistent finding in the studies. Still, I do not claim to know with any degree of certainty which side of the empirical debate is correct. Bernard Harcourt and Jens Ludwig may be right. We are left with a Scottish verdict—“not proven.”²⁹ Or, as James Q. Wilson himself has observed, ““God knows what the truth is.””³⁰

But I want to make the case that these empirical shouting matches miss the point—or at least some important points—about order-maintenance policies. We do not, or perhaps even cannot, know with certainty whether disorder causes crime, but we do know other things about disorder. And the things that we can know are important—so we should not lose sight of the forest for the trees fighting about regressions and robbery rates. And I am sure that it is a point that James Q. Wilson and George Kelling would wholeheartedly endorse. After all, in *Broken Windows*, Wilson and Kelling admitted—on the first page of their essay—that order-maintenance policing will not necessarily reduce crime. The essay was prompted by the Newark Foot Patrol Experiment, which increased the presence of police officers *walking the beats* instead of driving patrol cars. Kelling participated in an evaluation of the

incidents of violent crime); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 275–77 (2006) (challenging these New York City studies).

29. Harcourt & Ludwig, *supra* note 28, at 276.

30. Patricia Cohen, *Oops, Sorry: Seems that My Pie Chart Is Half-Baked*, N.Y. TIMES, Apr. 8, 2000, at B7.

program, which found, in Wilson and Kelling's words, that "to the surprise of hardly anyone . . . foot patrol[s] had not reduced crime rates."³¹ Despite this, however, they still concluded that the foot patrols had made the affected neighborhoods *safer*. They reasoned that "residents of the foot-patrolled neighborhoods seemed to feel more secure[,] . . . tended to believe that crime had been reduced, and seemed to take fewer steps to protect themselves from crime (staying at home with the doors locked, for example)."³²

This is a critically important insight. Because even if disorder does not cause serious crime, it causes us to think that we are in danger of being victimized (even when we are not). In other words, disorder *scares us*. While the causal connection between disorder and *crime* is hotly contested, the connection between disorder and the *fear of crime* is not. Fear of crime is frequently overlooked in debates about order-maintenance policies, and it should not be. Nearly all efforts to measure the connection between disorder and fear find a strong positive correlation. People intuitively associate disorder and crime. Apparently, the average observer agrees with the broken windows hypothesis; when she sees physical disorder or experiences social incivilities in a neighborhood, she assumes that more serious crimes are prevalent there as well. Studies consistently show that residents living in neighborhoods with high levels of disorder are more fearful than those living in more orderly neighborhoods. And, interestingly, residents in the *same* neighborhood experience different levels of fear depending upon their individual perceptions of the amount of disorder in their communities.³³

Fear of crime is not the same thing as crime to be sure. Crime statistics suggest that we are more afraid than we need to be—that is, crime rates are lower than we think that they are. But that does not mean that fear is irrelevant to debates about policing policies. Fear imposes tremendous costs on our society for a number of related reasons. First,

31. Wilson & Kelling, *supra* note 7, at 29.

32. *Id.*

33. See Jeanette Covington & Ralph B. Taylor, *Fear of Crime in Urban Residential Neighborhoods: Implications of Between- and Within-Neighborhood Sources for Current Models*, 32 Soc. Q. 231 (1991); Randy L. LaGrange et al., *Perceived Risk and Fear of Crime: Role of Social and Physical Incivilities*, 29 J. RES. CRIME & DELINQUENCY 311 (1992); Edmund F. McGarrell et al., *Neighborhood Disorder, Integration, and the Fear of Crime*, 14 JUST. Q. 479 (1997); Chris L. Gibson et al., *Social Integration, Individual Perceptions of Collective Efficacy, and the Fear of Crime in Three Cities*, 19 JUST. Q. 537 (2002).

when we are afraid, we take steps to protect ourselves. These precautions are costly. Each year, Americans spend more on private-crime-avoidance precautions—estimates range from \$160 billion to \$300 billion—than on the total U.S. law enforcement budget—that is, more than U.S. governments at all levels (federal, state, and local) spend on police, prosecutors, judges, and prisons.³⁴ And these figures do not reflect the total cost of crime avoidance, such as the opportunity costs of remaining inside behind locked doors to avoid victimization.³⁵

Second, steps taken to avoid crime may have the perverse effect of increasing it. In numerous studies, social scientists have demonstrated a *social influence effect* on the compliance with legal rules.³⁶ That is, social scientists have shown that people are more likely to obey the law when they perceive that their neighbors are obeying the law. But private actions taken to avoid victimization cannot, by definition, support such a perception. Logically, would-be victims should not take steps to protect themselves from victimization if their neighbors are law-abiding; they will take precautions only if they believe themselves to be surrounded by criminals. Indeed, the private deterrence measures that fearful individuals are most likely to take—including neighborhood watch groups, alarm systems, extra locks, and bars on the windows—tend to signal that crime is prevalent in a community.

Even if neighbors do not interpret precautionary measures as evincing a lack of trust—perhaps because the community is plagued by criminals from other neighborhoods—fear, and the precautionary measures fear generates, may still increase crime by reducing neighborhood social capital. By social capital, I refer to, in Robert Putnam's words, "social networks and the norms of reciprocity and trustworthiness that arise from them."³⁷ Fear undoubtedly impedes a community's ability to generate and capitalize upon social capital. Consider, for example, the likely effects of one of the simplest and most common crime-avoidance strategies—remaining indoors. As Jane Jacobs influentially argued, the presence of law-abiding residents in a

34. Robert A. Mikos, "Eggshell" Victims, Private Precautions, and the Societal Benefits of Shifting Crime, 105 MICH. L. REV. 307, 308 (2006).

35. *Id.*

36. See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

37. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000).

community's public spaces provides *eyes upon the street* that keep crime and disorder in check.³⁸ But, when law-abiding, but fearful, residents become prisoners in their own homes, their fear effectively forces them to turn over public spaces in a community to their would-be victimizers.

The "prisoner-in-my-own-home" phenomenon also reduces informal inter-neighbor socialization and the social capital that it generates. In urban neighborhoods, an important predictor of both actual crime and fear of crime is what sociologists and social psychologists call "collective efficacy," or the "ability of neighborhoods to realize the common values of residents and maintain effective social controls."³⁹ Numerous empirical studies have demonstrated both that neighborhoods with low levels of collective efficacy are more dangerous than those with higher levels and that residents of such neighborhoods also are more fearful.⁴⁰ Not surprisingly, a resident who counts on her neighbors to address community problems has less cause to fear victimization. In other words—when we are afraid, we do not go outside and get to know our neighbors, so it becomes impossible for a neighborhood to organize to take care of neighborhood problems. And, if common sense (and social science) can predict anything with certainty—it is that a neighborhood that can organize, informally, to take care of neighborhood problems is healthier (and safer) than a neighborhood that cannot.

Third, disorder-triggered fear causes those of us with financial means to *move* to safer, less-disorderly neighborhoods. When we become afraid, those of us who can afford to move, move. In one nationwide study, for example, Julie Cullen and Steven Levitt found a strong correlation between crime and urban flight: Each reported city crime correlated with a one-person decline in city population; a 10% increase in crime corresponded to a 1% decline in city population.⁴¹ Moreover, this study focused on the connection between actual crime and out-migration, that is, moves from the city to suburbs. It is reasonable to assume that the fear of crime exerts at least as robust an influence on residents' decisions about whether to move from one city neighborhood to another. As a result, safer neighborhoods enjoy greater residential

38. JACOBS, *supra* note 6, at 45–54.

39. Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918 (1997).

40. See, e.g., Sampson & Raudenbush, *supra* note 27; Gibson et al., *supra* note 33.

41. Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 REV. ECON. & STAT. 159, 159 (1999).

stability—that is, they have relatively low levels of resident turnover and high levels of homeownership—than more dangerous ones. And, again, it comes as no surprise both that residential stability and homeownership are important predictors of neighborhood health and that highly educated, wealthier households with children also are most responsive to crime—that is, most likely to relocate when they become fearful. For all of these reasons, sociologists Robert Sampson and Stephen Raudenbush's prediction that disorder may lead to serious crime not directly but rather because it may "operate[] in a cascading fashion—encouraging people to move (increasing residential instability) or discouraging efforts at building collective responses"—seems self-evidently correct to me.⁴²

I have one final point about disorder, which is somewhat distinct from my observations about its connection to the fear of crime. It is also worth noting that the fear of crime impacts different demographic groups differently. And, for a host of reasons, we can know for certain that disorder diminishes the quality of life in urban neighborhoods—regardless of whether it causes crime—and those who suffer the most from the negative effects of disorder are those who have the least wherewithal to avoid it. I am a Catholic. And an important principle of Catholic Social Thought is something called *the preferential option for the poor*. The idea is a simple one—and certainly not an exclusively Catholic one—our legal policies ought to consider first the needs of the least among us.

We all know that the least among us live to the greatest extent with unchecked disorder. Consider an unpleasant example: Have you ever been at a park with a young child who spies a condom on the ground? I have. Have you ever been chased, while playing at a park with your children, by a mentally ill person? I have. And I never went back to either park. Thankfully, however, I have choices about where to take my children. And so, I have never seen a broken crack vile or a dirty syringe or a prostitute while I was at a park with my children, but I know that hundreds of thousands of parents have. And they are the parents with fewer recreational and residential choices than me. Their choice: Avoid the park or face the disorder. And if cleaning up the parks makes their lives better, their children's lives better, then I think we have a moral obligation to clean up the park. To paraphrase Justice Clarence

42. Sampson & Raudenbush, *supra* note 27, at 637.

Thomas's dissent in the *City of Chicago v. Morales* case, the people who have to live with the consequences of disorder do not live in our neighborhoods.⁴³ But we are obligated to improve theirs, even if the improvements do not directly reduce crime.

So what is the bottom line about safety, disorder, and policing policy? Disorder may or may not cause crime, but we know at least two important things about disorder with certainty. First, disorder scares us—destabilizing urban neighborhoods and making it more difficult for cities to compete with suburbs for residents who have choices about where to live. Second, it makes life difficult for the least among us—and addressing disorder will make it less difficult, a fact that we ought not to lose sight of arguing about regressions and robbery rates.

II. BUSYNESS

Perceptions of security are related in important ways to a second part of Kotkin's formula. Great cities, Kotkin argued, are busy—they are vital. Obviously, busyness and safety are closely connected: A city neighborhood is unlikely to be busy if it is not safe—if crime and the fear of crime prompts us to move to the suburbs or makes us too scared to go outside. That said, busyness, or urban vitality, is primarily the province not of law enforcement, but of land use regulators. Land use regulation, in a sense, set the pace of the social and economic life of our cities. And our prevailing land use regulations do not favor busyness. Our dominant form of land use regulation, zoning, reflects a long-standing judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones. Zoning has from its inception been predicated on the belief that ordered land uses suppress disorder. City officials have long assumed either that economic activity *is* disorder or that it fosters disorder, and they have therefore sought to shield residences from disorder by segregating them away from “incompatible” (that is, commercial) land uses.

For this reason, many of our cities are not busy places. For example, I am from the suburbs of Kansas City, and I grew up thinking that *downtowns* and *cities* were places that people worked, not lived. Downtown Kansas City was eerily deserted come 6 p.m., when “regular

43. See *City of Chicago v. Morales*, 527 U.S. 41, 114–15 (1999) (Thomas, J., dissenting).

people” went home where they belonged—to tidy, all-residential suburbs. (I must admit that it did not occur to me until much later that many of the neighborhoods where people lived were neither tidy nor all-residential—that was simply beyond my suburban experience.) Downtown Kansas City has changed somewhat. There are more busy center-city neighborhoods in Kansas City, Missouri, today than there were when I graduated from high school in the late 1980s. And the uptick in busyness likely is, at least in part, attributable to the fact that people feel safer in center-city neighborhoods than today. But the new busyness also is attributable to the growing influence of Jane Jacobs’s contrarian view of land use regulation, which has been popularized in recent years by the self-styled “new urbanists.” Jacobs argued that zoning had it exactly backwards—that, in contrast to the prevailing wisdom about land use planning—busy, mixed-use urban neighborhoods were superior to sterile, single-use ones. And she offered an order-maintenance justification for saying so. As Jacobs acknowledged, “The bedrock attribute of a successful city district is that a person must feel personally safe and secure on the street among . . . strangers.”⁴⁴ Commercial land uses, she reasoned, helped promote this necessary security: Commercial land uses, and the urban vitality that they promote, give people a reason to be present on city streets and sidewalks throughout the night and day. And, when more people are present, she reasoned, there are more *eyes upon the street* to keep disorder in check and monitor and curb potential criminal behavior.⁴⁵

Jacobs offered a second reason for favoring mixed-use neighborhoods—a reason that is also related to the broken windows hypothesis: Commercial land uses—the neighborhood pub and the corner store—promote social capital by bringing together strangers who would not otherwise interact. Now Jacobs did not use the words *social capital*, but that is surely what she meant. And, in particular, she was referring to the formation of what Robert Putnam has called “bridging” social capital—“bridging” referring to the bridging of strangers, in contrast to the “bonding” of friends.⁴⁶ The social-capital-production function of commercial land uses, Jacobs argued, is critical in diverse urban neighborhoods because there is only so much that the *police* can

44. JACOBS, *supra* note 6, at 30.

45. *See id.* at 38, 44–51.

46. PUTNAM, *supra* note 37, at 22–24.

do: “The first thing to understand,” she argued, “is that the public peace—the sidewalk and street peace—of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves.”⁴⁷ (Interestingly, James Q. Wilson, father of the broken windows hypothesis himself, said basically the same thing a few years later! But why he changed his tune is a question for another time.⁴⁸) Jacobs’s argument, in my view, has tremendous intuitive appeal. It seems self-evident to me that busy city neighborhoods *feel* safer than deserted ones. To test my intuition, ask yourself the following question: If you were to be left alone in a poor urban neighborhood, would you pick a deserted residential street or a busy commercial one? The difficulty is that the empirical evidence testing Jacobs’s assertion that busy, mixed-use urban neighborhoods are safer than single-use residential neighborhoods does not necessarily bear out this intuition. Jacobs famously argued that even a neighborhood bar might reduce crime by increasing the presence of people late into the night.⁴⁹ Now, I am a big fan of neighborhood pubs, but I have to tell you that the available data strongly suggests that bars are generators, not preventers, of crime. In fact, most social scientists have concluded that commercial land uses generally (and not just criminal hotspots like bars) are associated with elevated levels of crime and disorder. One study of 100 Seattle neighborhoods found that the introduction of a single commercial enterprise corresponded with a 31% increase in serious crime.⁵⁰ Researchers conducting these studies link their findings to the “routine activities” theory of crime—which is a fancy way of saying that most crime is opportunistic—that it involves “motivated offenders, suitable targets, and the absence of capable guardians.”⁵¹ Commercial land uses, according to this view, bring together victims and offenders and, *contra* Jacobs, may in fact reduce opportunities for private surveillance by making it more difficult for

47. JACOBS, *supra* note 6, at 31–32.

48. See James Q. Wilson, *The Urban Unease: Community vs. City*, PUB. INT., Summer 1968, at 25.

49. JACOBS, *supra* note 6, at 52–53.

50. Pamela Wilcox et al., *Busy Places and Broken Windows? Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 SOC. Q. 185, 185, 198 (2004).

51. Sampson & Raudenbush, *supra* note 27, at 610 (internal quotation marks omitted).

residents to determine who “belongs” in a neighborhood.⁵²

I must admit that when I read these studies, I was crushed. I had always strongly endorsed Jacobs’s arguments—and now I was faced with evidence that they were intuitively appealing but empirically unsustainable. Perhaps, I wondered, my student was right? Urban leaders *are* coming to demand more disorder, and less, in our cities? Perhaps zoning has it right, and busyness is bad? Upon reflection, I have come—again—to believe that these studies may only tell part of the story. That is not to say that proponents of the legal reforms necessary to enable mixed-land-use urban neighborhoods to exist and flourish do not need to come to terms with these studies. We must. But, that said, these studies—at least in my view—raise as many questions as they answer.

First, while the literature linking commercial land uses to crime and disorder could be interpreted to suggest that economic activity should be minimized in the poorest urban neighborhoods, in most poor neighborhoods, the problem is not too much commerce but too little. Ask yourself whether, in a community where the prevailing land use is vacant and abandoned buildings, residents would prefer the *status quo* to more commerce? The answer seems clear. Not only could economic activity help address the crisis of unemployment and concentrated poverty facing many poor neighborhoods—both of which have their own troubling social-influence effects—but filling vacant store fronts would directly diminish crime and disorder by leaving fewer places for criminals to hang out.⁵³ In fact, one study found that nonresidential land uses were detrimental in relatively stable neighborhoods but *beneficial* in unstable ones. In other words, nonresidential land uses appeared to increase crime and disorder in relatively stable middle-class communities and to decrease crime and disorder in relatively poor ones.⁵⁴

Second, I am going to go out on a limb and suggest that the link between busyness and increased crime is not always a bad thing. To understand why, consider this: What if busy streets make people feel

52. The empirical literature testing the link between land use patterns, crime, and disorder is summarized in GARNETT, *supra* note 8, ch. 4, at 77–100.

53. See Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 ILL. L. REV. 1061; see also John Accordini & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301, 303 (2000) (“Crooks, killers, and losers tend to infest areas with dead buildings, like maggots on a carcass.”) (internal quotation marks omitted).

54. Wilcox et al., *supra* note 50, at 200.

safer even if they are not? What if the presence of *eyes upon the street* entices residents to come out from behind their locked doors and mingle in public spaces? It is possible that crime will increase—at least temporarily—because the number of potential victims present in public spaces will increase. But, to return to my previous discussion, the law ought to care about more than crime levels. If it did not, we would favor round-the-clock curfews. Consider a tort-law analogy. As Guido Calabresi helpfully elucidated in *The Costs of Accidents*, the total cost of accidents includes both the costs resulting from accidents and the costs of measures taking to deter or prevent them: “I take it as axiomatic,” Calabresi argued, “that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”⁵⁵ Similarly, the law arguably should seek not simply to minimize crime, but to minimize the costs of crime, the fear of crime, and crime-avoidance costs. If busyness reduces the fear of crime and crime-avoidance costs, then the *cost* of mixed-use neighborhoods might well be lower than the cost of single-use ones—even if crime rates stay the same or even increase. And, over time, incentivizing people to leave their homes may well affect a transfer of “title,” so to speak, of our public spaces to law abiding citizens.

Third, busyness can help cities compete with suburbs for residents and businesses. There is a principle of international trade economics known as *comparative advantage*. And the principle of comparative advantage suggests that international trading partners ought to focus on doing the things that they are *least bad* at doing. Now, it is fairly obvious that even when cities are bad at being cities—and there are, we must acknowledge, bad cities—they are probably better at being cities than being suburbs.⁵⁶ There is some empirical support for my hunch here. During the last few decades, many center cities gained population after years of decline. And, while the reasons for the “urban rebound” are contested and somewhat opaque, the best explanatory summary of the trends favoring urban development (at least in my opinion) comes from economists Edward Glaeser and Joshua Gottlieb. Glaeser and

55. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970).

56. This is true even if suburbs come to offer mixed-use urban environments that are, in some senses, superior to older urban neighborhoods. (For example, a “new urbanist” planned unit development in a suburb might well offer better public schools and newer low-maintenance buildings than a traditional urban community.) See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 45–46 (2004).

Gottlieb attribute the urban rebound to two phenomena—*first*, declining crime rates and a renewed emphasis by urban police forces on the quality of life in urban communities and *second*, an increasing demand among elites for the social, economic amenities fostered by dense, mixed-use urban neighborhoods.⁵⁷ Glaeser and Gottlieb point out that you cannot have one without the other—elite tastes for city life were fueled by the fact that an increased focus on city safety enabled more people to take advantage of city life.⁵⁸

Now, the current economic downturn has cast a cloud of doubt on the future of our cities; city redevelopment efforts have screeched to a halt, and many city neighborhoods—especially poor minority neighborhoods—have been devastated by foreclosures. But I was heartened when, a few weeks ago as I was preparing to teach my urban-development seminar, I came across a surprising article in the *Wall Street Journal*. I was *looking* for articles suggesting that the Great Recession has cast a cloud of doubt on urban development prospects. But the first article that I found suggested the opposite: *Cities Grow at Suburbs Expense During Recession*.⁵⁹ And the reasons why were in keeping with land use strategies that promote city busyness: Increasingly, people with means are choosing to live in cities because they *like* living in cities—that is, they (as Glaeser and Gottlieb suggest) like the vitality that dense, mixed-use urban environments foster.⁶⁰

III. SACREDNESS

Now I have covered safety (and policing policy) and vitality (and land use policy). But I would like to close with Kotkin's third criterion. Cities, he said, must be safe, and they must be busy, but they also must be *sacred*. But what does it mean to say that a city is sacred? The question was an easy enough one to answer in ancient times when cities were the centers of religious (as well as cultural and economic) life. But cities—at least in the Western world—no longer serve a religious function. So what can be said about the “sacredness” of cities in a

57. Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1276, 1288 (2006).

58. *Id.* at 1288.

59. Conor Dougherty, *Cities Grow at Suburbs Expense During Recession*, WALL ST. J., July 1, 2009, at A5.

60. *Id.*

postmodern, secular age?

The “new urbanists,” who promote the implementation of Jane Jacobs’s ideas about the superiority of mixed-land-use neighborhoods in planning policy, argue that “sacredness” is captured in good (that is, traditional) urban design and the social capital that it fosters. For example, my colleague Phil Bess from Notre Dame’s School of Architecture has argued that mixed-use neighborhoods are required by the natural law, and he even entitled his book on new urbanism, *Till We Have Built Jerusalem: Architecture, Urbanism, and the Sacred*.⁶¹ New urbanists like Bess argue that cities can effectively mandate “sacredness” by substituting urban design guidelines for zoning rules and promoting the mixing of land uses and a traditional urban aesthetic. I must admit that I am drawn to the new-urbanist aesthetic and their argument that traditional neighborhoods foster social capital by, *qua* Jacobs, drawing together diverse strangers. That said, I worry more than a little bit about the costs associated with implementing their regulatory model. And, while Jane Jacobs’s arguments about the social-capital-production function of mixed-land-use neighborhoods are appealing, the available evidence suggests that social capital runs deeper in the suburbs than in cities⁶²—perhaps because the bonds of like individuals are deeper than the bridges between diverse strangers or perhaps because urban residents do not stick around long enough to bond with their neighbors. In fact, there is evidence—depressing in my view—that diversity reduces, rather than fosters, social capital.⁶³

And, perhaps most importantly, while I am not a scholar of the natural law, I also think that sacredness has to be about more than the way our cities look. It must be deeper—not about how our cities look, but about *what they are*. Cities, to be sacred, must be *real*. They must be the kinds of places that *real* people live real lives and raise *real* families. They must be more than playgrounds for wealthy elites—consumer and cultural Disneylands. So I worry that H.G. Wells’s prediction of a century ago may be coming to pass: “cities may now be morphing . . . from commanding centers of economic life toward a more

61. PHILIP BESS, *TILL WE HAVE BUILT JERUSALEM: ARCHITECTURE, URBANISM, AND THE SACRED* (2006).

62. See Glaeser & Gottlieb, *supra* note 57, at 1293–97.

63. See Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007).

ephemeral role as a 'bazaar, a great gallery of shops and places of concourse and rendezvous.'"⁶⁴ Some cities today are prone to taking short cuts by engaging what Kotkin has called the "cool city strategy"⁶⁵—that is, trying to succeed by simply being hip, using mixed-land-use neighborhoods and new urbanist aesthetics (augmented by order-maintenance policies) to attract young, unattached yuppies. (Michigan Governor Jennifer Granholm has even launched a "Cool Cities" initiative.⁶⁶)

The cool city strategy draws intellectual heft from Richard Florida's influential 2002 book, *The Rise of the Creative Class*.⁶⁷ Florida argued that in order to thrive, modern cities must attract "the creative class"—the young and well educated, artists, high-tech professionals, gays and lesbians. Cities, according to Florida, "have become the prime location for the creative lifestyle and the new amenities that go with it."⁶⁸ And, importantly, cities are benefiting from the energy provided by creative young professionals, who stay single longer than in previous generations and prefer to live in diverse, urban neighborhoods. The cool cities strategy has a number of limitations, not least of which is the unfortunate reality that even the cool kids grow up and, when they do, many of them move to the suburbs. The fact remains that most young professionals, even hip ones, do not remain unattached and childless forever. When their life circumstances change, they face the same pressures and demands that all parents face—the need for more space, a yard, and good public schools. And these pressures inevitably lead many of them to move to the suburbs. Creativity may be a key to modern economic success, but as Kotkin quipped, "[i]t turns out that many of the most prized members of the 'creative class' are not 25-year-old hip cools, but fortysomething adults who, particularly if they have children, end up gravitating to the suburbs and more economically dynamic cities like Phoenix, Boise, Charlotte or Orlando."⁶⁹

64. KOTKIN, *supra* note 9, at 151 (quoting H.G. WELLS, ANTICIPATIONS OF THE REACTION OF MECHANICAL AND SCIENTIFIC PROGRESS UPON HUMAN LIFE AND THOUGHT 32 (1902)).

65. Joel Kotkin, *Uncool Cities*, PROSPECT (Oct. 22, 2005), <http://www.prospectmagazine.co.uk/2005/10/uncoolcities/> (internal quotation marks omitted).

66. To learn more about the "Cool Cities" initiative, visit COOLCITIES, <http://www.coolcities.com/main.html> (last visited Dec. 28, 2010).

67. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (2002).

68. *Id.* at 287.

69. Kotkin, *supra* note 65.

I have doubts about whether this revolving cool kids' door is, ultimately, sufficient to sustain urban life in the long run. Remember, for example, that social science research consistently links neighborhood social capital and collective efficacy with residential tenure and homeownership. This connection is, of course, easily explained. Not only do homeowners have economic incentives to organize to address neighborhood problems, but social integration into a neighborhood naturally increases over time, providing opportunities to build trust relationships. And, of course, all parents know that sharing the joys and burdens of childrearing with friends and neighbors also builds and sustains lasting relationships. Both of these realities suggest that the most successful, safest city neighborhoods ultimately will be the kinds of places where people choose to make their lives long term—to live, work, and raise families. In the end, I think that Kotkin is right. Cities must be safe and busy, but they also must be real—sacred—places. If so, restoring the connections between land use and policing—between safety and vitality—are necessary, but not sufficient, steps toward restoring long-term urban health.

CONCLUSION

And so, I end with a plea to urban officials eager to promote urban vitality: Recognize the connections between two of your three most important functions—land use and policing. But remember also that is not enough to draw cool and creative young people to your neighborhoods. It also is necessary to keep them there when reality hits—and, for most parents, reality hits when they consider (and reject) the urban educational options available for their children. Unfortunately, my time does not permit me to set forth a grand plan for improving the educational options available to urban residents—although I strongly endorse policies, including school choice and charter schools, that promise to increase educational diversity in our cities. As I tell my students in local government law, local governments are entrusted with three critical legal policy functions—policing, land use regulation, and education. And, in the end, all three are needed to ensure a sacred, safe, and busy future for our cities.

