

*Recent liberal political theory – and political philosophy generally – has had little to say about the criminal justice system, focusing instead on concerns of pluralism and social welfare. But I argue in this article that ‘order’ is a necessary precondition for any flourishing society, including a liberal one, and that the criminal justice system can be part of securing that order. Borrowing from Paul Weithman, I identify two types of order: ‘imposed order,’ which seems to be especially the province of the criminal justice system (that is, police and punishment) and ‘inherent order,’ which is the kind of order a society has when its principles win support over time from its adherents. Although I concede that inherent order is obviously more desirable, some kind of imposed order may be necessary as a precondition for that inherent order. In particular, the kind of pluralism and social welfare that liberal societies value may not be possible, let alone succeed, without a basis in imposed order.*

*Keywords:* criminal justice, liberalism, order, policing, political theory

## I Introduction

On election day, 8 November 2017, the city of St Louis, Missouri, voted on ballot ‘Proposition P,’ which asked voters whether the city should increase the sales tax to fund a raise for police and firefighters.<sup>1</sup> The time and place of the ballot proposition made it much more than just a financial issue.<sup>2</sup> In nearby Ferguson, Missouri, Michael Brown had been shot and killed by a police officer in 2014, and the protests that roiled Ferguson and beyond for several months and the heavy-handed law enforcement response to those protests were still fresh in people’s minds. Even more recently, a trial judge had acquitted St Louis City police officer Jason Stockley, who was charged with murdering

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1 ‘Editorial: Prop P Is the Best Way to Stop Abuses and Improve Police Performance,’ *St Louis Post Dispatch* (17 October 2017), online: <[www.sltoday.com/opinion/editorial/editorial-prop-p-is-the-best-way-to-stop-abuses/article\\_66c6e862-cb35-5f99-828a-b452e268623b.html](http://www.sltoday.com/opinion/editorial/editorial-prop-p-is-the-best-way-to-stop-abuses/article_66c6e862-cb35-5f99-828a-b452e268623b.html)>. The text of Proposition P can be found online: YES on Proposition P <[www.yesonpropp.com/wp-content/uploads/2017/02/Ordinance-25678.pdf](http://www.yesonpropp.com/wp-content/uploads/2017/02/Ordinance-25678.pdf)>.

2 For an overview of policing issues in St Louis before the vote, see Ryan J Reilly & Rebecca Rivas, ‘In St Louis, The Politics of Police Reform Are Tougher Than Ever,’ *Huffington Post* (4 June 2018), online: <[www.huffingtonpost.com/entry/ferguson-st-louis-police-reform\\_us\\_59a722b8e4b07e81d354e8ca](http://www.huffingtonpost.com/entry/ferguson-st-louis-police-reform_us_59a722b8e4b07e81d354e8ca)> [Reilly & Rivas, ‘In St Louis’].

LaMar Anthony Smith, after Smith had led Stockley on a high-speed car chase.<sup>3</sup> Protesters came out again – and were again met by a massive show of police force.<sup>4</sup> To be sure, some voters saw Proposition P as a routine question about officer compensation, but certainly not all voters saw it that way, not even most. No, Proposition P was invariably and inevitably also cast as a referendum on the police and policing.<sup>5</sup> Did the police deserve a raise, given all that had happened recently?<sup>6</sup> Or did the police need to be 'sen[t] a message'?<sup>7</sup> In the United States, such questions and concerns have been raised with increasing frequency and intensity.<sup>8</sup>

It was something of a surprise, then, when the measure passed with nearly 60 percent of the vote.<sup>9</sup> In the end, it was not really that close. What was more surprising was that support for Proposition P seemed to cross race and class lines. It received support from both majority white and majority black wards in the city and also from the poorer wards (although low turnout in many of these wards could mean the results were not especially representative).<sup>10</sup>

3 'Editorial: 'Vote No on Prop P,' *St Louis American* (2 November 2018) ['Editorial'] (tying Proposition P to police response to protests after the Stockley verdict).

4 Mitch Smith, Julie Bosman & Richard A Oppel Jr, 'Protesters Descend on St Louis and Police Respond, 'We're in Control',' *New York Times* (18 September 2017), online: <[www.nytimes.com/2017/09/18/us/st-louis-police-tactics.html](http://www.nytimes.com/2017/09/18/us/st-louis-police-tactics.html)>.

5 Sarah Fenske, 'Prop P Won Big Margins in Deep South City – and Solid Support in the North,' *Riverfront Times* (8 November 2017), online: <[www.riverfronttimes.com/newsblog/2017/11/08/prop-p-drew-big-margins-in-deep-south-city-and-solid-support-in-the-north](http://www.riverfronttimes.com/newsblog/2017/11/08/prop-p-drew-big-margins-in-deep-south-city-and-solid-support-in-the-north)> [Fenske, 'Prop P Won Big Margins'] ('[o]pponents had sought to position the sales tax increase, which will fund salary increases for police and fire, as a referendum on the St. Louis Metropolitan Police Department').

6 See e.g. Tom Prost, 'Just Vote No on Proposition P,' *St Louis Post-Dispatch* (4 November 2017), online: <[www.stltoday.com/opinion/columnists/just-vote-no-on-proposition-p/article\\_38f8f9f2-9af1-5a36-871c-8fe74b07c52f.html](http://www.stltoday.com/opinion/columnists/just-vote-no-on-proposition-p/article_38f8f9f2-9af1-5a36-871c-8fe74b07c52f.html)> [Prost, 'Just Vote No'] ('[a]n institution that has disappointed us time and time again can't simply be rewarded'). See also 'Vote Hell-2-the-NO on Prop P' (19 October 2017), online: Organization for Black Struggle <[www.obs-stl.org/vote-hell-2-the-no-on-prop-p/](http://www.obs-stl.org/vote-hell-2-the-no-on-prop-p/)> ['Vote Hell-2-the-NO'] ('the same police who are beating up people exercising their First Amendment rights of freedom to peaceably assemble ... the same police who have been walking scot free after murdering countless residents for decades – they want a raise?').

7 'Vote Hell-2-the-NO,' supra note 6 ('[s]end a message to the [St. Louis Metropolitan Police Department] that we are disappointed in the level of protection and service we are receiving from them').

8 This article has the United States as its focus, but I mean to highlight an ongoing tension between the values of crime control and social justice. For a similar framing of the problem in a Canadian context, see Peter Sloly, 'There Is a Problem with Our Policing,' *Globe and Mail* (23 July 2016).

9 Sarah Fenske, 'Prop P Wins Approval, Giving St Louis City Police a Raise,' *Riverfront Times* (7 November 2017) ('[t]he proposition cruised to victory with 59.7 percent of voters saying yes, according to final but unofficial results released by the city's board of election commissioners just before 10 p.m.').

10 Fenske, 'Prop P Won Big Margins,' supra note 5 ('[b]ut last night's final, unofficial election results show that Prop P found a plurality of voters in every single north city ward – the parts of St Louis that are home to majority black and, often, impoverished voters').

Those who backed Proposition P were quick to interpret the results as showing that citizens were by and large backing the police, even despite the controversies of the last few months and years.<sup>11</sup> Crime was indeed a growing problem across St Louis, supporters of ‘Prop P’ argued, and citizens needed the order that the police provided – perhaps warts and all.<sup>12</sup> But those opposed to the proposition were also quick to supply their critique of the ballot results. They conceded the need to protect the safety of citizens and to preserve order, but there were other ways of doing that besides just giving more money to the police.<sup>13</sup> ‘Order’ could and should be understood more holistically, they said, as including giving citizens educational and employment opportunities and providing mental health and drug treatment services to those who needed them.<sup>14</sup> Reducing crime was not just about throwing more police at the problem or ‘arresting our way out.’<sup>15</sup> In fact, police in their own way, by their heavy-handed tactics, were adding to the disorder that communities were suffering.

Both sides of this debate about the ‘need for order’ are right about the need for, and nature of, order, and I am going to explore how this is so. Crucial to this project will be understanding how order can be read along at least two different dimensions, what I will call in this article ‘imposed’ order and ‘inherent’ order.<sup>16</sup> I am going to equate imposed order with the order that is the business of the criminal justice system to supply – from criminalization to punishment. This is the order that is perhaps paradigmatically the job of the police to enforce, where the police are the agency, to use Egon Bittner’s useful formulation, that exists to ‘coerce a provisional solution upon emergent problems without having

11 Celeste Bott, ‘Police and Firefighters Will See Raises after St Louis Voters Approve Proposition P,’ *St Louis Post-Dispatch* (8 November 2017), online: <[www.stltoday.com/news/local/crime-and-courts/police-and-firefighters-will-see-raises-after-st-louis-voters/article\\_e1381ee1-bd62-5bff-aec2-1ba429d4ba13.html](http://www.stltoday.com/news/local/crime-and-courts/police-and-firefighters-will-see-raises-after-st-louis-voters/article_e1381ee1-bd62-5bff-aec2-1ba429d4ba13.html)> (police union statement that results were ‘crystal clear[:] Residents support the police!’).

12 For one representative’s views along these lines, see ‘Proposition P, What, Why, & Why It Matters,’ *Ward24stl.org* (1 November 2017) (arguing that St Louis has ‘way too much crime’ and lower pay for police officers will lead to attrition and difficulties recruiting officers).

13 One opponent of Proposition P, Alderwoman Megan Green, proposed a bill that would fund a raise in police salaries but would also dedicate money to social services to get at the ‘root causes of crime.’ See Reilly & Rivas, ‘In St Louis,’ supra note 2.

14 ‘Vote Hell-2-the-No,’ supra note 6 (‘[w]hat we want is a new vision of public safety that makes thriving communities the priority’).

15 See e.g. Prost, ‘Just Vote No,’ supra note 6 (‘[i]t is imperative that we move away from the arrest-and-incarcerate model of public safety’).

16 I borrow these terms from Paul Weithman, *Why Political Liberalism? On John Rawls’s Political Turn* (Oxford: Oxford University Press, 2010) [Weithman, *Why Political Liberalism*]. Weithman is interpreting concepts in Rawls’s two books: *A Theory of Justice* and *Political Liberalism*. John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972) [Rawls, *Theory of Justice*]; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) [Rawls, *Political Liberalism*]. For a discussion of Rawls and criminal punishment, see Chad Flanders, ‘Criminals behind the Veil: Political Philosophy and Punishment’ (2016) 31 *BYUJ Pub L* 83 [Flanders, ‘Criminals behind the Veil’].

to brook or defer to opposition of any kind.<sup>17</sup> Police are on the front lines of getting people to behave in an orderly way by the use of force and violence, if necessary.<sup>18</sup> With inherent order, however, we are getting closer to what John Rawls was mainly concerned with in his own liberal theory. What kind of society will get people to want to live by its principles, Rawls asked in *A Theory of Justice*, so that the principles do not have to be imposed but will 'generate [their] own support'?<sup>19</sup> When we have plenty of inherent order, we do not really need the police because people see themselves in the rules and identify with them or at least see the rules as reasonable. People will not need the added incentive of threatened or actual police violence and jail time for them to comply with the law. They will just comply because they want to obey the law or feel they should. They will act not out of fear of punishment but, rather, out of a sense of justice.<sup>20</sup>

Part II of my article spells out the indispensability of imposed order. Societies – real ones, not ideal ones – will have people who commit crimes and who by committing those crimes interrupt the ability of others to plan and control their lives. Violence takes a real toll on societies. We can see this perhaps most clearly in the international context, although the lessons can be learned closer to home. We cannot have development without order, and order means first and foremost the kind of order that the criminal justice system exists to preserve and, when necessary, to impose on people. Indeed, we cannot have the possibility of inherent order if we do not have some pre-existing order, usually of an imposed kind. But, at the same time, a 'bad' imposed order – the order that a colonizer might put on colonized people – is its own kind of disorder. Policing can be unfair and unjust. And so people will (sometimes rightly) recoil from calling the police. They will also resist when faced with bad policing. This means not only that the possibility of inherent order goes down, but also that imposed order will not work: people will not obey laws they do not see as legitimate. The worst of both worlds is when the imposed order itself works against the development and growth of inherent order – when force yields resistance, rather than compliance. Part III tries to draw this point out, by showing that you cannot have a decent imposed order unless you have some inherent order. This is why both sides of the Proposition P debate were right. Both inherent and imposed order are necessary, and, more deeply, both kinds of order need each other to work.

17 Egon Bittner, 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police' in Herbert Jacob, ed, *The Potential for Reform of Criminal Justice* (Beverly Hills, CA: Sage Publications, 1974) 17 at 18 [Bittner, 'Florence Nightingale']. I am using Bittner's definition here as a normative one, not as a descriptive one.

18 See Rachel A Harmon, 'When Is Police Violence Justified?' (2008) 102 Nw UL Rev 1119 at 1122 [Harmon, 'When Is Police Violence'] (describing policing as a 'distinctive state enterprise arising out of the state's responsibility to protect freedom by creating order').

19 Rawls, *Theory of Justice*, supra note 16 at 138, 261.

20 See the summary in John Thrasher & Kevin Vallier, 'The Fragility of Consensus: Public Reason, Diversity and Stability' (2013) 23 Eur J Philosophy 933 at 939 ('[a] conception of justice is stable for the right reasons when citizens comply with principles of justice for moral reasons and out of moral motives, not merely from accidental or pragmatic considerations').

Part IV of my article both tries to incorporate the ideas of imposed and inherent order into a liberal theoretical framework and to describe how imposed and inherent order might be reconciled in a liberal society. Liberal societies need imposed order because all societies need imposed order. They cannot do without it; they cannot exist without it – not in the beginning and not if they want to endure for any amount of time. But liberal societies will worry especially about imposed order because they will want to ensure that any imposed order is legitimately imposed and not just the result of brute force. Any coercion in a liberal society has to be justified, even coercion that is the necessary condition for a society to function. We might even think that the criminal law is never legitimate given liberalism's emphasis on consent, so that when the state comes after you we resort back to the state of nature. But I believe this idea is mistaken. In fact, there are actual methods of enforcing the criminal law that show how the state's policing and punishing power can be legitimate given liberal principles and justifiable to those who are the objects of the state's violence.

## II *The need for imposed order*

To begin our discussion of order, we need a working definition of what order is so that we can make sense of the difference between order that is imposed and order that is inherent. But what is order generally or, more expansively, what goes on in an ordered society? Here, I am simply going to equate 'order' with law-abidingness. An ordered society is one where most people obey most laws most of the time. Obviously, this definition could be more nuanced. What number of people have to be law-abiding? Which laws are the most important for most citizens to follow all of the time or nearly all of the time? What level of lawbreaking can a society tolerate and still be law-abiding and 'orderly'? By leaving my definition vague, I hope it is still clear that I am not meaning to side with the values or the definition of order implicit in so-called 'order maintenance' policing.<sup>21</sup> Such policing – at least to a first approximation – values coming down hard on any low-level criminal violations (vandalism, not paying a subway fare) as a means of upholding societal 'order.' I do not mean order in this sense, nor do I mean to endorse any particular mode or style of policing. But beyond a general tendency of most of society to obey the law, I am not going to go much further in saying what the content of 'order' is.

That is because I am more interested here in how that order (or that 'orderliness') comes about. And, here, I have already introduced two ways that it can: a general tendency of law-abidingness can be imposed on a society or it can be inherent in a society. By 'imposed' order, I mean that kind of order that societies impose on people by the use of force or by the threat of force. In the context of this article, I will be using imposed order mostly to refer to the workings of the criminal justice system – from the existence of a criminal code, to the use of police to enforce that code, and to the various modes of 'harsh treatment' that are

21 See George Kelling & James Q Wilson, 'Broken Windows,' *The Atlantic* (March 1982).

used as punishment for violations of that code. Practically speaking, we can see these as ways of making you comply by either using coercive power or threatening coercive power. Policing just means imposing order on a disorderly situation by forcing people to obey. That is why it is hard to improve on the somewhat vague, but nonetheless useful, definition of policing given by Bittner: '[P]olice work consists of coping with problems in which force may have to be used.'<sup>22</sup> At the extreme, policing leads to a kind of forced compliance, the kind of forced compliance where the state keeps you in a box (that is, a cell) so that your freedom of movement is restricted and you have no choice but to comply with the law.

But we can say something more general about imposed order, and I borrow here from Paul Weithman's discussion of it in his recent book on Rawls.<sup>23</sup> The idea of imposed order comes in two main varieties: the threat of force and the actual imposition of force. For one way that order can be imposed is by threatening force if you do not comply. The threat of force gives you a reason – a very compelling reason – to obey the law in addition to the reasons and motivations you may already have. Imposed order, when it works, ensures that the balance of most people's set of reasons tips decisively in favour of law-abidingness. There are various reasons why such a society that relies too much on imposing order might not be very good, and we may have worries (as Rawls did) that a society that only or even a lot of the time relies on imposed order may not last very long, but I will get to those worries later. The point now is that imposed order can be 'imposed' not by the actual use of force but, rather, by credible threats that force will be used. You are complying because of the force that hangs over your head, not necessarily because you had a predisposition to obey or that law obedience was consistent (if not identical) to the interests that you have.

When this threat of force fails, however, order will be imposed on you. There is a bit of a paradox here because, when you break the law, we may think that imposed order has failed. We are left picking up the pieces. But this is too narrow of an understanding of the idea of imposed order. Imposed order is the threat of force and the use of force to both sanction lawbreaking and also to try to stop future lawbreaking. There is a continuum here. Police can constrain you before you break the law but are close enough to breaking it that they are justified in acting; consider the use of police to stop a criminal attempt or a criminal conspiracy (so-called 'inchoate' crimes). You have already demonstrated your willingness to break the law by attempting to do so or conspiring to do so and are about to break it; police enter in to make sure this does not happen. Police also come after the crime has been committed, of course. They can stop what may be part of an ongoing criminal activity – flight from a crime or the destruction of evidence. They may miss imposing one form of order (the bank has already been robbed), so they are too late to prevent the disorder from occurring, but they can stop you from getting away with it and try to make you make amends (return the money)

22 Bittner, *Aspects of Police Work* (Boston: Northeastern Press, 1990) at 256. See also Harmon, 'When Is Police Violence,' supra note 18 at 1152 (policing as involving 'commands – commands to submit, to appear, to cease, or to disperse').

23 Weithman, *Why Political Liberalism*, supra note 16.

and restore order to a previously disordered situation. Even though this is ‘too late,’ in one sense, it can have the function of assuring that lawbreaking does not pay, and the people who did it will now be restrained and themselves prevented from breaking the law again.

I do not think it should be too controversial that real societies – not societies of angels – need some institutions that impose order. In other words, they need a criminal justice system, loosely understood. We can see this perhaps more easily if we look at badly disordered societies around the world. In their important book, *The Locust Effect*, authors Gary Haugen and Victor Boutros show the devastation wrought on communities that have no effective system of criminal justice, where there is no policing, no investigation of crimes, no judicial system, no carrying out of punishments.<sup>24</sup> People are victimized and have no recourse, with the result that communities suffer – if they can even be called functioning ‘communities’ at all. Without any sense of consequence, people break the laws with impunity – again, if we can speak of law in those communities in any meaningful sense.

But what is just as important is what follows from this, according to Haugen and Boutros, which I think shows the indispensability of a criminal justice system. If you do not have a framework of criminal laws as well as a system of policing, investigation, trials, and punishments, nothing else that you want to happen in that society can get off the ground. All the development programs in the world, all the money in the world, cannot make a society that does not have a working criminal justice system into a functioning society, and without imposed order, a barely functioning society cannot hope to improve. As they write in a key passage in the opening of their book, after reflecting on the still recent, horrible violence in Rwanda:

None of the other things that people of good will had sought to share with these impoverished Rwandans over the years was going to matter if those good people could not stop the machetes from hacking them to death. Moreover, none of those good things (the food, the medicine, the education, the shelter, the fresh water, the micro-loan) was going to stop the hacking machetes. The locusts of predatory violence had descended – and they would lay waste to all that the vulnerable poor had otherwise struggled to scrape together to secure their lives.<sup>25</sup>

Haugen and Boutros’s book is a scathing indictment of development economists who urge increased funding for health care, education, and so on programs without focusing first on the need for imposed order in those societies. Without that framework of order, nothing else can work because nothing else will ever get a chance to work. In that very real sense, the need for criminal justice is primary because it is the prerequisite for anything else to be useful in that society. It also shows that criminal justice is something that is a unique need, that there is an indispensable place for its kind of imposed order, because it provides a kind of order that no amount of other good things can give you.

24 Gary A Haugen & Victor Boutros, *The Locust Effect: Why the End of Poverty Requires the End of Violence* (Oxford: Oxford University Press, 2014).

25 *Ibid* at x.

What I am about to say has to be qualified, but Haugen and Boutros's lesson is one we can also see locally, bearing always in mind the danger of comparing the plight of the global poor to the domestic, North American poor. There are many disanalogies of which we need to be aware. But take the study undertaken by Patrick Sharkey that considered education in an inner-city neighbourhood that was plagued by violence, discussed in his recent book *Uneasy Peace*.<sup>26</sup> Sharkey and his co-authors studied how students performed on a standardized test when there had been a recent, serious crime committed in the area – a shooting, for example. What he found stunned him. The effect of taking a test after a violent crime in your neighbourhood meant that you perform on that test the same as if you had missed several years of schooling. He did the test again and found an even worse effect.<sup>27</sup> The link between the trauma associated with violence and its effect on development seems almost unassailable. If you do not have that order, poor kids cannot learn, cannot focus, and cannot perform well in their classes and on their tests. Of course, it may be hard to separate the crime itself from what also follows from the crime – an increased police presence in the area, for instance, which can be (and is) stressful in its own right. But the primary blame for the stress must surely lie with the person(s) who did the act of violence, and that violence is an example of disorder. And disorder hits the poor hard, really hard. Better schools will not matter, or will not matter as much, if those schools are surrounded by violence and the trauma that violence brings to community – and that lack of education means it gets even harder for the poor to get out of poverty. What Haugen and Boutros saw in Rwanda plays out in miniature in all disordered societies: disorder prevents development.

It would be too quick to say that imposed order is the only thing that the communities that Sharkey studies need. They also need better schools, of course, and this is a key component of inherent order that I will get to in the next Part. But it is nonetheless the case that imposed order is something that they need. Imposed order is the answer when there is an immediate need to control the situation and you need someone just to coerce an answer for the problem, as again Bittner recognized, when that problem is a rash of violence or an increase in property crimes. It might be that better schools will reduce crime in the long run, but the problem is that there is a need for imposed order now, not only to prevent the crimes that could occur (that is, the immediate disorder of crime) but also to make it the case – as Haugen and Boutros show – that the development efforts that will lead to inherent order will have a chance to 'take.' When the poorer wards in St Louis voted for Proposition P, it may have been precisely out of this felt need that they could not wait for better jobs or better schools to come and provide different and superior options for those who might feel that they had no real option other than to engage in criminal activity. They needed more policing, and they needed it yesterday. Imposed order provides a way at least in the short term not to make other options available but, rather, to make the costs of

26 Peter Sharkey, *Uneasy Peace: The Great Crime Decline, the Renewal of City Life, and the Next War on Violence* (New York: WW Norton & Company, 2018).

27 Ibid at 85–6.



criminal activity higher, and if that does not work, then the police can make arrests and remove sources of disorder when the threat of force by itself fails. And when policing withdraws, or does not function in those societies, the poor can be the most vulnerable.

### III *The good of inherent order*

Part II gets at some real conceptual truths about the nature of imposed order (its primacy and indispensability) and also some practical realities about the need for such order, especially as shown by Haugen and Boutros in the context of development economics. But those truths, it might be objected, rely on an idealized version of the police function and the criminal justice system. A version which it is becoming increasingly clear is at odds with the actual lived experience of many people – and many in poor communities, where not just any policing but also good policing is most needed. In this Part, I articulate the idea of inherent order as a counterpoint to imposed order. I do this, initially, by pointing out some obvious problems in the current way ‘imposed order’ is imposed on communities in America, both in perception and in reality. From this, the idea of inherent order becomes much more attractive, and imposed order much more problematic.

Inherent order takes as its focus winning approval for the laws and rules of society – to gain voluntary compliance – and not forcing order on people. In the phrase of Weithman’s, which I will have occasion to analyse further, a regime has ‘inherent stability’ (or, as I will put it, ‘inherent order’) when it creates conditions that generate support for that order.<sup>28</sup> We might think that it is here in which inherent order is especially desirable as compared to imposed order because there seems to be almost the opposite effect when we try to impose order: imposed order may get you compliance for a time, but that compliance is only contingent, and it may foster resentment of the principles being imposed rather than approval for them. Imposed order becomes even more problematic when the ‘imposers’ themselves are badly flawed.

We can see this by again taking the police as the exemplars of ‘imposed order.’ For there is a lot of bad policing – and so a lot of bad imposed order. We only need to review example upon example of policing that was done at the very least extremely poorly and which led to the death of people in the communities that the police were ostensibly ‘protecting.’<sup>29</sup> We cannot just read about these, we can see them for ourselves from dashboard cameras and body cameras. Even in cases where the policing was arguably ‘lawful’ in a lot of cases (that is, did not result in criminal or civil liability), the policing was of poor quality, not meeting the standards we might expect of the police or even that the police might expect from themselves. And this matters because police are not only there to impose order but also to represent order. So in these cases, at the very least, police are

28 Weithman, *Why Political Liberalism*, supra note 16 at 45, 232.

29 See e.g. Aaron Morrison, ‘16 Recent Brutality Cases That Show How Often Officers Aren’t Held Accountable’ (15 September 2017), online: Mic.com <[mic.com/articles/184491/14-recent-police-brutality-cases-that-show-how-often-officers-arent-held-accountable#.wSj2iSKBc](https://mic.com/articles/184491/14-recent-police-brutality-cases-that-show-how-often-officers-arent-held-accountable#.wSj2iSKBc)>.

failing at being symbols of order. At worst, police become examples of the disorder they are supposed to be preventing. They are acting unlawfully. What is more, the creation of disorder inheres not only in the initial, unlawful act, but it is also extended, and even compounded, when the criminal justice system does not sanction bad police officers – when they are not even charged or when they are acquitted after being charged.

In fact, when the police themselves break the law in ways large and small, they work a triple damage on the good of order, broadly construed. There is, first, the harm done by their act of lawlessness or near lawlessness: the arbitrary stops and frisks, the harassment, the abuse, and the unjustified and unnecessary killings. These are themselves acts of disorder and disruption, just as any other crime is. But, second, there is the downstream effect of the fact that the police themselves – by and through the acts of individual officers – become less trustworthy, less reliable, in the eyes of the community. That affects their ability to actually help that community because the community will (understandably) no longer look to them to aid them when they themselves need force to be used in their favour, not in the immediate turn and not in the long term. They will not call the police when they themselves are the victims of crime (which may in turn lead them to take up self-help remedies, which can further disorder). And they will not aid detectives in trying to solve crimes. So the crime will go un-investigated, and unpunished, and the signal that crime does not pay will become weaker, and those communities again will suffer more of the disorder of ordinary criminal behaviour. Finally, and this leads me closer to the topic of this Part, when the police act in ways that are criminal, they will gradually lose their legitimacy in the eyes of the community. This means that even when they subsequently act to impose order in a way that really helps the community – supports the framework that allows communities to flourish – they will be resisted and seen as opponents of the very order they are trying to promote and preserve. Lawlessness by the police leads to non-compliance with the police, which leads to active resistance against the police.

In effect, the police will be seen as sort of an occupying force in these communities.<sup>30</sup> When the police themselves are able to break the law and are perceived as being able to do this with impunity (again, either by not being charged or by being acquitted of any charges), the imposed order brought by the police will be objected to not only by those who are subject to it immediately but also by everyone. But the police breaking the law is just the most visible and egregious way that this shift in perception happens. It also happens when the police legitimately enforce laws but do so in a biased and partial manner – when they only go after some subset of the community or only go after the violation of certain crimes. This may be behaviour that falls short of lawlessness – they really are stopping someone who they have probable cause to believe has committed a crime or the car really is violating a traffic law – but it can also render the police a sort of foreign and alienating presence. The police may be seen as interested

30 See 'Vote Hell-2-the-No,' supra note 6 ('[t]his same department would be rewarded for its entrenched, systemic, ingrained para-military anti-social policies that retard community development and serve as an occupying force terrorizing the have nots in our city').

in something else besides the order of the community (raising revenue, showing people who is ‘in charge’) even though a type of order is what they are imposing. For those who opposed Proposition P, it was this sense that the police were breaking the law, or, if not breaking the law, unfairly enforcing the law, that led them to conclude that the police did not deserve a raise. They needed to be held accountable. They were not policing for the community; they were policing against it – similar to the way that Haugen and Boutros describe elsewhere in their book a developing country’s police taking on the habits of the old colonial powers that used to rule it. Police were not there to protect the people.<sup>31</sup> They were to protect the colonizers from the people. A recent bestselling book on policing aptly describes the plight of those suffering from police abuse as that of a ‘colony in a nation.’<sup>32</sup>

Sometimes, opponents of Proposition P seemed to be against the idea of imposed order. But this is a false impression. What they wanted was accountable and legitimate policing (whether a raise would make this more or less likely – maybe a raise would encourage better police officers to join the force – is an empirical question).<sup>33</sup> But the opponents of Proposition P said that what was also lacking was any interest in the idea of inherent order, and there was clearly a preference for working on inherent order, first, before spending more on those flawed and corrupt agents of imposed order. We need to say more, though, about what inherent order amounts to.

Inherent order, and here I borrow from Paul Weithman, is the idea that the principles of justice should be ones that can win the allegiance of people over time. People obey the rules not because they have to but, rather, because they want to and because the rules are good.<sup>34</sup> If the rules are bad, or if they are enforced in an oppressive and unfair way, then people will not want to obey the rules, and they may feel themselves entirely justified in not obeying the rules. This idea should be understood broadly. If the rules of society lead to great wealth for some and poverty for others, then those who suffer from that poverty will not want to stick with those rules. But if the rules lead to a fair distribution of resources, then people will want to stick with those rules and support the society that has those rules. The rules, in the words of Rawls, will lead to conditions that ‘generate their own support.’<sup>35</sup> When a society has rules like this, people should want to support them, and they, by and large, will support them.

31 The opposite of this nightmare vision of the police is a vision of policing as a ‘public good,’ where citizens form attachments with the police, and the police provide a basis for community. See Ian Loder & Neil Walker, ‘Policing as a Public Good’ (2001) 5 *Theoretical Criminology* 9. I worry that this picture of policing might be too utopian, but a fuller consideration is outside the scope of this article.

32 Chris Hayes, *A Colony in a Nation* (New York: WW Norton & Company, 2017).

33 See ‘Editorial,’ supra note 3 (arguing that St Louis not only needs ‘better-paid police officers’ but also ‘more professional, better managed [and] more accountable police departments’); Tracy Meares, ‘Policing: a Public Good Gone Bad,’ *Boston Review* (1 August 2017).

34 I mean to leave the precise sense of ‘good’ a little ambiguous. I mean that they are good for people in a narrowly self-interested sense but also right (the rules seem to them just and fair).

35 Rawls, *Theory of Justice*, supra note 16 at 261.

Rawls had another phrase that is useful here, which is the 'strains of commitment.'<sup>36</sup> Rawls worried that some principles of justice would be just too much for people to bear – not that they could not contingently handle living in an unjust society, although this had to be at the back of his mind. It was that the principles would give rise to justifiable resentment on the part of citizens. Rawls's example was utilitarian principles of justice, where some citizens would be forced to bear burdens themselves for the sake of the happiness of others. A member of that society might reasonably object: 'Why should I have to suffer for the sake of the betterment of others, when there is nothing in it for me, and my suffering is because I happened to be born one person rather than another?' The commitment to the principles of justice might just be too much for her to reasonably bear. That is why, for Rawls, we had to make sure everyone had equal liberties and also that any material inequalities in society had to benefit the least well off – that way, people who had less would see the more other people had as being justified. Maybe having less than others is not great, but the societal order does not mean that they were given unequal shares for no good reason. People who see their order as legitimate, even if not the best, may be more willing to put up with having less.

When the opponents of Proposition P urged greater spending on educational programs, job training, and community development, they were urging precisely the conditions of this fair order – which made society a good deal for those living in it. That was the path to order because people who see society as benefiting them – not in the sense of enriching them but, again, as giving them a fair shot – are more likely to obey the rules. In the current system of imposed order, we have the worst of both worlds. We have unjust rules that are enforced unjustly. That is, we have a system where resources are not distributed fairly, where people do not (effectively) have equal liberties, where the rules arbitrarily burden some for the benefit of the others, and where those rules are themselves only selectively enforced and sometimes even broken by those who are tasked with ensuring compliance with them. This is a double failure of order, both on the levels of the principles themselves and on the level of enforcement. The rules by themselves are not ones that will foster adherence to them over time, and, moreover, the way that they are imposed on people also does not foster trust in those who are imposing them. We cannot justifiably expect people to adhere to principles that fail in both of these ways – the strains of commitment on them are too great. Why should I stick to principles that are both unjust and enforced in an unfair way?<sup>37</sup>

This allows us to more deeply explain an empirical fact that we mentioned above. If the police are not perceived as behaving fairly (they do not hold themselves to the same rules as others, they enforce the rules arbitrarily), then the police will have a hard time imposing order. For there to be policing that wins people's trust, it will have to be perceived as being legitimate. People will be less likely to obey and less likely to cooperate with the police.<sup>38</sup> Earlier, in Part II, we

36 Ibid.

37 Every member of society should ask this question, even those who benefit materially from the unjust social order.

38 A key theme in Jill Leovy, *Ghettoside: A True Story of Murder in America* (New York: Spiegel & Grau, 2015).

discussed that imposed order was necessary for inherent order. But now we can see that things run the other way around as well. We need some inherent order for there to be effective imposed order. If the rules are thought to be bad, and the police are the ones charged with imposing them on the ground, and they are also behaving badly, then we do not have the conditions where people will willingly comply with police rules and orders. Policing will be perceived as part of the problem, which is that of an unjust order, rather than as the conditions for a just order to exist. The communities that need good policing most will not be ones where that policing will be trusted, which dooms effective policing. It gets worse. The more this dynamic exists, the more police will be seen as simply the imposers of an unjust order – as an occupying force rather than as something that exists for the good of society, as protecting and benefiting that community. Things will spiral downward. Police may withdraw rather than engage, except when they absolutely have to, and when they have to, they will have to go in with force to get the compliance that they cannot get willingly. Citizens will resort to self-help rather than calling the police.<sup>39</sup> The result might be both more crime and more bad policing. If there is no inherent order, the police cannot function effectively because they will be seen as forces of disorder themselves. And the result is more disorder from lack of policing.<sup>40</sup> But, as we saw in the last Part, if there is no imposed order, then the conditions for inherent order will not be there. Both sides in the Proposition P debate were right.

#### IV *Reconciling imposed and inherent order*

The temptation is to say that this is not really a paradox even though it may have the air of paradox, precisely because both sides are right. In the language of the opponents of Proposition P, we need accountable policing, and we do need a just social order. This does not entail denying what those who supported Proposition P aver, which is that we also need to impose that order when force is the only thing that will do it. It is only that the order that we are imposing has to be legitimate and legitimately enforced. But this reconciliation, while promising, ignores social reality; it engages in too much idealization, although of a different sort than what Rawls engaged in when he assumed full compliance with the laws. It ignores transition costs. That is, it imagines that we can get at this just social order without any problem and that we can switch to good policing just like that. This blinkers reality. For the reality is that we will need to impose order even when our principles are less than just, even when we do not have much in the way of inherent order. And we will have imperfect police enforcing those less than perfectly just laws. Of course, we can train police better and make them more accountable. Still, this takes time, and what may take even more time is this policing regaining the trust that it has lost. Our question is not: do we need better

39 Adam Harris, 'When Calling the Police Is a Privilege,' *The Atlantic* (21 April 2018), online: <[www.theatlantic.com/politics/archive/2018/04/when-calling-the-police-is-a-privilege/558608/](http://www.theatlantic.com/politics/archive/2018/04/when-calling-the-police-is-a-privilege/558608/)>.

40 And perhaps also a rise in aggressive policing, as police see no other way than brute force to gain compliance.

police and more just laws? Of course we do, and we have a duty to work toward these things. Rather, the question is how should we think of the necessary and inevitable imposition of social order in the meantime?

In this Part, I am going to answer that question piecemeal, first by setting out what I take to be some general truths about order and about the imposition of order in less than just circumstances. For I take it that order is good for liberal societies and that order will need to be imposed in those societies, even when the principles underlying that order will be less than ideal, because there are real costs to disorder – the kinds of costs I canvassed in Part II. But we cannot ignore the fact that much in our current order is illegitimate, so we have to talk about the constraints on the imposition of order in less than just societies. I spell out two of those constraints. The first is that principles of legality must be observed. There has to be fair notice and also equal enforcement of the law. In cases where legality of these two types is not present, then things urgently need to change. At the same time, if legality is observed, then this justifies the imposition of order even in societies where there is not much in the way of 'inherent' order. But this gets me to my second constraint. I do think that there is a place for an expansion of excuses – or other means of non-enforcement – based on the fact that the underlying principles of society are themselves unjust. Some have called this the 'rotten social background' excuse, but I would rather phrase it in terms of the strains of commitment being too great, which also allows us to think more broadly than just the context of the recognized excuses (for example, duress, necessity). In other words, in some cases, it should be allowed that unjust social conditions should lead to non-enforcement of the law, a finding of no criminal liability, or at least a reduced or alternate sentence. I close my article by discussing some innovative crime fighting techniques that I think get the balance right between imposing order and making allowances for the lack of inherent order. I tie these reforms to general liberal political principles to show the connection between the abstract principles I lay out in this Part and concrete proposals for reforming policing and the criminal justice system.

#### A LIBERALISM AND THE PROBLEM OF STABILITY

The discussion of stability in Rawls has left a gap in the literature on liberalism, and this is a gap in discussing imposed order. There has been some work on liberal principles of punishment, but even this literature rarely engages liberal political principles, preferring instead to treat punishment as its own discrete topic, with its own standards of justification. Rawls is no exception to this,<sup>41</sup> and even Rawls's discussion of stability can seem almost unworldly, as his concern about instability comes not from the prospect of people hurting or killing one another but, especially in his later work, the problem of people disagreeing with one another reasonably. There are reasons for Rawls's idealization, and Rawls was certainly not required to talk about every problem in political philosophy. But Rawls's influence on the literature means that we do not have any sustained

41 See Flanders, 'Criminals behind the Veil,' *supra* note 16; Chad Flanders, *Political Philosophy and Punishment* [forthcoming].

liberal articulation, let alone liberal defence, of imposed order. We might conclude that, absent inherent order, all imposed order is unjustified. Rawls hints at the need for imposed order in *Theory of Justice*, but it is not clear in the well-ordered society that order would ever be actually imposed.

I take it that order – in the sense that I indicated earlier – is necessary for liberal societies, in part because it is necessary for all societies. People will break the law and take things from other people and hurt people, sometimes because social conditions are bad and sometimes just because people do bad things at times. Liberals should care about that because crime represents (phrase it how you want) a violation of people’s rights, a show of disrespect, or a forced transfer of wealth. I assume that the state bears some responsibility to prevent these things from happening and to make sure they do not happen again. Liberalism in most of its forms is not merely a theory of what the state cannot do but also involves the state regulating the private behaviour of others, including imposing measures so people do not hurt and steal from one another. Even those who oppose transfers of wealth will support the creation of police departments, which in their own fashion are a ‘positive’ right that the state guarantees to its citizens.<sup>42</sup> Liberalism has to set down rules and enforce them, again, because that is what you need for a society, but, more deeply, because of its own internal theoretical obligations, liberalism has to protect and defend its own citizens. And for the reasons we saw in Part II, if we are going to go after any more robust egalitarian liberal goals – the redistribution of wealth, health care, education, and so on – we will need, first, the presence of some sort of imposed order.

I have argued elsewhere that this preservation of basic order is probably as far as liberalism should go in terms of the goals of the criminal justice system.<sup>43</sup> Others have wanted to go further, to see liberalism as requiring that people be punished according to their desert – that this is an essential part of respecting people’s dignity or upholding their rights or expressing respect for them. I find that these ideals of punishment go too far and make liberalism illiberal. They rely – to borrow from Rawls in his later work – on premises that are controversial and can themselves be the object of reasonable disagreement and so would be improper as a basis for justifying punishment in a liberal regime. But I do not think the same can be said of the need for order, for public safety, and for the protection of people’s life, health, and property. We need only very thin (and widely shared) presuppositions to support this.<sup>44</sup> This focus of public safety also has the effect of collapsing different parts of the criminal justice system or, rather, connecting them. Police serve a function of preserving order, but so too does prison. They (police and prison) are just at different stages of the order-preserving role of the state. Police are there to act quickly in the face of emergencies and to prevent disorder from happening or to contain it when it does. Prisons exist to

42 See Cass Sunstein & Stephen Holmes, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: WW Norton, 1999) at 146–7.

43 See generally Chad Flanders, ‘Punishment, Liberalism, and Public Reason’ (2017) 36 Criminal Justice Ethics 61.

44 *Ibid.*

constrain those who have shown themselves to be dangerous and to make good on the threat that the criminal law makes when it promises consequences to disorderly behaviour. All of this is about public safety. It is not as if, at some point, we stop being worried about public safety and start worrying about desert or balancing benefits and burdens. Deserved punishment is obviously not the business of the police – nor (I think) should it be the business of prisons, at least if we are consistent in our liberalism and in a liberal understanding of order.

#### B CAN LIBERALISM JUSTIFY IMPOSING ORDER?

But from the fact that liberalism needs order, it does not automatically follow that it can justifiably impose it. And this is a problem. There may be a gap between what liberalism needs and what liberalism is justified in doing. This is especially problematic when the principles of the existing society are not yet fully just or if the police are bad. The need for order is still going to be there, but the content and the manner of imposing that order is going to raise some real problems. Rawls, in fact, imagines something like this when he discusses the problem of stability in *Political Liberalism*.<sup>45</sup> We may want a liberal society around some one comprehensive ideal – an ideal of liberalism, for example, where people see following principles of justice as part of their own good. But, in modern society, people tend to come to disagree about what is most important in life – what is most worth pursuing – so we may start off all agreeing that following justice is part of the life well lived, but we may all drift from that. So what do we do? Rawls says that, given the conditions of modern life, the only way we can ensure that people all agree on the same thing when it comes to the place of justice in one's life is if we use state power oppressively.<sup>46</sup> But this would be itself illiberal. Liberalism cannot force people to agree on what their life's goal should be, even if that life goal is a kind of liberalism. That leaves us with two options. Either we figure out another way to think about agreement on the liberal principles of justice or we give up on the pursuit of a just political order that does not involve the oppressive use of state power (which would mean giving up on liberalism). *Political Liberalism*, of course, is Rawls's attempt to do the former.

It is not hard to see the problem of justified coercion transposed into the criminal justice context, where the 'oppressive use of state power' is the coin of the realm. Could it be that policing and punishment are themselves illiberal? That goes too far. But we do have a problem about when a not fully liberal society pursues the good of order in ways that involve less-than-fully-just principles and less-than-fair police. What we need is principles of criminal justice that are legitimate and can be legitimately imposed even in less than perfect circumstances, something that would be a part of what Rawls calls 'non-ideal' theory. If we cannot have principles like this – if they are just impossible – then I strongly doubt that we can have a liberal theory of criminal justice or at least not one that has any practical relevance. Some scholars, notably Alice Ristroph and Raff Donelson, have argued that, in fact, in conditions like our own (and even in more idealized

45 Rawls, *Political Liberalism*, supra note 16.

46 Ibid at 37.



conditions<sup>47</sup>) the exercise of the power by the state to enforce the criminal law is in fact oppressive, and the victim of state power is entitled to resist.<sup>48</sup> Both Ristroph and Donelson are explicitly Hobbesian in their orientation and see the relationship of the state and the person who breaks (or is suspected of breaking) criminal laws as reverting back to a state of nature.<sup>49</sup> I take this position seriously. It seems reasonable to argue that, in a very unjust society, the proper response to the enforcement of any laws is not compliance but, rather, resistance. The injustice of the underlying laws and the harsh and arbitrary manner of enforcement pervades the whole encounter, and so the state in its own way acts as a criminal, and the citizen is entitled to defend him or herself against the (violent) use of force by the state.

If this is our conclusion, we are in a bad way as far as liberalism and the criminal law goes. But I think that there is a place for some non-ideal principles, so that even in an unjust society the criminal law can be legitimately enforced. These principles must at least involve the rather basic constraints of legality. First, there has to be in place a robust notion of fair notice. People have to know what the laws are that will be enforced against them. This is true for both minor laws and major laws, although I do think that for really bad crimes there will be stronger presumption that fair notice has been given – this roughly tracks the *malum in se* / *malum prohibitum* distinction.<sup>50</sup> You should know that killing someone or destroying their property is something that other people and the criminal law (and, especially, the police) will pay attention to and take seriously. Not coincidentally, these are the kinds of crimes that cause the most disorder in society<sup>51</sup> and which it is necessary for the police to stop both because of the immediate harm they cause and because of the need to stop that harm and send a message to those who would do further harm of a similar kind. It is therefore these crimes that the state seems most justified in stepping in to enforce because of the presumption of notice as well as the damage they cause. But there is a further legality constraint, which is that the state must enforce laws equally. I think especially minor laws lose their legitimacy when they are enforced unequally, and this may give some a claim to void enforcement of those laws based on the discriminatory way that they are imposed by the police. It gets harder to make this claim when serious crimes are at issue: that police are enforcing laws against murder in a discriminatory way

47 Ristroph sees in Hobbes a generalized right to resist state punishment. Alice Ristroph, 'Respect and Resistance in Punishment Theory' (2017) 97 Cal L Rev 601 [Ristroph, 'Respect and Resistance'].

48 Raff Donelson, 'Blacks, Cops, and the State of Nature' (2017) 5 Ohio St J Crim L 183 [Donelson, 'Blacks, Cops'].

49 Ristroph puts this point most explicitly: 'Punishment, on Hobbes's account, is never actually authorized by every single subject – it is never authorized by the individual who suffers it. For that individual, punishment is the rule of the stronger[.]' Ristroph, 'Respect and Resistance,' supra note 47 at 632; Donelson, 'Blacks, Cops,' supra note 48 at 184.

50 See Tommie Shelby, 'Justice, Deviance and the Dark Ghetto' (2007) 35 Philosophy & Public Affairs 127. Shelby's wise article is relevant to the entire discussion in this Part.

51 But we should be wary of minimizing the disorder that corporate crimes (pollution, tax evasion) can cause. See Alex S Vitale, *The End of Policing* (London: Verso, 2017).

should not lead courts to void a murder conviction. At the same time, the fact that minor and silly laws are enforced equally may give those laws the benefit of the doubt. So long as everyone is suffering in the same pointless way, the police can keep on enforcing the law (this does not mean, of course, that the law should not change and may face other kinds of challenges).

Do these two principles of legality remove all problems of justified policing? Of course not. But they may be enough to show that some policing even in unjust ways can be permissible in a liberal society. The good of order is good enough that I think it has to be possible to impose that good even in non-ideal conditions, supposing that some legality constraints are observed. One way of testing this conclusion is to ask whether we could justify policing and punishment to the object of those practices – the suspect, the accused, the convicted, and the punished.<sup>52</sup> With an obviously unjust law or a clearly discriminatory enforcement of a minor law, this becomes hard to do. But suppose we have a police officer who stops an abusive husband from further beating his wife. Could the officer not say to the abuser: 'Look. I know we don't enforce all the laws, and I know that social conditions are great for you now. But your wife has rights, too, and we are justified in at least intervening at this point in stopping you. What happens next isn't up to me. But it could involve putting you in prison, both to stop you from doing this anymore, and to send a signal to others who might abuse their wives. It could also involve getting you into some anger management programs.' I will expand more on this in the next Part because it may be that punishment (given the circumstances) is not justified in this instance. But policing – immediate restraint by force or threat of force – almost certainly is, and this is so even if many laws in that society are unjust and even if the police are selectively enforcing the laws. The justification in this case seems to me sound and something that a reasonable person should assent to, even if, practically speaking, the policing and the punishment involve frustrating his desires. Maybe this is too much, but should the hope not be that when the abuser cools off, he too will see that he was right to be constrained? Could he not even consider himself lucky that he was not able to go any further with his abuse?

### C. JUSTICE AND IMPOSED ORDER

Not enough due has been given to the good of inherent order. Above, I have been discussing the possibility of legitimate imposed order and how that order can be imposed legitimately, even if underlying social conditions are not very good and even if the law is enforced in a heavy-handed and sometimes arbitrary (and even discriminatory) manner. But there has to be space to allow the absence of inherent order – the failure of a social order to willingly win adherents because the order represents an unfair deal for them – to possibly excuse, or at least mitigate, punishment for those who disobey the law. It is in these cases that the 'strains of commitment' should enter into the calculations of the criminal justice system to limit some of its unfairness. I am using this phrase ('strains of commitment') in

52 My approach is inspired by Thomas Nagel's essay, 'War and Massacre' (1972) 1 *Philosophy & Public Affairs* 123, especially at 136–7.

a way that departs from the way Rawls uses it. Rawls was concerned at the level of principles of justice, not in individual cases. But the notion, however, is still useful even in these case-by-case circumstances. The idea is that, in many cases, the existence of crime means that society has failed the criminal and not, or not only, the other way around. Of course, we have to balance an understanding of the strains of commitment with an understanding that those who break the law are still agents. Retributivists are right that a failure to treat people as responsible in any way denies them the respect that they are owed. Retributivists go too far when they excessively limit excusing or mitigating conditions, with the idea that to excuse or forgive people or to go easy on them would be to disrespect them. We can hold people responsible and be merciful toward them.

So there may be a role for criminals who have been convicted to say that they should be given a reduced or alternate sentence because of the lack of inherent order in their society. Poor social conditions could even form the basis for excusing the bad conduct altogether. In some cases, these excuses may track ordinary excuses, such as when a homeless person pleads necessity in the face of a trespassing ordinance violation.<sup>53</sup> More broadly, poverty in some cases may be relevant to whether a person should even be charged for an offence. But the main area where a 'rotten social background' should be relevant is in punishing (indeed, this is where the concept first developed<sup>54</sup>) and in determining the appropriate sentence. The crime would still be stopped and the person committing the crime restrained, so the exigency that occasioned the involvement of the criminal justice system would be abated. Force, in that limited way, would be justified and legitimate. Beyond this, though, punishment may be thought to be illegitimate<sup>55</sup> because what is most needed is not that the person suffers further (and suffers all of the collateral consequences usually attendant on punishment<sup>56</sup>) but, rather, that the person gets help. Drug treatment, or mental health treatment, may be more appropriate in many or most cases. Jail or prison would not be warranted and would in fact make things worse from the perspective of order.<sup>57</sup> Seeking out these alternatives to traditional forms of punishment when someone is arrested and convicted of a crime is a way to better accommodate both the demands of imposed and inherent order.

A concrete example of how to institutionalize this balance is found in the programs that David Kennedy discusses in his book *Don't Shoot*.<sup>58</sup> In several cities, Kennedy worked with local officials to identify those who frequently broke the law. He would invite them to assemble in a room where they would demonstrate

53 *In re Eichorn*, 69 Cal App (4th) 382 (1998).

54 See *United States v Alexander*, 471 F (2d) 923 at 961 (DC Cir 1973) (Bazelon J dissenting)

55 I use 'illegitimate punishment' in the sense Beccaria used it – punishment that exceeds what is necessary to incapacitate and deter is pointless suffering.

56 See generally Zach Hoskins, *Collateral Consequences of Punishment* (Oxford: Oxford University Press, 2019).

57 Putting people in jail may cause them to lose their jobs or get evicted; it may break up families. It will make it harder for them to become employed and get housing in the future.

58 David Kennedy, *Don't Shoot: One Man, A Street Fellowship, and the End of Violence in America* (New York: Bloomsbury, 2011).

that law enforcement did indeed have enough evidence (sometimes more than enough) to prosecute them for any number of crimes. But they also – at the same meeting – would show that there were a variety of social services available to them: to help them get a job, find housing, continue their education. They could see that the community wanted to help and cared about them making better choices. It was not only about legality (fair notice) but also the promise and possibility of inherent order. Notice was given to frequent offenders that the next time they slipped up, the full force of the law would be brought to bear on them. This was, clearly, a threat. But there was also an implicit recognition that, up to that point, society had failed on the level of inherent order. The society that they have been living in had not given them a fair opportunity, and the social service agencies were there to try to right that, at least in the short term. After all, there is no substitute for a fully just society, which can 'generate its own support' over time without the need of force or the threat of force and which wins support by something more than just a patchwork of non-profits and poorly funded government programs. But, in the meantime, measures like the ones in Kennedy's book may be the best we can do in reconciling imposed order with unjust social circumstances.

#### *V Conclusion*

As a matter of political philosophy, liberals have not focused on – if they have said anything at all about – the criminal justice system. Instead, recent debates within liberalism, or between liberalism and other theories of justice, have been mainly over topics such as the distribution of resources or the accommodation of a 'reasonable pluralism.' But, for these debates to be meaningful, liberals must take seriously the need for order, the kind of order that the criminal justice system exists to provide. For without this order, none of those other good things can be realized. Of course, stopping violence and property crimes are also good things in themselves, things that the criminal justice system is first and foremost about preventing. And when these things happen, sometimes societies – even liberal societies – cannot simply let them happen; they will have to impose order.

But liberals should be worried about imposing order because it involves a state's use of coercive power that may not be reasonable and, indeed, which one might have a right to resist (as some have suggested). Much more desirable would be if a society could have a kind of inherent order where people obey the law because they want to obey the law and because it is in their interest to obey the law. But inherent order can break down or may even be absent, and real societies – as opposed to ideal or idealized ones – will need to create that order by imposing it on people. And they will need to impose it, again, both because disorder is bad and harmful and because a lack of order prevents liberal societies from doing all of the other liberal things they may want to do; in fact, a lack of order can prevent liberal societies from ever developing inherent order.

One question we should have is whether the near total lack of inherent order in a society may make any use of imposed order in that society unjust. We should want societies to be ones where people want to obey the law and not just because

they like following rules. We should want society to seem to all of its members to be a good deal. But when society is not that good of a deal for many people, we still need to be prepared with reasons to give to those people who break the law or attempt to break it and whom we seek to restrain by the use of force: reasons why we are justified in stopping them or in punishing them when we fail to stop them. I have tried to outline what those reasons might look like in the last Part of my article, but, in some situations, it is possible that these reasons may not be enough – they will run out – and people will be justified in opposing imposed order because that order is only propping up an unjust society. This is the point when even the good of order may not be enough to justify imposing it.

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