Under-Propertied Persons

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ARTICLES

UNDER-PROPERTIED PERSONS

Marc L. Roark*

Property shapes the way we talk about our communities and ourselves. It also, unintentionally, shapes the way we talk about the poor. Within property, the doctrine of waste reinforces notions of autonomy, privacy, and boundary-making for property owners, while leaving those without property searching for other ways to assert these self-defining protections. Likewise, nuisance assists owners' participation in their communities by dictating when individuals must account for harms their property use causes to neighbors. The law, however, provides few legal remedies for poor persons who are harmed by owners' sanctioned use of property. Through the language of ownership, property doctrines facilitate special benefits for those with property, while forcing those outside of property to seek other means to assert similar benefits. Owners—landlords of gap rentals, public housing authorities, and cities—often treat their poorest residents as problems to be managed rather than residents deserving autonomy and community. Housing units are destroyed, families are displaced, and homeless are forced further out of sight. The doctrines and rules that encourage these outcomes focus on the improper, the impaired, or the imperfect instead of facilitating discourse about how living environments promote human flourishing for these residents. In this way, our property system's rules and language create a class of persons who are under-propriated, under-housed, and under-valued.

* Professor of Law, Savannah Law School. I want to thank Laura Underkuffler and Gregory Alexander for the invitation to discuss this project with the Cornell Property Law Colloquium Class, which was helpful in thinking about how to group these ideas together. Lorna Fox O'Mahony, Ezra Rosser, and Joseph Singer helped me think about frameworks for articulating these ideas through conversations over the last year. I want to thank participants in the Texas A&M Property Works in Progress Schmooz, the Savannah Law School Faculty Scholarship Series, and the Loyola New Orleans Faculty Colloquium series for helping me along in my thoughts on this Article. Special thanks to Lisa Alexander, Mary Algero, Stephen Alton, Lynn Blais, Nicholas Blomley, Steve Clowney, Mitchell Crusto, Nester Davidson, Joseph D'Agostino, Gabriel Eckstein, Warren Emerson, David Fagundes, Julie Forester, David Grunning, Vinay Harpalani, James Hicks, Dian Tooley-Knoblett, Kathy Lorio, John Lovett, Kellyn McGee, Thomas Mitchell, Larry Moore, Timothy Mulvaney, Christopher Odinet, Chris Ogolla, Vanessa Casado Perez, Shakira Pleasant, Sara Rankin, Sally Richardson, Caprice Roberts, Erin Ryan, Craig Senn, Christopher Serkin, Aric Short, Judd Sneirson, Gregory Stein, Asmara Tekle, Robert R.M. Verchick, Andrew Wright, and Kellen Zale. I also want to thank my assistants Emilie Urdahl, Sonya Jackson, Branden Critell, and Travis Heller who contributed to this Article.

INTRODUCTION	2
I. WASTE AND AUTONOMY	13
A. <i>Tearing Down to Exclude the Homeless</i>	19
B. <i>Evicting the Poor</i>	29
C. <i>The Physical/Fiscal Boundaries of Public Housing</i> ...	36
1. Tearing Down Public Housing	39
2. Forcing the Poor to Internalize the Burdens of Community Change	43
3. Rejecting Service Delivery over Landlord/Land Manager Roles	45
II. NUISANCE AND COMMUNITY-MAKING	48
A. <i>Homelessness, Community-Making, and Citizenship</i> ..	51
B. <i>Institutionalizing and Public Housing</i>	53
1. Rules and Public Housing	55
2. The Environment and Public Housing	57
3. Public Housing's Stigma	60
C. <i>Gap Renters and Community-Making</i>	61
CONCLUSION: LIVING IN THE SHADOWS	63

THE MEANING OF BEING "UNDER-"

*Sometimes I feel, Like I don't have a partner
 Sometimes I feel, Like my only friend
 Is the city I live in, The city of angels
 Lonely as I am, Together we cry*

RED HOT CHILI PEPPERS, *Under the Bridge*,
 on BLOOD SUGAR SEX MAGIK (Warner Bros. 1992).

INTRODUCTION

Bridges are common haunting grounds for city homeless,¹ drug users,² or others who are down and out. In Savannah, Georgia, African-American addicts sleep off their withdrawal under an overpass crossing the Bay Street Viaduct, in the shadows of one of the Savannah Housing Authority's more notorious and dangerous projects.³ After the with-

¹ UNDER THE BRIDGE: THE CRIMINALIZATION OF HOMELESSNESS (A Bigger Vision 2015) (documentary depicting the way Indianapolis reclaims homeless spaces).

² RED HOT CHILI PEPPERS, *Under the Bridge*, on BLOOD SUGAR SEX MAGIK (Warner Bros. 1992). The 1992 Red Hot Chili Peppers hit single *Under the Bridge* draws on the experiences of singer Anthony Kiedis as he struggled with heroin addiction. The lyrics scripted from a poem by the same title remember a time when he went under a Los Angeles bridge, in gang infested territory, to do speedball and heroin. At that moment, he felt isolated, alone, and "like [his] only friend [was] the city [he] live[d] in." See ANTHONY KIEDIS & LARRY SLOMAN, SCAR TISSUE 263-66 (2004).

³ Tom Barton, *The Foulest Place in Savannah—And other Non-Garden Spots in the Hostess City*, SAVANNAH MORNING NEWS (Jan. 22, 2016, 2:29 PM), <http://savannahnow.com/>

drawal, they will hustle for more money, buy more drugs, and shoot up again, returning to their bridge to start the process over again.⁴ A similar scene is played out on the east side of Savannah under the Talmadge Bridge, approximately seven miles away, with young white drug addicts, who also nurture a colony of feral cats.⁵ In Miami, underneath the Julia-Tuttle causeway, a colony of 140 homeless sex offenders lived until 2010, when the community was forced out. That bridge was the only place sex offenders could live in Dade County because restrictive ordinances closed off areas in close proximity to schools, churches, neighborhoods, or other places where “children gather.”⁶ In Boston, a group of homeless writers have authored short fiction published under an anthology titled “Under the Bridge.”⁷ Both figuratively and literally, being “under the bridge” has come to symbolize someone whose life has steered off track and who has only one place to go—under the bridge.

Being under the bridge captures the metaphor well because bridges represent progress.⁸ Bridges link areas so that cars can travel sixty-five

opinion-column/2014-06-01/tom-barton-foulest-place-savannah-and-other-non-garden-spots-hostess-city. Home to a dozen or more homeless persons, the area is convenient to tourists in Savannah’s Historic District (which comprise the major target for their bamboo rose economy) and to Yamacraw Village, a local housing project, where they can spend their hard-earned money buying crack or heroin. *Id.*

⁴ *Id.*

⁵ The Talmadge Bridge is the location of two homeless camps in the Savannah area. Dash Coleman, *Volunteers, City Team Up to Clean Savannah Homeless Camps*, SAVANNAH MORNING NEWS (Mar. 1, 2014 7:58 PM), <http://savannahnow.com/news/2014-03-01/volunteers-city-team-clean-savannah-homeless-camps>. On the west bound side, a homeless camp made up primarily of veterans takes up residence, prominently displaying an American flag across two of the overpass pillars and a local mission banner, staking claims of a local church mission that periodically drops off food, water, and clothing. See Sinjin Hilaski, *Living Under the Bridge: A Peek at a Homeless Camp*, CONNECT SAVANNAH (Aug. 14, 2013), <https://www.connectsavannah.com/savannah/under-the-bridge/Content?oid=2286941>. The other camp is comprised of mostly transient homeless persons, though a few are regulars. These regulars maintain the cat population under the bridge.

⁶ In *Dep’t of Transp. v. City of Miami*, 20 So. 3d 908, 909–10 (Fla. Dist. Ct. App. 2009), the State of Florida Department of Transportation alleged that the City of Miami “created, allowed, or facilitated the taking up of permanent residence by [homeless persons under the Miami Julia Tuttle Causeway Bridge], and that due to the lack of electricity or facilities for these residents, several violations of the City of Miami Code, as well as health risks, ha[d] resulted.” The dwellings were described as “makeshift” and as a “shantytown.” *Id.* at 910. Other reports indicated that many of these residents were sex offenders with no other viable housing. *Id.* The homeless encampment also inspired Russell Banks, a writer and poet, to pen the novel *Lost Memory of Skin*, which was a finalist for the Pen Faulkner Award in literature in 2012. See Russell Banks’ ‘*Lost Memory of Skin*’ up for Pen/Faulkner Award, HUFFINGTON POST (Feb. 23, 2012), http://www.huffingtonpost.com/2012/02/22/russell-banks-lost-memory_n_1293641.html.

⁷ UNDER THE BRIDGE: STORIES AND POEMS BY MANCHESTER’S HOMELESS (Ray Gamache ed., 2000).

⁸ Bridges and roads often were viewed as marks on the physical landscape that represented progress. For example, in the nineteenth century, Susan Fenimore Cooper lamented the paucity of American structures that would testify to the lasting progress and greatness of the

miles per hour on roads that not only link new destinations by car, but allow cities to spread beyond their natural geographic constraints.⁹ Money flees to the suburbs, but returns to the city via bridges and highways, where ironically the most downcast live, conduct their business, and sleep away their addictions. Being under the bridge is in a very real sense being under social progress, rather than in its flow.

The concept of being “under-” something suggests that some goal has not been met. Under-employed persons work less hours or for fewer wages than their other predictors might suggest.¹⁰ Companies that are under-capitalized have fewer resources than is expected to conduct their normal business operations and pay their creditors.¹¹ Underdevelopment refers to a country that lacks modernization or other forms of growth (mostly economic) compared to others in its region.¹² In the nineteenth century, the term “undereducated” was often used to describe the differ-

American enterprise. Susan Fenimore Cooper, *A Dissolving View*, in GEORGE PUTMAN, *THE HOME-BOOK OF THE PICTURESQUE* 79, 88–89 (1852). After noting the impressive array of cathedrals, bridges, and aqueducts that the European old world has preserved, Cooper laments “[h]ow different from all this is the aspect of our own country! The fresh civilization of America is wholly different in aspect from that of the old world: there is no blending of the old and the new in this country; there is nothing old among us. If we were endowed with ruins we should not preserve them; they would be pulled down to make way for some novelty.” *Id.*

Later American landmarks like the Brooklyn Bridge and Golden Gate Bridge were lauded for their creativity, engineering, and social message of progress. The Brooklyn Bridge for example was depicted in art, culture, and representations for its ability to be a “cultural bridge of the mind and imagination.” See RICHARD HAW, *THE BROOKLYN BRIDGE: A CULTURAL HISTORY* 7 (2005). Tributes to the Golden Gate Bridge often have focused on the tension between the engineering marvel and the artist’s impact on humanity. See, e.g., *Collections: Legacy of a Landmark*, 89 CAL. HIST. 3, 3 (2012) (“[d]esigned and constructed during the 1930’s in the midst of an unprecedented economic depression, this graceful and elegant art deco structure soon captured the imagination of local residents and when the bridge was formally opened on May 27, 1937, up to 200,000 of them clamored to cross the span.”); Vikram Smith, *On the 50th Anniversary of the Golden Gate Bridge*, 31 THE THREE PENNY REV. 5, 5 (1987) (“The green and empty hills agreed, that humankind, might be allowed this binding deed—which brings to mind, The engineering dean’s reply to her who said, ‘if such a man-made thing should lie, metaled and dead, across God’s natural world, and why should we think it best.’”). But see Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1937 (2015) (noting the role that bridges played as exclusionary tools to keep certain groups out of the city).

⁹ See JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* 85–87 (1993) (describing the simultaneous growth of highway systems with the growth of suburban residential communities).

¹⁰ Jean Mouly, *Some Remarks on the Concepts of Employment, Underemployment, and Unemployment*, 105 INT’L LAB. REV. 155, 158 (1972) (“I noted earlier the discrepancies between an essentially individualistic theory and the reality, where individual . . . problems must be set against the background of a larger unit, which may, depending on the circumstances, vary in size from the restricted family to the extended family or the village.”).

¹¹ *Undercapitalized*, BLACK’S LAW DICTIONARY (6th ed. 1990).

¹² Gail Hollander, *Underdevelopment*, in *ENCYCLOPEDIA OF HUMAN GEOGRAPHY* 507, 507 (Barney Warf ed., 2006).

ences between educational opportunities for men and women.¹³ There are so many ways we use the concept of “under-” to describe a scenario where the individual does not meet an already established norm.

The term “under-” also isolates an individual or group outside an established framework. Once outside, those on the inside can articulate reasons why outsiders remain “under-”. Acknowledging that there is an “under-” to something recognizes that there is an insider/outsider approach to a certain problem. Martha Minow notes the role that law plays in affirming insider/outsider cultures:

Law has treated as marginal, inferior, and different any person who does not fit the normal model of the autonomous, competent individual. Law has tended to deny the mutual dependence of all people while accepting and accentuating the dependency of people who are “different.”¹⁴

Lorna Fox O’Mahony observes that this role of separating groups as “different” is a “function of social relationships and invites a challenge to the patterns of relationships and knowledge that assign the burden of differences between people to only some people.”¹⁵ The discourse that is encouraged by legal structures around poverty and land use invites society to treat those outside the realm of traditional housing as “different.” And by different, society treats these under-persons as damaged, disdained, and causing a depletion of society’s resources.¹⁶ This Article invites the reader to consider how these forms of discourse shape our

¹³ Christine Stansell, *Women in Nineteenth-Century America*, 11 GENDER & HIST. 419, 423 (1999) (describing the general state of women in the nineteenth century as “undereducated”); Anthony P. Carnevale & Stephen J. Rose, *The Undereducated American*, GEO. U. CTR. ON EDUC. AND THE WORKFORCE 8 (2011), <https://cew-7632.kxcdn.com/wp-content/uploads/2014/11/undereducatedamerican.pdf> (describing the growth of college-educated Americans as lower than expected).

¹⁴ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 10 (1990).

¹⁵ LORNA FOX O’MAHONY, HOME EQUITY AND AGEING OWNERS: BETWEEN RISK AND REGULATION 175 (2012).

¹⁶ See CHAIM WAXMAN, THE STIGMA OF POVERTY: A CRITIQUE OF POVERTY THEORIES AND POLICIES 7 (2d ed. 1983) (describing the “culture of poverty”). Waxman points out those who are poor are seen as:

being different from the non-poor, not only economically, but in many other respects as well. Their being different, or deviant, with respect to a whole set of patterns of behavior, it is suggested, sets them apart basically from the rest of the society. According to the cultural perspective on poverty, the lower class is seen as manifesting patterns of behavior and values, which are characteristically different from those of the dominant society and culture. Moreover, according to culturists, these unique patterns of behavior and values are transmitted intergenerationally through socialization and have become the subcultural *determinants* of the lower socioeconomic status of the poor.

policy views and outcomes and how to reimagine relationships with the poor through a different lens.¹⁷

To do so, though, I argue that we employ two new words to understand the way current law and social policy treats those in poverty—under-housed and under-propertyied. In both, there is the recognition that an individual has not met a societal standard. Failure to meet that standard creates a social problem. This Article makes the argument that being under-propertyied or under-housed harms individuals because of the collateral benefits that both proper housing and being propertyied provide to those on the “inside.”¹⁸ To be sure, poverty policy governs the substantive decisions that cause people to be treated as under-propertyied. This Article labels those choices by communities to favor property holders over those who are poor. It reflects that the community norms relating to property naturally implicate our conclusions about poverty. Truly the person who is “under-” has her own conception of who she is. Yet, time and again, we regularly define people not by their individual identities, but by the collective woes about which their “under-” group is associated.¹⁹ To be “under-” in America is a collective judgment that you’ve somehow squandered an opportunity. I use the term under-housed to refer to people who are homeless, live in public housing, or are “gap renters.”²⁰ These forms of housing are inter-related and often recursive.

¹⁷ As Kate Green wrote, “I want to show who does not fit the stereotype. In the traditional world of land law, there [are few places] for the examination of the relationship between the ‘private’ rights of a landowner and the ‘public’ rights” of some other. See Kate Green, *Citizens, and Squatters: Under the Surfaces of Land Law*, in LAND LAW: THEMES AND PERSPECTIVES 229, 229 (Susan Bright & John Dewar eds., 1998).

¹⁸ Different writers have captured similar ideas in the context of property. A.J. van der Walt, in *Property in the Margins*, describes the role of property in a transformative context where “property rhetoric and doctrine loses its hegemonic grip on property discourse.” A.J. VAN DER WALT, *PROPERTY IN THE MARGINS* 21 (2009). In this setting, the very recognition of the role of the outsider in having a place at the table forces a reconciliation of property’s insider characteristics by those in power. See *id.* Likewise, Lorna Fox O’Mahony describes the way that insider/outsider relationships are revealed when the law attempts to provide special treatment for a group to mitigate harsh circumstances that those on the inside are unlikely to appreciate without some external urging. O’MAHONY, *supra* note 15, at 174–75. This work draws more directly on Joseph Singer’s work in *The Reliance Interest in Property*, that property regimes often harm outsiders unnecessarily because of the over-preference to the ownership discourse. Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 621 (1987).

¹⁹ See, e.g., Sara Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016); Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53 (2015) [hereinafter Roark, *Homelessness*] (describing how homeless persons are often assigned identities as opposed to choosing identities).

²⁰ I choose the term “gap renter” to reflect those renters that qualify for federal housing subsidy but who are unable to take advantage of it because of space or other criteria that have made that housing unavailable. Notably, Lisa Alexander describes these renters as “subsidized renters,” but that term was too broad as other renters are subsidized, just not from government sources. See Lisa T. Alexander, *Evicted: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J. F. 431, 431 & n.2 (2017). Gap renter not only describes the fact that the renter is

Evictions from public housing or gap rentals often lead to homelessness or leasing other gap rentals.²¹ Gap renters and homeless persons often seek out public housing as a solution to their living conditions. Wash. Rinse. Repeat.

I want to make very clear my claims at the outset of this Article and why understanding property properly is crucial to tackling systematic poverty.

First, property discourse is not only about those that have property but also about those that do not.²² Property regimes have been thought to primarily concern “owners,” and our usual attention is drawn to them to the exclusion of others.²³ The problem with that ownership-centric view is that we miss the people that are impacted by the property system, but have no participation in it.²⁴ We treat property owners as winners and others as losers in a game the losers did not choose to play.²⁵

Second, we need to appreciate that property rights are propped up by a social system that everyone participates in, including those without property. For example, A.J. van der Walt writes about marginal property theory:

A further implication of marginality thinking in property theory is that it should focus our attention much more on the social position, economic status, and personal circumstances of the parties involved in property relations or disputes and less on their legal status or established property rights. Marginal people such as criminals, out-

unable to obtain housing she might be entitled to, it also reflects certain gaps in legal remedies that are available.

²¹ In an ironic twist, the cottage industry of movers that evict persons from housing often depend on homeless persons scraping together what money they can earn to eventually find themselves in their own rental. See Gretchen Purser, *The Circle of Dispossession: Evicting the Urban Poor in Baltimore*, 42 CRITICAL SOC. 393, 393–94 (2016).

²² Singer, *supra* note 18, at 621; LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: IT'S MEANING AND POWER* (2003).

²³ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. OF CHI. L. REV. 711, 712 (1986) (describing critiques of public doctrines (like public trust) as omitting public property as property because property is only that which may be reduced to individual ownership).

²⁴ NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 75 (2004) (noting the importance of “community property claims” can be the infusion of vocabulary necessary for the naming, claiming, and blaming for how public space is used); Ananya Roy, *Paradigms of Propertied Citizenship: Transnational Techniques of Analysis*, 38 URB. AFF. REV. 463, 476 (2003) (“If the American dream is articulated in a language of single family detached suburban dwellings, then ‘less home like’ accommodations . . . are seen as unworthy alternatives.”).

²⁵ Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, YALE L.J. F. 458, 459 (2017) (“Desmond’s understanding of exploitation begins with the simple idea that ‘[t]here are losers and winners’—and that, in the low-income housing market, ‘[t]here are losers because there are winners.’”).

laws, the homeless, the weak, the poor, the elderly, and the handicapped, but also the politically defiant, often have no rights and therefore they cannot enter the dogmatic syllogism to compete in a classic legal battle about property. The interests that they do have might either not be recognized by law or, if they are recognized, might be protected weakly because these interests enjoy a lower status than mainstream rights.²⁶

We need to change our discourse so that property winners are appreciated as the beneficiaries of a system that all of society props up. To the extent that people in that system do not get the benefits of a property system, they are better understood as victims rather than losers.

Third, framing our discourse requires a purposeful choice to incorporate a morality language that reflects the kind of social values we want our property regimes to further. We talk about property as creating opportunities for human flourishing, self-determination, participatory citizenship, and community validation.²⁷ But the way our property regime operates towards those in poverty becomes more of a barrier to those ideals.²⁸ Our morality dictates that we find ways to articulate for underpropertied persons the same values we ask property to protect. Using language that reveals this problem is a starting point.

This Article argues that one reason the housing problem persists in the United States is that the way we talk about ownership and poverty are insulated from one another.²⁹ On the one hand, owners of property and

²⁶ See VAN DER WALT, *supra* note 18, at 245.

²⁷ See Nester M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 768 (2009) (emphasizing the role of property in defining self-autonomy); Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1260–61 (2014) (arguing that property's true normative value is towards facilitating human flourishing); Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089, 1094 (2011) (“[I]t is essential that such rules be established not only to protect individual interests, but also to contemplate and protect individuals in their roles as members of communities and larger societies.”); Roy, *supra* note 24, at 464 (unfolding the “American paradigm of propertied citizenship by mapping its edges of exclusion.”).

²⁸ Roark, *Homelessness*, *supra* note 19, at 80 (describing the challenges that homeless persons face to occupy public space, private space, and liminal space, including being ejected as nuisances); Marc L. Roark, *Human Impact Statements*, 54 WASHBURN L.J. 649, 666–673 (2015) [hereinafter Roark, *Human Impact*] (describing the conflict that public housing residents and homeless face when competing land use claims are made in city processes); Sara Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 418 (2015) (noting the frequent denial of life, liberty, and property to homeless persons).

²⁹ Other authors have focused on discourse as a way of understanding different aspects of poverty. Teresa Gowan wrote about homeless persons in San Francisco and how they adopted discourse from institutional actors as a way of explaining homelessness. See TERESA GOWAN, *HOBOS, HUSTLERS, AND BACKSLIDERS: HOMELESS IN SAN FRANCISCO* 184 (2010). David Fleming has written about the language of public housing and its focus on class, race, and environment. See David Fleming, *Subjects of the Inner City: Writing the People of*

cities often use discourse around ownership, value increase, and security that encourages property owners to maximize their gains. The value-maintenance rhetoric is enabled by legal structures that incentivize increase, disincentivize perceived costs, and encourage property owners to treat their interests as one collective agency towards growth.

Discourse on poverty, on the other hand, treats the individual as isolated from his surroundings.³⁰ Teresa Gowan describes this kind of discourse as types of talk for why that person was poor in the first place. “Sin talk” attributes direct responsibility for poverty to the actor.³¹ “Sick-talk,” or the unintended but uncontrollable actions of the individual, suggests that poverty may be curable if only we took seriously the maladies that impacted the poor.³² And “system-talk” suggests that poverty results from the intrinsic system of services that force those in poverty to spend more time navigating bureaucratic webs instead of bootstrapping themselves out of poverty.³³ Without critiquing the accuracy of these discourses, the point here is that unlike the property-owner discourse that serves to create collective agency in the furtherance of individual gains, the discourse around poverty serves to isolate individuals towards the loss of collective agency. I argue that one reason for this isolation is that property is the instrumentality by which we choose to protect other core values, choices, and identities. This Article focuses on two of those core values—identity-making and community-making.

Property as the vehicle for identity-making activities affords owners with enhanced privacy against outside scrutiny so that they are able to expose themselves to the world on their own terms.³⁴ Such privacy gives property owners autonomy towards creating and revealing their identity.

Cabrini-Green, in *TOWARDS A RHETORIC OF EVERYDAY LIFE* 207 (Martin Nystrand & John Duffy eds., 2003).

³⁰ See Rankin, *supra* note 19, at 7 (describing discourse of public space exclusions as the “influence of exile” that create “deeply ingrained class and status distinctions”). She writes:

discrimination, stereotypes, and bias fuel the enactment and enforcement of laws and policies that regulate and restrict visibly poor people from public space; however, these laws are not commonly understood as discriminatory. Instead, legal and popular discourse often legitimates these laws through narratives that blame poor people for their poverty, associate them with criminality, or accept as unassailable the purported interests of public safety or public health. A better understanding of the influence of exile should prompt a reexamination of such laws and policies, which not only push poor people to the literal fringes of society but also condemn them to stay there.

Id.

³¹ GOWAN, *supra* note 29, at 184.

³² *Id.*

³³ *Id.*

³⁴ Nester Davidson notes how this idea of property as an enforcer of self-autonomy comes through viewpoints shared by both Adam Smith and David Hume. Describing this tension as the “desire for comparative status,” Davidson quotes Smith on the role of public exposure in shaping individuals’ views of themselves:

In contrast, under-proprieted persons are often exposed to the world with their property rarely providing the range of discretion that might afford a covering of identity.³⁵ Likewise, whereas property is a natural vehicle for wealth accumulation, being under-proprieted often carries higher costs associated with ordinary activities. And when a person is wealthy, they have far greater autonomy on how they are exposed to the world. Being proprieted affords one the space and the resources to be private.

Second, property also is a vehicle for community-making. Nester Davidson describes this as the “connective tissue for communities, defining mutual obligations and setting the boundaries of social relations.”³⁶ This happens through a variety of networks. Property that is spatially joined together furthers relationships among neighbors. Sometimes, if people have the resources, they are able to choose their property and neighbors simultaneously. The law furthers that choice by making certain areas more attractive by easing access to shared amenities and restrictions that similarly-situated property owners seek out.³⁷ Davidson notes:

Suburban communities have long regulated land use to privilege single-family housing, typically with large minimum lot sizes, generous set-backs, and extensive floor as requirements. Although this tends to generate an affluent homogeneity decried by planners and scholars, people are increasingly willing to take on unsustainable levels of debt and commute distances that would once

It is because mankind are disposed to sympathize more entirely with our joy than with our sorrow, that we make parade of our riches, and conceal our poverty. Nothing is so mortifying as to be obliged to expose our distress to the view of the public, and to feel, that though our situation is open to the eyes of all mankind, no moral conceives for us the half of what we suffer. Nay it is chiefly from this regard to the sentiments of mankind, that we pursue riches and avoid poverty.

Davidson, *supra* note 27, at 776 (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 70 (London, George Bell & Sons 1875) (1759)).

³⁵ Under-proprieted persons are certainly property holders. But the distinction I am drawing is that under-proprieted persons' property rarely serves to enhance their individual autonomy or their participation in community-making. For example, the Ninth Circuit held in *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012), that homeless persons had a distinctive property right in their personal items that had been seized by the Los Angeles Police Department during street sweeps. The Court even went so far to say that traditional doctrines like abandonment applied to protect their property because they had not intended to abandon their property when they left it temporarily. *Id.* at 1025. But these “rights to property” do not go so far as to provide homeless persons any greater sense of personal autonomy or give them special access to engage in community-making. Likewise, other under-proprieted persons, those in public housing, and those living in subprime lease arrangements rarely are able to leverage their property either to validate a self-selected identity or to have that identity validated by community-making actions.

³⁶ Davidson, *supra* note 27, at 760.

³⁷ *Id.* at 763.

have seemed unthinkable to be able to say that they live in such communities.³⁸

One might say that the core values we have chosen through our property in making ourselves and our community are those that isolate us from those who are poor.

This Article unpacks these ideas by describing how the law shapes social approaches to housing for impoverished persons by the way it talks about property. I argue that discrete property doctrines around waste and nuisance influence the way we think about problems relating to occupancy of property, whether by an owner or an outsider. Waste as a doctrine allows certain stakeholders in property to tear down structures and alter the way property is used, while denying that right to other occupiers, even though they may be legal occupants of the land. By making a choice, the law implicitly creates an insider/outsider preference for who gets to have a say in what structures are preserved. Nuisance protects against intrusions that cause harm to another's property. Like waste, when the law chooses to recognize a nuisance, it is declaring that certain property owners have a right to prevent outsiders from activities that harm their property.

The property doctrines of waste and nuisance form guideposts for how we typically think about identity-making and community-making in spatial relationships.³⁹ The doctrine of waste shapes our understandings of identity-making by facilitating certain property owners' claims to autonomy. Those claims arise through enforcement mechanisms that favor an owner's right to alter an estate as he chooses. Commentators often refer to the rule-making work of boundary-making and value-making as the stated goals of the doctrine.

Nuisance articulates certain values towards community-making by enforcing boundaries for how we use property in relation to its effect on others around us.⁴⁰ Under-propertyed persons often find themselves on

³⁸ *Id.* at 759.

³⁹ Joseph Singer articulates a similar thought in his *Stanford Law Review* article *The Reliance Interest in Property* when he writes:

Owners of valuable social assets hold them partly for their own benefit and partly in trust for the community and for others with whom they establish continuing relationships. Owners should not be allowed to waste valuable social resources. The corporation should not be allowed to waste property which has been relied upon by members of the common enterprise; such property is held in trust for the benefit of the common enterprise and especially for the benefit of the more vulnerable parties to the relationship. This conception of property allows us to shift the discussion in a way that focuses on the moral and policy concerns that led Judge Lambros to consider creation of the community property right.

Singer, *supra* note 18, at 659–60.

⁴⁰ These are not static. For instance, nuisance is often used as a mechanism for enforcing community norms thereby playing a role in identity-making. See Roark, *Homelessness*, *supra*

the outside of these property rights and/or as the subjects of enforcement actions that protect these property rights. Buildings and houses can be demolished with little recourse afforded the residents that occupy the spaces. Activities or persons can be removed from geographic places either because they are deemed a nuisance or because what they do is considered nuisance activity.

Besides the role these doctrines play in supporting the basic functions of identity-making and community-making for property owners, they also illustrate how similar values elude under-propriety persons. While waste may encourage autonomy in property owners by encouraging boundary-making and wealth creation, under-propriety persons often find that their property's boundaries do not perform the same function for asserting privacy or exclusion. They also find that the property they occupy may actually work as a barrier to wealth creation rather than as an aid. And rights of property owners to exclude or set the terms of exclusion that apply against under-propriety persons interfere with community-making by poor residents.

Each part of this Article unpacks how these doctrines impact under-propriety persons by considering first how these doctrines protect human values for property owners and then how those same protections escape under-propriety persons.⁴¹ Part One reveals how the law of waste gives owners a right to exclude and alter the property while depriving tenants and other occupiers protections that safeguard their humanity. Part Two shows how the law of nuisance allows owners to dictate terms for how their property is used, without taking into account how those rules impact dwellers on their land. Together, the law provides both a sword and a shield—a sword to reclaim land when owners decide it's in their best interests, and a shield to block claims from residents that might interfere with those claims.

note 19, at 74 (describing how enforcement of nuisance-like rules against homeless persons often serve collective-identity norms); Singer, *supra* note 18, at 678 (describing how a doctrine of waste could further a community-making norm).

⁴¹ Jack Knight's observations on how social institutions, particularly property, should interact in social settings are mindful here. Knight observes that rights in property are really just rules on the appropriate "use, control, and transfer of property." These rules provide important background for persons engaging in exchange because they stabilize rights that are held and later acquired. Knight observes that "to the extent that society is able to participate and benefit in these economic exchanges, established rules of property often accrue to the benefit of the society as a whole." JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 22–23 (1992).

It goes without saying, that when the rules and institutions are not equally accessible or carve out special rights for one group over another, then the rules do not benefit society as a whole, but rather segments of society that have been preferred in the rule-making process.

I. WASTE AND AUTONOMY

The American law of waste divides the world of property ownership between those who can tear down and those who cannot.⁴² Scholars have debated the underlying historical forces driving the law of waste, finding its underpinnings in natural resource exploitation,⁴³ boundary-making,⁴⁴ and/or economic utility.⁴⁵ The discourse on waste nicely explains why the doctrine developed as it did. What is often missing from that discourse is who the law leaves out. In that sense, this Part is not about waste but rather articulates a theory of non-waste. Specifically, this Part weighs why we talk about waste in the hands of certain persons (what I call propertied persons), while others (under-propertied persons) do not have claims for waste even though they may suffer the same kinds of depletion, displacement, or disruption that rise to a remedy in a propertied person's hands.

In the traditional waste narrative, property interest holders of different stripes sort out who may make changes to the physical structures on the property.⁴⁶ The doctrine pits two interest holders in the property who may not be aligned in how they think the property should be transformed (or not transformed as the case may be). Short-term possessory interest holders may want to change the property for greater economic utility,⁴⁷ or have the property remain as is.⁴⁸ Long-term interest holders may want the opposite. Thus, the doctrine pits those who are in possession of the property, but without a long-term interest, against those who are not in possession, but who will be connected to the property after the immedi-

⁴² Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 658–59 (2005) (“The crux of the law is therefore the definition of *waste*—that is, the set of actions a tenant may not commit—and conversely, the set of actions she may commit without express permission from the reversioner.”); Thomas W. Merrill, *Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1056 (2011) (“Waste is an action by an absent owner to prevent the tenant from injuring the absent owner’s interest in property. The action for waste has always been preventive in nature.”); Jill M. Fraley, *A New History of Waste Law: How a Misunderstood Doctrine Shapes Ideas About the Transformation of Law*, MARQ. L. REV. (forthcoming) (“Waste law punishes a tenant for changes to the estate that detrimentally impact the inheritance.”); Sally Brown Richardson, *Reframing Ameliorative Waste*, AM. J. COMP. L. (forthcoming) (“The doctrine of waste governs what actions—and inactions—the possessor may take.”).

⁴³ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); Purdy, *supra* note 42, at 661; John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 567 (1996).

⁴⁴ Fraley, *supra* note 42.

⁴⁵ Richardson, *supra* note 42.

⁴⁶ Fraley, *supra* note 42.

⁴⁷ See, e.g., *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899). Notably, Thomas Merrill points out that the longer the term of the short-term interest holder, the more likely the estate may be altered. See Merrill, *supra* note 42, at 1093.

⁴⁸ See, e.g., *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972).

ate possessor is gone.⁴⁹ These include life tenants versus reversioners, defeasible fee holders against remaindermen, and renters versus their landlords.⁵⁰ Usually, in the waste context, the law preserves one of two functional values for those entitled to waste claims: boundary-maintenance or value-maintenance.⁵¹

Boundary-maintenance and value-maintenance often provide real-world outcomes for property owners. Boundary-maintenance means that propertyed persons are secure in their ability to self-define.⁵² Thanks to those boundaries, owners also find greater protections against certain intrusions against their liberty by the state.⁵³ Value-maintenance means that property owners can repair and/or improve their property with reasonable certainty that whatever resources they invest will inure to their benefit.⁵⁴ Spending money on property you own means that you are investing in the property and the community around you.⁵⁵

Conversely, under-propertyed persons are often deprived of discrete places where they may choose to whom and how much of themselves

⁴⁹ Purdy, *supra* note 42, at 663–64.

⁵⁰ *Id.* at 658.

⁵¹ *See id.* at 664; Fraley, *supra* note 42; Richardson, *supra* note 42.

⁵² This idea of property's self-determination function has been cited by numerous scholars in different ways. *See, e.g.,* Davidson, *supra* note 27, at 760 ("Property forms an underlying and important aspect of the self, helping to shape personality and individual autonomy."); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (arguing that proper self-development requires a certain level of control over one's resources, namely property); Carol M. Rose, *Introduction: Property and Language, or, the Ghost of Fifth Panel*, 18 YALE J.L. HUMAN. 1, 3 (2006) (describing property as a communicative tool that requires understanding by others before it will be respected).

⁵³ It is well settled that the Fourth Amendment requires greater process by the state to enter a home than it does outside the curtilage of one's home. *See United States v. Jones*, 565 U.S. 400, 406–07 (2012) (aligning the *Olmstead* prior protections of the home from unreasonable search and seizure with the *Katz* protection of privacy against unreasonable search and seizure). In fact, the Fourth Amendment has gone from recognizing that a trespass to a home was necessary to protect against unreasonable search and seizure, *Olmstead v. United States*, 277 U.S. 438, 466 (1928), to a standard that assessed whether a reasonable expectation of privacy was breached to determine whether the Fourth Amendment right protected against state actions, *Katz v. United States*, 389 U.S. 347, 359 (1967), to recognizing that both a trespass to the home and a government intrusion on the reasonable expectation of privacy violate the Fourth Amendment. *Jones*, 565 U.S. at 409–10. By inference, this means that the larger one's yard and the larger one's house, the greater the protections one has against unreasonable search and seizure.

⁵⁴ Daniel DiClerico, *8 Ways to Boost Your Home Value*, CONSUMER REP. (Feb. 9, 2016), <http://www.consumerreports.org/home-improvement/8-ways-to-boost-your-home-value/>.

⁵⁵ Beldon Russnello Strategists LLC, *Americans' Views on their Communities, Housing, and Transportation*, URB. LAND. INST. 9 (March 2013), <http://uli.org/wp-content/uploads/ULI-Documents/America-in-2013-Final-Report.pdf> ("The overall contentment with communities is reflected in the high degree of satisfaction Americans have with their own homes and surroundings.").

they reveal.⁵⁶ Gap rentals, public housing, and shelters require that privacy is surrendered or lost as a prerequisite to shelter.⁵⁷ Unlike landlord-tenant arrangements where tenants disclose reasonable access to income to pay the rent, public housing tenants are forced to produce annual financial disclosures that ensure that tenants are paying enough rent based on their income.⁵⁸ Additionally, background checks that move beyond basic economics, such as criminal background checks, child support delinquencies, outstanding warrants, family composition, disabilities, and other types of invasive questions, are common in the public housing and gap rental sectors. After accepting a tenant, landlords and public housing agencies can treat the tenant as an undesirable or potential corrupter of the community by scrutinizing the private activities of the tenants and their guests, even unreasonably crossing the boundaries of the home to do so.⁵⁹ Even the mundane becomes scrutinized when you're poor.⁶⁰

Under-protected persons often lack the same protections that property owners possess, as they are constantly confronted with the state, as if they were held in public institutions. Homeless persons regularly find themselves subject to police scrutiny for infractions by which other, better situated persons are unaffected.⁶¹ Gap renters are discouraged from

⁵⁶ Kia Gregory, *Doors Often Closed to Transgender Tenants Searching for Housing*, ALJAZEERA AM. (Sept. 25, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/9/25/doors-often-closed-to-transgender-tenant-searching-for-housing.html>.

⁵⁷ DAVID A. SNOW & LEON ANDERSON, *DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE* 27 (1993) ("[T]he Salvation Army . . . require[s] all first-time users to fill out a registration card that asks for name and Social Security number, if any, as well as some demographic and background information."); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 4 (2016) ("There are hundreds of data-mining companies that sell landlords tenant-screening reports listing past evictions and court filings.").

⁵⁸ A review of every public housing eviction case that was appealed to a higher court from the 1930s to current reveals that income certification conflicts made up 5% of cases where public housing tenants were evicted. Notably this sample doesn't include all public housing evictions. Case data on file with author.

⁵⁹ Nuisance-type claims made up 12% of the sample of public housing evictions. Within that group, public housing authorities also evicted residents for being an "undesirable" and for general nuisance. Public housing authorities also evicted residents for certain political activities, such as being a part of a particular group or for not signing certifications that they were not a part of certain groups. Case data on file with the author.

⁶⁰ See, e.g., *Preston Hous. Auth. v. Aguiar*, No. 20581, 2013 WL 6439710 (Conn. Sup. Ct. Nov. 14, 2013) (denying eviction of tenant based on guest parking policy violation); *Chicago Hous. Auth. v. Blackman*, 122 N.E.2d 522 (Ill. 1955) (denying forcible entry and detainer to evict tenants in a low-rent public housing project on grounds of refusal to subscribe to the loyalty oath and refusal to sign a certification of non-membership of a subversive organization); *Almeida v. Hernandez*, 804 N.Y.S.2d 648 (N.Y. Sup. Ct. 2005) (overturning termination of Section 8 Subsidy due to tenant's failure to complete a document); *Peters v. N.Y.C. Hous. Auth.*, 147 N.Y.S.2d 859 (N.Y. App. Div. 1955) (denying eviction for failure to sign a certification of non-membership in designated subversive organizations).

⁶¹ See DESMOND, *supra* note 57, at 187–88 (Crystal, a tenant, called the police after she heard the tenant upstairs being abused in a domestic violence situation by her partner. "[S]he called 911 three separate times. The police finally showed up and took [the partner] away.

seeking police intervention because too many police calls may warrant a “nuisance” citation.⁶² They are also discouraged from contacting local housing departments for housing code violations for fear that landlords may retaliate with an eviction or the city will shut down their property.⁶³ And public housing tenants live under constant observation from both management and other residents in fear that ordinary infractions could jeopardize their residence.⁶⁴ Thus, while propertied persons enjoy boundaries of security, under-propertied persons find their boundaries are regularly intruded by either the state or outsiders. They are “relegated to this space or that space,” until those spaces are deemed inconvenient or more valuable for other purposes.⁶⁵

While propertied persons enjoy the potential for their residence to preserve their economic value, under-propertied persons often find that their residence bleeds economic value. More affluent homes are often located near better school districts, which give parents autonomy in selecting educational options for their children. Areas where public housing and gap rentals predominate are often near failing or troubled schools, where parents must expend additional resources to ensure that their children are well educated. These include time away from work to take children to extracurricular activities or direct resources for tutoring

When they left, [a neighbor] looked at Crystal. ‘You must want to lose your house,’ she said. . . . Last year, [Crystal] had received a letter from the Milwaukee Police Department . . . [informing her] that she would be ‘subject to a special charge for any future enforcement costs for any of the listed violations that occurred at her property [even if it was a domestic violence call]’).

⁶² See *id.* at 190–91 (“[T]he nuisance property ordinance . . . allow[s] police departments to penalize landlords for the behavior of their tenants. Most properties were designated ‘nuisances’ because an excessive number of 911 calls were made within a certain timeframe. . . . The ordinances pushed property owners to ‘abate the nuisance’ or face fines, license revocation, property forfeiture, or even incarceration. . . . In 2008 and 2009, the Milwaukee PD issued a nuisance property citation to residential property owners every thirty-three hours. The most popular nuisance activity was ‘Trouble with Subjects,’ a catchall designation applied to a wide variety of incidents, including people refusing to leave a residence and loud arguments. Noise complaints came second. The third most common nuisance activity was domestic violence. The number of domestic violence incidents—most of which involved physical abuse or a weapon—exceeded the total number of all other kinds of assaults, disorderly conduct charges, and drug-related crimes combined. One incident involved a woman having bleach thrown in her face. . . . Two involved the battering of pregnant women. Box cutters, knives, and guns were used. In one incident, ‘the caller stated that [her boyfriend] just sprayed her with lighter fluid and also set a piece of paper on fire.’”).

⁶³ *Id.* at 191 (“In the vast majority of cases (83 percent), landlords who received a nuisance citation for domestic violence responded by either evicting the tenants or by threatening to evict them for future police calls.”).

⁶⁴ See *id.*

⁶⁵ JASON ADAM WASSERMAN & JEFFREY MICHAEL CLAIR, *AT HOME ON THE STREET: PEOPLE, POVERTY & A HIDDEN CULTURE OF HOMELESSNESS* 154 (2010). A homeless police resource office described it perfectly: “In reality, its playing hide the homeless. We all know that. Nobody wants to sit and look at the homeless. It’s a fact of life.” *UNDER THE BRIDGE*, *supra* note 1.

programs. Moreover, frequent evictions often have impacts that have indirect consequences, besides the obvious cost of moving. Frequent readjustment can be taxing both socially and cognitively on children.⁶⁶ Displacements from communities, either through affirmative evictions or indifference to living conditions by landlords, impose significant costs on tenants.

Additionally, individual residents often suffer financially because the landlord fails to maintain the premises.⁶⁷ Sickness, injuries, or money expended on repairs deplete what little money tenants may have after paying rent. In public housing residences, tenants pay less in rental income, but may suffer from similarly unstable environments due to rules-based evictions⁶⁸ or localized crime that can exhaust residents' finances or make wealth accumulation challenging.⁶⁹ Residents of both public housing and gap rentals spend more time in doctors offices and mental health appointments, in school offices addressing their children's disciplinary issues, or in police stations, lawyers offices, or court houses, paying for the fallout of living in high-crime environments.⁷⁰ And homeless

⁶⁶ Ann Douglass, *Rethinking the Effects of Homelessness on Children: Resiliency and Competency*, 75 CHILD WELFARE 741, 742 (1996) ("Much of the research evaluating and describing children who are homeless has reported alarmingly high levels of developmental delays, emotional disturbances, and psychopathology among this population.").

⁶⁷ See AUDREY PETTY, *HIGH RISE STORIES: VOICES FROM CHICAGO PUBLIC HOUSING* 157 (2009) (A former tenant describes her experience as a child living in Ogden Courts, Chicago Public Housing, and the frustrations of her mother who continuously requested maintenance, in the hopes of not having to spend the money to fix the issue herself. "When I was little, we would go down to the front office and the next day that problem would be solved. But around the time I turned ten or eleven, the office was still open, but it definitely wasn't staffed like it was before. It was only maybe two or three people in there and they were responsible for maintaining the entire complex. I remember my mother going to that office a lot. The staff would say, 'Oh yeah, we'll put the request in, we'll put the request in,' and nothing would happen. My mother—she tried not to get frustrated in front of us, but we could tell that she was pretty upset"); see also DESMOND *supra* note 57, at 72–74 (describing the Faustian bargain that renters accept between reporting deficient conditions on their property and potentially being forced out).

⁶⁸ Quality Housing and Work Responsibility Act of 1998 § 545(a), 42 U.S.C. § 1437f(o)(6)(C) (2012) (The PHA can disapprove or evict tenants or any member of household if their activity: "(i) threatens the health or safety of, or right to peaceful enjoyment of the premises by, other tenants or employees of the public housing agency, owner, or other manager of the housing; (ii) threatens the health or safety of, or right to peaceful enjoyment of the residences by, persons residing in the immediate vicinity of the premises; or (iii) is drug-related or violent criminal activity").

⁶⁹ Mary C. Comerio, *Pruitt Igoe and Other Stories*, 34 J. OF ARCHITECTURAL EDUC. 26, 26 (1981) ("It's true that elevators were undersized and stopped only on the 4th, 7th and 10th floors requiring tenants to walk up or down flights of stairs through a labyrinth of corridors that made recognition of neighbors difficult-to-impossible, [and] provided endless opportunities for intruders and convenient settings for crime.").

⁷⁰ See James Krieger & Donna L. Higgin, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758–59 (2002) ("Poor housing conditions are associated with a wide range of health conditions, including respiratory infections, asthma, lead poisoning, injuries, and mental health. . . . Lack of affordable housing has been linked to

persons are taxed in resources, time, and community because the decentralization of services forces them to constantly be on the move to obtain basic human needs, such as food, shelter, medical care, economic resources through government programs, and potential job opportunities.⁷¹

Landlords, municipalities, and localized developers on the other hand have no problem either accumulating personal wealth, or leveraging their real property for other wealth preservation plans.⁷² Homeless camps are dismantled with little notice when they become inconvenient or better uses are apparent. Gap landlords capitalize on their knowledge of the system, often able to leverage above-market rents from tenants and damages on top when evictions occur—all with minimal expense in maintaining these deplorable properties.⁷³ Public housing authorities demolish and rebuild projects with little resident input, and over resident objections. These inequalities highlight how propertied persons hold systematic advantages over under-propertied persons, with little opportunity to escape the cyclical drain of poverty. Looking deeper at each of these

inadequate nutrition, especially among children. Relatively expensive housing may force low-income tenants to use more of their resources to obtain shelter, leaving less for other necessities such as food.”); DESMOND, *supra* note 57, at 257 (“Substandard housing was a blow to your psychological health: not only because things like dampness, mold, and overcrowding could bring about depression but also because of what living in awful conditions told you about yourself.”); LAWRENCE J. VALE, RECLAIMING PUBLIC HOUSING: A HALF CENTURY OF STRUGGLE IN THREE PUBLIC NEIGHBORHOODS 82–83 (2002) (During 1967 in South Boston, the Boston Housing Authority investigated racial incidents on D street. It was discovered that over one third of the population had registered at least one complaint. Some complaints consisted of minor damages to property (“severed clotheslines, vandalized mailboxes, smashed hallway lights”) to more serious threats (“ignited papers thrust under their front doors; teens who urinated in their hallways . . . doors smeared with racial epithets . . . rocks, bricks, bottles, and other debris being hurled through their windows”). One resident claimed that “she and her family ‘felt like prisoners,’ and that the ‘degradation and humiliation’ was such that her children felt ‘as though they were being punished by having to stay at D Street’”).

⁷¹ GOWAN, *supra* note 29, at 144 (Willie, a panhandler, wanted to find work, but after he spent his day trying to make enough money to survive tomorrow, he “then had to get up and try to find work. Except [he] had to go back to the hotel and change [his] clothes to look for work. It all took time, and [Willie] was so down, it was hard [for him to go] into a joint and ask for work”).

⁷² See VAN DER WALT, *supra* note 18, at 60 (landlords, municipalities, and localized developers can accumulate personal wealth by leveraging the possibility of eviction. “[E]viction is a political instrument that not only serves a general socio-political purpose in that it entrenches the existing hierarchy of owners and non-owners, but that could also be used to further less wholesome and far more contentious ideological goals, such as . . . oppression. . . . [E]viction law . . . entrench[es] and uphold[s] social and economic inequalities and injustices in the existing property system”).

⁷³ DESMOND, *supra* note 57, at 102 (“Most tenants taken to eviction court were sued twice—once for the property and a second time for the debt—and so had two court dates. But even fewer tenants showed up for their second hearing than for their first, which meant landlords’ claims about what was owed them usually went unchallenged.”); Rosser, *supra* note 25 (“Desmond’s understanding of exploitation begins with the simple idea that ‘[t]here are losers and winners’—and that, in the low-income housing market, ‘[t]here are losers *because* there are winners.’”).

categories of under-propertied persons reveals how property's promises escape the grasp of the poor.

A. *Tearing Down to Exclude the Homeless*

Behind a chain link fence along Rose Hill Avenue in Danbury, Connecticut, sits a vacant wooded lot, with electrical transmission poles piercing the dense shrubbery and a large bare spot where trees and bushes have refused to grow. Sixteen years ago, at this same spot sat a defunct shuttered factory, with a smoke stack that read in vertical print "M-A-L-L-O-R-Y," surrounded by some of these same trees and outlined with warehouses, office space, and a railway line. Some years before it was abandoned, the factory was one of Danbury's largest employers, manufacturing hats and providing employment for 400 people.⁷⁴ After it closed in 1987, between seven and forty homeless persons used the building as a shelter, preferring the anonymous confines of an abandoned factory to living in the city-run homeless shelter.⁷⁵

To be clear, places like the old Mallory factory are not ideal living spaces. They are typically places that foster addictions and disorder that homeless shelters will not tolerate.⁷⁶ Understanding how homeless per-

⁷⁴ Rob Ryser, *Danbury Hopes to Redevelop Once-Thriving Mallory Hat Factory Site*, NEWSTIMES (Sept. 14, 2016, 4:22 PM), <http://www.newstimes.com/local/article/Danbury-s-drive-to-bring-life-back-to-a-9220546.php> ("The Mallory Hat factory was one of the reasons Danbury was known as the hat capital of the world. At the turn of the last century, the factory employed 400 people, making about 50,000 hats annually. It was one 30 factories in the city, making 5 million hats a year.").

⁷⁵ Frances Chamberlain, *Demolition of Factory Scatters Homeless*, N.Y. TIMES (Jan. 9, 2000), <http://www.nytimes.com/2000/01/09/nyregion/demolition-of-factory-scatters-homeless.html>.

⁷⁶ GOWAN, *supra* note , at 184. Gowan's study of homeless persons in San Francisco describes one homeless man named Carlos's description of that control:

"The new shelters—they are definitely nicer inside than your old-school lottery deal. [Half the local male shelters still ran a daily lottery for the night's lodging]. You get some kind of bed, real deal, somewhere to put your clothes. You can keep yourself clean. That's all good. But it's like they want to control you, everything about your life."

"They don't know you, but they think they do. And it *gets* to you. . . . After a while you start thinking maybe they're right, maybe it's all about *me*, my *bad* attitude, my *drug* use. Maybe I'm depressed, like they say. This one woman was saying I needed antidepressants." Carlos gestured towards a hooded dealer on the street corner opposite. "What the fuck! Like I need more drugs in my life?"

Id.

Snow and Anderson describe why homeless persons may choose to live in places other than shelters: "In Austin, as elsewhere . . . many of the homeless turn their backs on available shelter space. Most do so not because of insanity or judgmental incompetence, as some officials would have us believe, but because of the deplorable and often dehumanizing conditions in shelters." SNOW & ANDERSON, *supra* note 57, at 80. For a discussion of why those conditions are so deplorable, *see id.* (describing poor sleeping conditions, chemical smells, cigarette smoke, sounds, etc. making the shelter living less of a space for rest, and more of a "retreat from elements").

sons perceive the space they occupy, whether it's a place like the Mallory factory or a shelter, discloses how homeless persons understand the benefits they do not have.

A primary way that being homeless negatively impacts a person's autonomy is the regular physical violence that homeless persons are subjected to. The unseen and hidden places where homeless communities find shelter often either present formidable challenges to public well-being, or they contradict society's delicate balance between public safety and health concerns. Street living often takes its toll by exposing homeless persons to physical violence from those seeking to appropriate money, goods, or vengeance on unsuspected persons sleeping "rough."⁷⁷ At the Mallory factory, fires started by homeless persons for warmth or cooking resulted in several out of control blazes that required the local fire department's intervention.⁷⁸ Additionally, while shelters may be a place of implied violence,⁷⁹ homeless camps abandoned buildings are often places of overt violence, particularly towards women and those perceived to be weaker.⁸⁰ Lastly, homeless campsites create public health concerns for the residents because they rarely offer suitable plumbing and sewage disposal sites for human waste. Regularly though, the cities respond to these problems by tearing them down—giving occupants very little notice of removal before clean-up crews show up to dispose of personal items and mow down shrubs and brush that once hid the

⁷⁷ HOWARD M. BAHR, *SKID ROW: AN INTRODUCTION TO DISAFFILIATION* 7–8 (1973) ("Everyone bothers the skid row man; it is always open season on the homeless. The police man, the jackroller, the welfare worker, the employment agent, other skid row men, and the poor white playing a desperate game of one-upmanship by treating the skid row resident as a child, a criminal, or an animal—all may prey with relative impunity on the human being stigmatized as derelict."); GOWAN, *supra* note 29, at 181 (describing a physical attack on an informant while sleeping, losing \$48, and resulting in an emergency room visit for stitches).

⁷⁸ Chamberlain, *supra* note 75 ("There is a group that does not use the shelter," said Deborah MacKenzie, director of Welfare and Social Services for Danbury, the organization that runs the City Shelter. . . . The factory, depending on who one talks to, was home to between 7 to 40 people, all single adults. In early December, fires that were probably set by remaining squatters, forced the police to set up 24-hour surveillance on the building to keep people out.").

⁷⁹ There is also significant evidence that shelters are places of overt violence as well. Participants in the *Under the Bridge* documentary described one shelter as "worse than jail." *UNDER THE BRIDGE*, *supra* note 1. See also Tanene Allison, *Confronting the Myth of Choice: Homelessness and Jones v. City of Los Angeles*, 42 HARV. C.R.C.L. L. REV. 253, 257 (2007) (describing first-hand accounts of the danger that the shelter system presents prompting vulnerable homeless persons (women and youth) to pursue options outside the shelter system); GOWAN, *supra* note 29, at 152 n.12.

⁸⁰ GOWAN, *supra* note 29, at 15 ("The conditions of life for homeless single women, and even more for homeless women with children, were strikingly different from the situation of single men. Homeless services made a priority of female shelter beds, as women were often victimized on the street. In comparison, men received less financial support and were overwhelmingly caught up in the criminal justice system.").

homeless from public view.⁸¹ Cities often cite public health concerns as their motivation for such swift action.⁸² Thus, cities and property owners perceive a moral authority to close off access to homeless persons occupying these premises.⁸³ Addressing the problem through demolition forces homeless persons towards a shelter system that offers threats, although different, to personal safety.⁸⁴

Homeless persons rarely gain better protection in shelters. Before the 1980s, homeless shelters were deplorably maintained, making the properties undesirable places of last resort. The 1987 McKinney Act offered some relief to the problems of inadequate facilities by tying federal funding to certain standards that shelters had to satisfy.⁸⁵ Still, even with standards that ensured a baseline of adequacy, the conditions remained less attractive because of the prevalence of violence and theft that persisted in the shelters.⁸⁶ Moreover, many shelters and service providers disqualify certain homeless from services, such as those that cater to specific gender, those that exclude because of some deficiency (like drug

⁸¹ See *City of Abbotsford v. Shantz* (2015), 392 D.L.R. 4th 106, ¶ 98 (Can. B.C. Sup. Ct.) (describing the city of Abbotsford's policy of mowing down shrubs to expose homeless persons); see also *UNDER THE BRIDGE*, *supra* note 1 (one homeless person describing the city of Indianapolis's decision to shut down his homeless camp: "[w]hen they threaten to shut down the camp, they never said that being outside is a bad thing, they want to put you in different places. When you come in large groups like this, people see it, people know about it, people respond to it"); Sven Berg writes:

Earlier Thursday, the city closed a block of West River Street between South Americana Boulevard and South 15th Street. Barricades were set up at both ends, and two police SUVs sat parked next to the barricades. A local company set up large, enclosed tents and installed portable heaters inside them on the closed-off block of River Street. Workers set up two large garbage dumpsters on the same block. At least eight bicycle police officers circulated through the area. Journee said the closure was due to the 'unsafe, unhealthy conditions at Cooper Court.'

Sven Berg et al., *Cooper Court Homeless Camps: 'You Have to Leave Today,'* IDAHO STATESMAN (Dec. 3, 2015), <http://www.idahostatesman.com/news/local/community/boise/article47804210.html>

⁸² But see Berg, *supra* note 81 (noting that the public health concern has been challenged as more cover than legitimate for a municipality's desire to reclaim an area).

⁸³ See GOWAN, *supra* note 29, at 235 ("The problem of homelessness became the problems created by the homeless, and in particular, the threat to safe and clean urban spaces.").

⁸⁴ See *id.* at 76–77 ("For many residents, the shelters are an unpleasant reminder of time behind bars. . . . [T]he last thing [the shelter employees] care about is keeping people safe. Instead it's rules and constant—I mean *everlasting*—disrespect. It knocks you down."); *id.* at 280 ("[I]t was common sense that 'losing the van' signaled utter disaster, the end of any hope of safety, personal space, or autonomy.").

⁸⁵ Stewart B. McKinney Homeless Assistance Act, H.R. 558, 100th Cong. (1987).

⁸⁶ GOWAN, *supra* note 29, at 48–49 (interviewing director of the San Francisco Coalition on homeless, who described the feel of shelters as just "a little safer than the streets" while the "level of conflict and fear intensified because the down and out and desperate were concentrated in confined spaces").

use or inebriation), or those that prefer cases that suggest some level of “salvageability.”⁸⁷

The public health problem that cities cite as grounds for demolishing homeless camps often ignores other public health problems that are present in the shelter system. Public health investigations have tied tuberculosis outbreaks in homeless populations to shelters⁸⁸ in Illinois,⁸⁹ New York,⁹⁰ North Carolina,⁹¹ Florida,⁹² Mississippi,⁹³ Maine,⁹⁴ and Ohio.⁹⁵ Likewise, even when cities are aware that high populations of homeless persons are likely to populate certain areas (such as the Skid Row area of Los Angeles or the Tenderloin district of San Francisco), cities may simply look the other way even when they know that public health issues are exacerbated by the lack of public facilities for the safe disposal of human waste.⁹⁶

But cities and property owners rarely look beyond the obligation not to cause harm to someone else’s property when making their claims of moral authority. Homeless persons, not viewed as propertied persons, have nothing to lose and, therefore, are subject to the whims of cities and owners.⁹⁷ Typically, when homeless persons occupy either private prop-

⁸⁷ SNOW & ANDERSON, *supra* note 57, at 83. There is an increasing trend amongst service providers to take cases only that are likely to succeed, reducing incentives to be innovative or take on tough cases. See Marc Roark, *The Service-Provider Gap*, OBSERVER (Nov. 18, 2015), <http://observer.com/2015/11/the-service-provider-gap/>.

⁸⁸ S. Harris Ali, *Tuberculosis, Homelessness, and the Politics of Mobility*, 19 CAN. J. URB. RES. 80, 84 (2010); Proudfoot C., *Tuberculosis and Homeless People*, 15 PRIMARY HEALTH CARE 16, 17 (2005).

⁸⁹ Claire Dobbins et al., *Tuberculosis Outbreak Associated with a Homeless Shelter - Kane County, Illinois*, 61 MORBIDITY AND MORTALITY WKLY. REP. 186 (2012).

⁹⁰ Jillian Knorr et al., *Notes from the Field: Outbreak of Tuberculosis Associated with a Newly Identified Mycobacterium Tuberculosis Genotype—New York City*, 62 MORBIDITY AND MORTALITY WKLY. REP. 904 (2013); J. Hudson et al., *Tuberculosis Transmission in a Homeless Shelter Population—New York*, 54 MORBIDITY AND MORTALITY WKLY. REP. 149 (2005).

⁹¹ Peter D. McElroy et al., *Outbreak of Tuberculosis Among Homeless Persons Coinfected with Human Immunodeficiency Virus*, 36 CLINICAL INFECTIOUS DISEASE 1305 (2003).

⁹² Matt Soergel, *Duval’s Homeless Say ‘We’d Be the Last to Know’ about TB Outbreak*, FLA. TIMES UNION (Jul. 14, 2012, 5:33 PM), <http://jacksonville.com/news/health-and-fitness/2012-07-14/story/duvals-homeless-say-wed-be-last-know-about-tb-outbreak>.

⁹³ Mario J Azevedo et al., *Tuberculosis Containment among the Homeless in Metropolitan Jackson, Mississippi*, 56 J. MISS. ST. MED. ASS’N 243, 246 (2015).

⁹⁴ N. Nickerson et al., *Public Health Dispatch: Tuberculosis Outbreak in a Homeless Population - Portland, Maine*, 52 MORBIDITY AND MORTALITY WKLY. REP. 1184 (2003).

⁹⁵ Centers for Disease Control and Prevention, *Tuberculosis Among Residents of Shelters for the Homeless—Ohio*, 40 MORBIDITY AND MORTALITY WKLY. REP. 869 (1991).

⁹⁶ Snow and Anderson point out similar issues with an established homeless provider in Austin—the Salvation Army: “[e]ven the Salvation Army didn’t have enough toilet facilities for its overnight clients. In the recreation room, where most of its homeless clients slept, was a single toilet, which could be in use for ten minutes at a time. As a consequence, many, if not most, relieve themselves outside” SNOW & ANDERSON, *supra* note 57, at 74 n.1.

⁹⁷ UNDER THE BRIDGE, *supra* note 1 (as a homeless resource officer attends to the city’s evacuation of a homeless camp, he says “everyone here has been homeless somewhere else

erty or public property that's not being put to other uses, cities will eventually tear down the physical spaces (whether temporary or permanent). Homeless occupation is viewed as a challenge to the moral or rhetorical identity of the property holder/city. It is also viewed as a detriment to the property's higher economic use. Danbury tore down the Mallory factory after numerous fires, yet nothing sits in the former homeless haven.⁹⁸ In San Francisco, a former homeless camp area known as Dogpatch gave way to new townhouses, live-work villages, a football stadium, a college campus, and shopping centers.⁹⁹ Areas that become associated with "car-living" suddenly strictly enforce nighttime no parking zones.¹⁰⁰

Waste serves to preserve two primary functions of property that elude homeless persons. The first is a self-preservation function that allows individuals to dictate the terms under which they engage the world. Indeed, one of the primary benefits of being a participant in a property system is the ability to decide how much of oneself is exposed to the world and the ability to choose what parts of oneself to hide away.¹⁰¹ Matthew Desmond ends his ethnography on evicted Milwaukee, Wisconsin, families with this observation:

The home is the center of life. It is a refuge from the grind of work, the pressure of school, and the menace of the streets. We say that at home, we can "be ourselves." Everywhere else, we are someone else. At home, we remove our masks. The home is the wellspring of personhood. It is where our identity takes root and blossoms"¹⁰²

before they ended up here. This is not their first taste of homelessness. Let's not caudle everybody. They can handle themselves pretty well. Is it right? No. Is it the perfect solution? No").

⁹⁸ See GOWAN, *supra* note 29, at 98–99. Teresa Gowan tells of another instance where the City of San Francisco retaliated against a homeless encampment for a breach of decorum:

[T]he area's homeless camps had been severely shaken by an event that showed the limits of the social control exercised by the more community-minded residents. One of the groups camping in the area made the dubious decision to engage in major mayhem on their own turf. Over a couple of nights they broke into a pier where several new city buses had recently arrived from Italy. They swiftly stripped them of their shiny aluminum rims and trim, which they hauled away for scrap. The city was quick to retaliate, razing much of the undergrowth that had sheltered the nearby camps and changing the relatively hands-off policy towards the area.

Id.

⁹⁹ *Id.* at 97.

¹⁰⁰ *Id.* at 227.

¹⁰¹ SNOW & ANDERSON, *supra* note 7, at 75 (noting that homeless persons reject the shelter system largely because of its impairment of their autonomy). Snow and Anderson write that "a desire to sleep past 4:30 and to exercise a little autonomy [causes] many of the homeless [to] prefer sleeping arrangements other than those provided by the Sally Shelter." *Id.*

¹⁰² DESMOND, *supra* note 57, at 293.

Teresa Gowan, in her ethnographic observations into the San Francisco homeless world, acknowledges that those who experience severe poverty have a harder time hiding parts of themselves from the world.¹⁰³ Likewise, Snow and Anderson describe the shelter system not so much as a place to sleep but “a temporary retreat from the elements, particularly the rain and the snow.”¹⁰⁴ Indeed, the liminal space of an abandoned building, while perhaps not “safe,” offers “some measure of escape from harassment, [and becomes a] place where visible homelessness [is] less likely to be perceived as a criminal offense.”¹⁰⁵ As Snow and Anderson suggest, “the relevant criterion for the homeless is not so much property rights as the functional value the space has for the host community. That is, the critical questions are not who owns the property or whether it is public or private land, but whether it is of importance for domiciled citizens.”¹⁰⁶

Homelessness interacts with privacy in varying layers according to the resources that individuals have. At the first layer, where one is able to sleep defines the kind of privacy he or she carries into other areas of daily activity.¹⁰⁷ At the bottom end of the scale are those that live on the streets, out in the open, with no place to hide from society, the elements, or themselves.¹⁰⁸ Next, shelters offer to hide homeless persons temporarily from the world, but not from each other. In fact, the shelters are often as dangerous as the street, with the only perk of avoiding police interaction for a few hours.¹⁰⁹ Homeless persons who have some resources may

¹⁰³ GOWAN, *supra* note 29, at 7 (describing the things she learned from participating in the recycling work with homeless persons and noting that she learned about their private lives “by seeing things they did not have the resources to hide”); SNOW & ANDERSON *supra* note 57, at 75 (noting that homeless shelters offer no privacy—from waking next to strangers, to a lack of facilities to conduct their private bodily functions).

¹⁰⁴ SNOW & ANDERSON, *supra* note 57, at 80 (describing the pervasive sounds, violence, and poor conditions that homeless persons experience in the shelter system).

¹⁰⁵ GOWAN, *supra* note 29, at 13.

¹⁰⁶ SNOW & ANDERSON, *supra* note 57, at 103. Interestingly, this statement by Snow and Anderson harkens back Joseph Singer’s observation in his article, *The Reliance Interest in Property*, that legal questions that start from the question of ownership are often starting from the wrong question. Singer, *supra* note 18, at 687.

¹⁰⁷ Rankin, *supra* note 19, at 6 (“[T]he hallmark of homelessness is a lack of private seclusion, so people experiencing homelessness endure conditions of persistent, nearly inescapable visibility.”).

¹⁰⁸ SNOW & ANDERSON, *supra* note 57, at 75 (noting that “whatever the reason for sleeping rough” it is seldom done without some awareness of the risks: vulnerability to mean spirited citizens, other homeless, or probing surveyors; inclement weather; or menacing varmints such as Texas fire ants or brown recluse spiders”). Snow and Anderson note that homeless persons will often sleep in cars, “sleep rough” under bridges, in abandoned buildings, or in low-lying “jungles” to avoid sleeping out in the open. *Id.* at 75.

¹⁰⁹ GOWAN, *supra* note 29, at 76–77. Gowan’s conversation with her informant “Morris” highlights the wariness many homeless persons feel about the shelter system:

I don’t know what they’re thinking, some of these shelters. You can’t expect to put a load of people together and have them all respect each other, respect each other’s

find short-term or over-night privacy in the form of SRO (single-room occupancy) establishments that the barracks-style shelters don't offer. But the respite of the SROs is temporary by design—most SROs are on a first-come first-serve basis with the queue restarting every day.¹¹⁰ But even in these places, the privacy is perhaps only possible if you ignore the other facets of the space.¹¹¹ Teresa Gowan describes the SROs in an institutional-like language, saying there is a feeling of “being caged or feeling watched.”¹¹² Slightly higher on the pecking order are hotel residents, who may have a spike in funds or a long-term voucher that provides for near-resident-like atmospherics.¹¹³ Here, those vouchers or extra funds have purchased the resident “a refuge” from the ordinary chaos of daily street life, a place to get clean and to keep his stuff. While these residents may utilize other homeless services (such as meals), the participation in a pseudo propertied space (even if temporary) allows

personal shit. The few assholes will mess it up for everyone. And they do. Every night there is some bullshit. It's impossible to really sleep. You know, I have my earplugs, but all the same it always wakes me up, someone going off, something missing. And it stinks. Man, does it stink. Close your eyes, you're in jail again. Worse even.

But I could stand the stink if they would put in some kinds of cages, you know like the old cage hotels. For security. Even some of the jails understand this. Like over in Contra Costa County, they give you the key to your cell. It's the only way to make it safe. So you don't have to fight, you don't have to get all your personal items lifted. But the last thing they care about is keeping people safe. Instead its rules and constant—I mean everlasting—disrespect. It knocks you down. . . .

So I go up Van Ness a few blocks, set me up in the bushes on one of those streets up there—what do I get, second night I'm there, a damned ticket.

Id.

¹¹⁰ Kate Shannon et al., *The Impact of Unregulated Single Room Occupancy Hotels on the Health Status of Illicit Drug Users in Vancouver*, 17 INT'L J. OF DRUG POL'Y 107, 108 (2006) (“A standard SRO unit contains a small single room (~100 sq. feet) with a mattress, occasional cooking facilities, and toilet facilities that are usually shared by all residents on a floor of a hotel. Living conditions have been described as deplorable, unsanitary, and dangerous. The majority of unregulated SRO buildings are privately run and offer no services or building maintenance. Many are found in century-old buildings that require frequent repair and structural maintenance. Neglect and poor management by absentee landowners is not uncommon resulting in dilapidated structures that do not meet even the most basic of housing standards. In several cases, managers require tenants to leave their rooms for a day or two after renting for 21–28 days to circumvent the law that states residents acquire permanent tenancy after 30 days of continuous occupation. As such, many SRO residents find themselves sleeping on the streets at some point throughout the month.”).

¹¹¹ For example, homeless persons who are married or who otherwise cohabitate are often excluded from shelter space that is not specifically designed for families. Even then, those shelters are often premised on providing space for mothers with children, not married or cohabitating partners. SNOW & ANDERSON, *supra* note 57, at 75–76 (describing a couple, Marilyn and Smitty, whom none of the church charities would allow to sleep together).

¹¹² GOWAN, *supra* note 29, at 66.

¹¹³ SNOW & ANDERSON, *supra* note 57, at 75 (“Some of the homeless who have been working may choose to spend a few dollars on a cheap motel. . . . Even though it is only for a night or two every now and then, the warm bed, quiet sleep, and private shower add up an almost idyllic retreat from the street.”).

them to adopt a swifter, more anonymous stride in their daily activities, one that Gowan writes communicates to others “just passing through.”¹¹⁴

The second layer of interaction in privacy is the way boundaries are controlled at the city level. Policing of city areas communicate through sheer numbers the places where homeless persons are welcome and where they are not. Gowan’s work on the San Francisco Tenderloin district (a homeless “archipelago of services” located in the heart of San Francisco between the government sector and the business district) not only pulls in homeless persons by offering a vast network of services, but also keeps them there through “aggressive policing” of its border streets and the outer lying spaces beyond.¹¹⁵ Snow and Anderson call this relationship prime space versus marginal space, where enforcement often happens rigorously in prime space to prevent homeless persons from entering or making their stay permanent.¹¹⁶ Gowan writes that this policing communicates “a clear enough message that ragged loiterers should stay within the Tenderloin’s ‘ragged zone.’”¹¹⁷ San Francisco is not alone in this. Savannah, Georgia, is well known to protect the confines of its touristy historic downtown rather vigorously, while not really enforcing other areas to the same degree.¹¹⁸ This type of boundary setting by cities functions inapposite to the normal way boundary setting operates—instead of reaffirming that the residents are propertied persons, entitled to privacy and choice of engagement, the boundaries communicate that they

¹¹⁴ GOWAN, *supra* note 29, at 67.

¹¹⁵ SNOW & ANDERSON, *supra* note 57, at 103 (describing inconsistent enforcement of certain ordinances between homeless persons and other propertied citizens).

¹¹⁶ GOWAN, *supra* note 29, at 103. Snow and Anderson define the space according to who uses the space regularly:

Prime space can be defined as space that is either being used routinely by domiciled citizens for residential, commercial, recreational, or navigational purposes or has symbolic significance. In the latter case, the space is not being used directly, but its value resides in what it symbolizes—order rather than disorder, civility rather than incivility. Marginal space, by contrast, is of little value to regular citizens. In most communities, abandoned buildings, isolated weed patches, alleys, the roofs of buildings, the space under bridges, vacant lots, impoverished, run-down residential areas, warehouse districts and skid rows are all marginal spaces.

SNOW & ANDERSON, *supra* note 57, at 103.

But see WILLIAM DAVID ESTRADA, *THE LOS ANGELES PLAZA: SACRED AND CONTESTED SPACE* 258 (2008) (noting that homeless surround the contested symbolic space); Gary Blasi, *Policing our way out of homelessness? The First Year of the Safer Cities Initiative on Skid Row*, C. ENVTL. DESIGN 6–7 (Sept. 24, 2007), http://www.ced.berkeley.edu/downloads/pubs/faculty/wolch_2007_report-card-policing-homelessness.pdf (describing the significantly higher number of vagrancy and jay-walking citations in the skid row area of Los Angeles than in other parts of the city).

¹¹⁷ GOWAN, *supra* note 29, at 59.

¹¹⁸ *Id.* at 78 (stating that “[c]ertain areas, such as tourist destinations like Fisherman’s Wharf or the elegant sidewalks of Pacific Heights, were hard places to sleep unmolested by police or security guards”).

are institutionalized, being watched, and lack any anonymity that being a propertied person might afford. As one of Gowan's informants tells her:

That's how it is, you know. Once you been out here for a while you see that you ain't gonna get no peace round the TL, anywhere downtown. You got your thieves on your left and your cops on your right and whoa! You better watch your back in every direction you can. That's why you see the smarter people, or I guess people who have their shit together, they'll find something more private, more out of the thick of things, you know.¹¹⁹

In Gowan's words, "homelessness is all about being deprived of a claim to place."¹²⁰ Claiming place is about the ability to choose whether to reveal oneself to the world, the terms in which you make that reveal, and to whom you choose not to reveal. For property owners, the bundle stick of rights implicitly contains a space to exist that is coextensive with their use and ability to exclude others. For homeless persons, their very right to exist is always in conflict with a bundle they don't have.

Privacy associated with place relates to two central ideas surrounding identity. One is the right to be left alone by others—to be an individual. In a city where economic growth is pushing development, spaces for impoverished people to be individuals are diminishing.¹²¹ Again, one of Gowan's informants, "Morris," describes this tension in a town hall meeting called to address homelessness in one community of San Francisco:

I'm hearing all this about your so-called bad actors. But this is hard times, you know. We are not people that have had much of a chance, the people out here. You have your war veterans, your abused kids, your people with a mental illness. But a lot of this is about being poor, always being poor, and your family before you being poor, not having no rich aunt to pick you up. And there's us out there minding our own business. Like me, I work all day picking up cans and bottles. It's dirty, it's tiring, but there's nothing wrong with it. We are like your traditional hobos. We don't ask for much, but we

¹¹⁹ *Id.*

¹²⁰ *Id.* at 80. Snow and Anderson suggest that this deprivation stems from an "urban unease" by other propertied residents. SNOW & ANDERSON, *supra* note 57, at 106.

¹²¹ SNOW & ANDERSON, *supra* note 57, at 103–04 (noting that marginal space may quickly become prime space, forcing homeless persons to spend more time in view of others). It also erodes safe spaces where homeless persons can hang out. *Id.* at 104.

would appreciate being left alone and not treated like trash.¹²²

Morris's desire to be left alone included external threats, like police and other homeless persons that used violence and preyed on other weaker homeless victims. It also included a systematic, broad-based view of individualism to be self-defining.¹²³

Besides reaffirming security, privacy through place also affords persons the ability to assert some level of agency—or the capacity to choose how one's resources are put to use. One of Gowan's most important observations in her work is how homeless men sought to find some level of agency over their homeless status.¹²⁴ Some of this agency involved the choice to work meager jobs like dumpster diving, recycling,¹²⁵ or the like as a way to avoid the homeless service archipelago in San Francisco. Working meant not having a reason to enter the space of the Tenderloin district, where most homeless services were located.¹²⁶ That in itself afforded a sense of agency over their status as homeless persons. Gowan observes that this work often asserted new spatial claims to the city, as their routes and collection spaces expanded to areas beyond those traditionally occupied by homeless persons:

Instead of skulking around in alleyways and vacant lots, they claimed the sidewalk, even the roadway itself. Indeed, the collective assertiveness of the [recyclers] was changing not only the microspatial order of the sidewalk but also the map of homeless in San Francisco, otherwise densely concentrated into a few neighborhoods.

¹²² GOWAN, *supra* note 29, at 85.

¹²³ *Id.* at 89. Gowan describes one community of homeless around the "Dogpatch" in San Francisco (a separate and discrete community of van livers, shanty dwellers, and tent encampers) as creating an "alternative homeless social space, distinctive from the [archipelago of homeless services in typical skid row areas] and the humiliation of panhandling in the neighborhood commercial strips." As she says about these spaces, they are both "literal space," in terms of the territory the homeless can sleep in without interference from either predatory jack rollers (other homeless predators) or the police, and a space of practices and relationships that separated the homeless from "both sin and sickness." *Id.*

¹²⁴ *See id.* at 95 ("Like the hustlers, they were trying to wrest back some sense of agency, of having a say in the shape of their own lives.").

¹²⁵ *Id.* at 154 ("Caught between two arms of the state, Derick experienced recycling as a vital free space, a narrow line he could walk that freed him from having to deal with welfare and shelters and did not increase his risk of incarceration.").

¹²⁶ *Id.* at 139 (noting that for some men, work "gave them a certain autonomy from the indignities of the homeless industry," allowing them to "combine critique of the system with some sense of agency"). Gowan describes one such informant whose entrée into recycling was a mix of keeping distance from the dangers of the Tenderloin area and the demeaning process of dealing with homeless service agencies. Fundamentally, though, Gowan notes "he liked recycling in particular because it was unsupervised, creative, and something he experienced as a choice," granting him true autonomy in himself. *Id.* at 177.

Particularly important were the many who moved into wealthy residential areas to do their routes. African American Dobie was the foremost such pioneer among my sample. With his high, customized “buggy,” his stylized hand gestures, his straight-shouldered, dignified attitude, he took the broad, quiet streets of the sunset as his own. Through their display of competence and “decency” Dobie and his colleagues made a (mostly successful) spatial claim, resisting the coral of the street rabble into the Tenderloin and other poor neighborhoods.¹²⁷

As described later, these claims to space when unwelcomed are met with nuisance-like claims, whether by private property owners, the city, or law enforcement.¹²⁸ For homeless persons, their personal autonomy often collapses with a city’s decision to force them to occupy certain areas and in the anticipation of the physical violence that those city-prescribed areas are bound to reproduce. Homeless persons are often moved from place-to-place under social or economic pressures. The respite they find in wasted spaces often is temporary until the squeaky wheel of public disapproval is sounded or the sudden realization that the space they occupy could be valuable if developed.¹²⁹

B. Evicting the Poor

Matthew Desmond tells the tale of eight evicted families, their landlords, and the fallout from losing the place where they have shelter. In the epilogue, Desmond tells the tale of Arlene and her two boys. Here are the basic facts:

- Arlene had been previously evicted from a home because her boys threw a snowball at a moving car, and the driver kicked in the door to the home.
- The eviction process gave Arlene an option to have her items stored for \$350 per month or have them placed on the curb. She chose the curb.
- Arlene and her boys stayed at the Salvation Army for three months while she looked for a new home.
- Arlene found a new place, a two-bedroom home for \$525 per month, but two weeks later was forced to

¹²⁷ *Id.* at 165.

¹²⁸ Roark, *Homelessness*, *supra* note 19, at 53.

¹²⁹ JASON ADAM WASSERMAN & JEFFREY MICHAEL CLAIR, *AT HOME ON STREET: PEOPLE, POVERTY & A HIDDEN CULTURE OF HOMELESSNESS* 154 (2010) (“Those that live on the street live in moving ghettos. They are segregated to wasted spaces, but only until the wheels of citizen complaints become squeaky enough or until those spaces become valuable again.”).

move because the city found her home unfit for human habitation. Arlene often looked back on that place as her favorite place she lived. She did not get her money back.

- Their next stop was an inner-city apartment complex known as a “haven for drug dealers,” where she stayed until the end of the summer.
- Arlene moved to a bottom duplex with a “fist-sized hole” in a living room window, a door with no lock but an “ugly wooden plank that had to be dropped into two metal brackets,” and filthy carpet.
- The rent in her new place was \$550 per month or 88 percent of her monthly \$628 welfare check.¹³⁰

Just as homeless persons often suffer the indignity of living life in the open, subject to scrutiny of both the police and the public, those that live in gap rentals like Arlene often suffer both the indignities of less-than-secure lives at the whims of their landlords, while paying an executioner’s ransom for a place to live.¹³¹ Indeed, the range of property remedies benefit the landlord, and rarely extend to offer protections to the gap renter.¹³² Here again, we see how the expectation of ownership as informed by doctrines like waste benefit the property owner and avoid the gap renter. Lacking these values, tenants in these leaseholds often lose a sense of autonomy that their home should convey.¹³³ This is primarily

¹³⁰ DESMOND, *supra* note 57, at 1–3.

¹³¹ See Purser, *supra* note 21, at 398 (describing the dynamics of the landlord-tenant power struggle). Purser explains:

The landlord’s ‘self-help’ efforts were in this case particularly sinister. After Evie [the tenant] complained repeatedly about the lack of gas and hot water, the landlord accused her of threatening arson. [Evie] was arrested and held in custody on \$10,000 bail. When it was determined at her bail hearing that she had no prior criminal record, Evie was released on her own recognizance, only to find that the locks on her apartment had been changed and all her possessions (amounting, in her estimation, to \$500) were trapped inside. That day, she filed the paperwork charging her ‘landlady’ with an illegal eviction, a charge later upheld by the court which found ‘beyond a reasonable doubt’ that the landlord ‘availed self-help techniques’. Due to the frequent and irregularly scheduled court hearings she now had to attend, Evie could not hold down a ‘regular’ job.

Id.

See also Matthew Desmond, Letter from Milwaukee: Forced Out: For Many Poor Americans, Eviction Never Ends, *NEW YORKER* (Feb. 8, 2016) [hereinafter Desmond-Letter], <http://www.newyorker.com/magazine/2016/02/08/forced-out> (describing the difficulty of people in poverty in eviction proceedings).

¹³² See Purser, *supra* note 21, at 399 (noting the disparity between landlord power to evict and tenant power to refuse is so one-sided that many tenants merely “move out and give up the battle” of eviction). These include illegal self-help evictions that are not reported in the housing stats. *Id.*

¹³³ Christine A. Walsh et al., *Characteristics of Home: Perspectives of Women Who Are Homeless*, 14 *THE QUALITATIVE REP.* 299, 308 (2009) (“Of primary importance is the need for

visible in how the law prefers value-maintenance for owners over gap renters and how privacy is only slightly better than life on the streets.

Landowners assume that ownership of property will create value rather than deplete it.¹³⁴ Property increases economic assets because it rarely diminishes over time.¹³⁵ Communal value grows as one lays down roots that have the opportunity to establish long-term relationships that enhance one's position in the community. And personal dignity is promoted by the feeling of safety and individual security both in physical environment and identity. But what we learn from looking deep inside the world of gap rentals is that these values elude tenants to the benefit of landlords. Desmond's work describes the "urban entrepreneurs" who deal in human suffering and profit handsomely knowing their clients have nowhere else to turn.¹³⁶ They promote neighborhoods where people no longer have long-term roots and, therefore, the ideal of identifying with the community in which you live never takes shape. What's more, the homes people reside in challenge notions of human dignity and security, turning landlords into private law enforcement and incentivizing tenants not to report crimes or property hazards.

First, gap renters often pay exorbitant amounts in rent for homes and apartments that end up costing them more money than similarly priced non-gap rentals. The challenge of course is that gap renters are often stuck leasing property they don't want because other property is not available to them.¹³⁷ Arlene paid nearly 88% of her monthly check for the first place she rented.¹³⁸ She later paid more. Meanwhile, the "urban entrepreneurs" take vacations to Jamaica, drive luxury cars, and deal out evictions like they are light bulbs to be distributed. Ironically, one tenant retorted, "I find it hard to believe these landlords are distribut-

privacy, a bedroom where they can be alone. The participants described their preference for sharing their living space with people of their own choosing, people they want to be with, often children and extended family members. In support of their personal growth and well-being, the women emphasized the need for autonomy and self-determination as necessary to their psychosocial well-being. Autonomy for these women includes the capacity to make their own decisions and choices, to practice individual religious beliefs and traditions, and the ability to take alone time for oneself if and when it is needed. Furthermore, the ability to cook, entertain, and pursue leisure activities were identified by study participants as freedoms that help make a place feel like home.").

¹³⁴ Amanda Falcone, *Why Buying a Home is a Smart Investment for Millennials*, U.S. NEWS AND WORLD REP. (Sept. 22, 2015), <http://money.usnews.com/money/personal-finance/mutual-funds/articles/2015/09/22/why-buying-a-home-is-a-smart-investment-for-millennials> ("Buying a home is one of the smartest financial decisions you can [make] . . . because it is inflation-protected and a physical asset that doesn't disappear like stocks can do.").

¹³⁵ See *id.*

¹³⁶ See Desmond-Letter, *supra* note 131.

¹³⁷ *Id.* This may be because they cannot qualify for better housing due to bad credit history or too many evictions, or because even though they qualify for public housing, there is not enough housing stock for them to take advantage of the opportunity.

¹³⁸ *Id.*

ing anything, let alone light bulbs.” Often their inventory costs less than \$20,000 while netting that amount in rentals in the first two years. The financial success off of the suffering of the poorest residents led one landlord to comment: “if you do low-income, you get a steady monthly income,” and that the “hood was good.”¹³⁹

The low investment by landlords does not mean that the rentals are lower for tenants. Starting with the monthly rental, gap renters often pay significantly higher amounts as a percentage of their income.¹⁴⁰ In contrast to those in public housing, those that live in gap rentals often pay exorbitant rentals due to prior evictions, credit problems, criminal backgrounds, or other reasons that make them undesirable to other landlords or to public housing agencies.¹⁴¹ Matthew Desmond captures this through the lens of one of his subjects, Arlene:

[She] had given up hoping for housing assistance long ago. If she had a housing voucher or a key to a public housing unit she would spend only 30 percent of her income on rent. It would mean the difference between stable poverty and grinding poverty, the difference between planting roots in a community and being batted from one place to another. It would mean she could give most of her check to her children instead of her landlord.¹⁴²

The life-changing discretion that this shift in income causes means that wait-lists for public housing access is generally long and usually not worth the wait. In Milwaukee, Arlene encountered a waiting list for rent-assistance that numbered over 3500.¹⁴³ In Savannah, Georgia, a city with a population around 150,000, the waiting list for public housing or subsidized housing is over 18,000 families. The prospects of moving up and down the list often depend on meeting pre-set criteria that allow individuals to jump ahead in line. Still, even with the potential to navigate the list in a quick manner, the likelihood of spaces opening up for individuals not already in public housing is minimal.

The high-cost of gap rentals does not mean that the premises are suited for human occupation. In one study, the authors noted that

¹³⁹ DESMOND, *supra* note 57, at 152.

¹⁴⁰ Some reports suggest that extremely low income persons outside the subsidized housing sector may pay over 70% of their monthly income on housing. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22 FAST FOCUS 1, 1 (2015).

¹⁴¹ See DESMOND, *supra* note 57, at 66.

¹⁴² DESMOND, *supra* note 57, at 59; see also Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 303 (2013); Martha Burt, *Homeless Families, Singles, and Others: Findings from the 1996 Survey of Homeless Assistance Service Providers*, 12 HOUSING POL’Y DEBATE 737 (2001); Maureen Crane & Anthony Warnes, *Evictions and Prolonged Homelessness*, 15 HOUSING STUD. 757 (2000).

¹⁴³ DESMOND, *supra* note 57, at 59.

[t]he risks associated with residence in substandard housing are disproportionately borne by poor renters and racial/ethnic minorities (including immigrants). In terms of access to basic services such as complete plumbing and kitchens, there are disturbing differences between renters and owners, and blacks, Latinos, and whites. Across the USA, renters are 3.80 times more likely to lack a complete kitchen in their unit and 2.04 times more likely to lack complete plumbing than owners (Bureau of the US Census 2000). . . . [T]he American Housing Survey reported that in US central cities in 2007, 76% of dwellings with holes in the floors, 77% without any electrical wiring, 62% with cracks in the walls, and 61% with broken plaster/peeling paint indoors were occupied by renters.¹⁴⁴

In fact, as Desmond demonstrates over and again, gap rentals are regularly deficient, leading tenants to fear other city officials besides the police. The housing department, if called to inspect a home, may declare that a home is uninhabitable.¹⁴⁵ Moreover, knowing that tenants have few options instills apathy by landlords towards repairs that may be necessary. As Desmond writes:

Landlords at the bottom of the market generally did not lower rents to meet demand and avoid the costs of all those missed payments and evictions. There were costs to avoiding those costs too. For many landlords, it was cheaper to deal with the expense of eviction than to maintain their properties; it was possible to skimp on maintenance if tenants were perpetually behind; and many poor tenants would be perpetually behind because their rent was too high.¹⁴⁶

If tenants were current on the rent, the law afforded a host of remedies to force landlord action—including withholding rent, contacting the

¹⁴⁴ Sara E. Grineski & Alma Angelica Hernández, *Landlords, Fear, and Children's Respiratory Health: An Untold Story of Environmental Injustice in the Central City*, 15 *LOC. ENV'T* 199, 200–01 (2010).

¹⁴⁵ DESMOND, *supra* note 57, at 87; *see also* Dash Coleman, *Update: Arbor Cottages' Owner Arrested after Police Raid in Savannah*, SAVANNAH MORNING NEWS (Jan. 22, 2014), <http://savannahnow.com/crime/2014-01-22/police-raid-arbor-cottages-savannah> (describing housing code violations and safety concerns that might force the court to “evict” the landlord’s tenants); Jan Skutch, *Judge Williams to Visit Troubled Cottages*, SAVANNAH MORNING NEWS (Oct. 15, 2013), <http://savannahnow.com/news/2013-10-15/judge-williams-visit-troubled-cottages> (while noting that progress was being made by the landlord above, stated that the units remained “empty”).

¹⁴⁶ DESMOND, *supra* note 57, at 75.

housing department, or both. But being in arrears or withholding rent for deficient conditions would often result in tempting an eviction or retaliation for reporting deficiencies in the property. In a report for Utah Legal Services for tenants, the procedural difficulties in withholding rent for poor residents are spelled out:

Many tenants don't pay the rent when the landlord refuses to fix something. This is *not* what you should do. If conditions are so bad you can't live there and you move out, you may get back some of the rent you paid. But if you continue to live in the place, it is almost impossible to get a judge to say you don't owe any rent at all. If you withhold *some* of the rent, you take the risk that a judge won't agree with that amount. And you may be evicted before you get to explain to a judge why you didn't pay all the rent. The landlord can get a hearing before a judge within 10 days after filing an eviction action against you for nonpayment. At the hearing the judge will only determine if any amount of rent is due, not how much. If any rent is due, you can be evicted about 3 days after that hearing. Only later would you get a chance to explain your rent deductions. In any event, the law requires a tenant to notify the landlord before the tenant can be compensated for bad housing or force repairs.¹⁴⁷

Also the lack of stable, sufficient housing leads tenants to prefer the devil they know to the devil they don't,¹⁴⁸ fearing reprisal from landlords if they report problems in the rental.¹⁴⁹ Tenants also resort to self-help or

¹⁴⁷ *Bad Housing: Dealing with Habitability Issues*, UTAH LEGAL SERVICES, http://www.utahlegalservices.org/public/self-help-uploads/Bad_Housing.pdf (last visited July 16, 2017). See also David Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 412 (2011) (noting the impact that payment and markets play in tenant choices to withhold rent or assert habitability claims); RICHARD POSNER, *ECONOMIC ANALYSIS IN LAW* 485 (6th ed. 2003) ("From the standpoint of protecting poor people, the provisions regarding procedural rights and rent withholding are particularly pernicious. They are rights more likely to be invoked by the poor than by the rich. They therefore give landlords an added incentive to substitute toward more affluent tenants, who are less likely to be late with the rent or to abuse the right to withhold rent.").

¹⁴⁸ Super, *supra* note 147, at 409 ("[I]n a tight housing market, tenants of substandard housing may feel they dare not assert the warranty [of habitability] because the likelihood they will end up somewhere worse is high.").

¹⁴⁹ Grineski, *supra* note 144, at 209–10 (describing one tenant's reluctance to call his landlord over mold in the bathroom for fear of eviction, and another tenant's actual eviction). Grisenksi and Hernández describe one informant's experience with her landlord after reporting conditions like vermin, mice, roaches, mold on the walls and ceilings, and problems in the kitchen: "[t]he landlord wants us out of the home because we've been complaining. He does not want to help." The informant also explained that she was current on rent and that she had one month to leave, and that she didn't know where she would go next. *Id.* at 210.

paying out of pocket for repairs to make homes more livable (if not make them habitable), and minimize deficiencies that make their homes intolerable.¹⁵⁰ But these fixers only slightly reduce the aggravation of paying higher-than-value rents to cover over some “deficiency” that led them to the rental in the first place. This self-help masks the problems endemic to gap rental conditions, while forcing the tenants to internalize the costs and burdens of a deficient home.¹⁵¹ Individual tenants particularly feel these problems when the unit is a single-family home rather than a multi-family structure.¹⁵² This Faustian bargain, where the renter agrees or feels constrained against reporting habitability problems in exchange for a few months longer of having housing, means that the eviction may be delayed.¹⁵³

Second, gap renters are often less stable and regularly seek other gap rentals soon after occupying a new space. As Desmond writes, “eviction is contagious,” and one is likely to beget another. The fact that people are evicted from tenancies means that not only is the financial cost of the next rental higher, but also the opportunity to create community roots has been lost. Losing time in a community means those persons who otherwise would learn to care about nearby neighbors now find themselves in an unending loop of living amongst strangers. This creates what Jane Jacobs calls a “perpetual slum,” rendering disrupted neighborhoods that suffer higher rates of upheaval as more likely to have higher crime rates.¹⁵⁴

What is more (as described below), gap renters often face evictions for various non-tenancy reasons. Landlords evict tenants because they believe they may make more money with other tenants.¹⁵⁵ Landlords

¹⁵⁰ *Id.* (describing one family that prior to eviction patched a defective ceiling after the landlord refused to do so). Grisenski and Hernández further note that where conditions presented health concerns to tenants, landlords might permit the tenant to remedy the condition at the tenant’s cost. *Id.* at 211.

¹⁵¹ DESMOND, *supra* note 57, at 112.

¹⁵² See Stephen T. Hasty, *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & POL’Y 581, 582–83 (2011) (describing one court’s use of receivership to protect multiple families harmed by landlord’s failure to maintain the property).

¹⁵³ Super, *supra* note 147, at 409.

¹⁵⁴ JANE JACOBS, *THE DEATH AND LIFE OF THE GREAT AMERICAN CITIES* 272 (1961).

¹⁵⁵ See D.W. Gibson, *How to Dump Tenants and Make a Fortune: The Chaotic, Abusive Process by Which New York’s Affordable Housing is Vanishing*, THE NATION 16, 18 (July 13, 2015) (describing efforts by landlords, such as destroying the plumbing in a tenant’s home, to force tenants to move and capitalize on higher rents); Simon Van Zuylen-Wood, *Get Out: New York City Landlord Steve Croman Mastered the Dark Art of Replacing Low-Income Tenants with Rich Ones. With Rents Skyrocketing, the State Attorney General Wants to Make an Example Out of Him*, BLOOMBERG BUS. WK. 50, 52–53 (Oct. 12, 2016) (describing efforts by landlord to force rent-controlled tenants to move out voluntarily such as removing the washing machines, closing the front door and requiring tenants to enter through the basement, removing the super, turning off the hot water, turning off all water, terminating pest control, cutting the phone lines, not fixing holes in units, etc.).

may also evict a tenant because they believe that the current tenant[s] impact their current value or are simply inconvenient.¹⁵⁶ In effect, the great discretion that landlords have makes clear that whatever privacy and security the gap tenant might have expected in the home, it is merely illusory, rendering them only slightly less in the public view than the homeless.

C. *The Physical/Fiscal Boundaries of Public Housing*

Like control of homelessness in downtown areas, much of the public housing segment's demolition and rebuilding is premised on a broken windows theory of social arrangement—a nuisance theory of crime prevention. The theory goes like this: one deteriorating property begets another. When a sufficiently high number of properties in a neighborhood become apparently deteriorated, the residents become apathetic about other conditions, specifically crime. Thus, crime is spatially associated to the conditions around which it is found.

But while community change is often premised on nuisance theory (we come back to this in Part Two), the remedies and authority to make the change are based on a waste-based doctrine of property ownership. That is, once the housing authority decides that a property is no longer sufficient to meet the needs of the community or the residents, the building can be demolished—even when residents may object. When cities have undertaken significant demolition of public housing units, they have done so to reset the conditions of the community and stamp out crime that has been concentrated in a place over an extended period of time. By demolishing places where crime took seed and distributing the residents to new places, where they have the opportunity to build community elsewhere, cities hope to reduce the amount of crime not only in these neighborhoods but also across the whole city. This theory of demolishing public housing to evict crime has spurred public housing razings in St. Louis, Chicago, New Orleans, Atlanta, Memphis, and elsewhere. Perhaps the most notable example of this theory in action has been the Chicago

¹⁵⁶ See Grineski, *supra* note 144, at 208 (describing interactions between an informant and landlord over conditions in rental). Grisenksi and Hernández explain:

The owner is not a good person, and neither is his wife. I complained to them that there was water under the refrigerator and a leak in the sink and they said, "Well, if you don't really like it here, then leave." They are finding little things to try and make us leave, but we can't leave. If we had money then we could leave. . . . The refrigerator broke and all our food went to waste. I asked if we could have a bag of ice since the refrigerator went bad and we were losing all our food and they said, "What, now you want donations?" They are not that nice. They finally gave us a new refrigerator but until then we stored our food in a friend's fridge (in Spanish).

Id.

Public Housing Authority's destruction and re-visioning of its public housing authority properties.

Almost from the beginning, Chicago's public housing projects existed under a specter of corruption, cheap materials, and racial segregation. After World War II, the city of Chicago experienced an increase in the African-American population, who resorted to the Chicago slums for housing relief.¹⁵⁷ At the time, public housing in Chicago was primarily dominated by white laboring class workers, with very few African Americans living on public assistance. The city's directives to clear the slums was followed by a decrease in the means test to qualify for public housing, resulting in large scale evictions of white families and a shift in the demographics towards African American families.¹⁵⁸ As the 1950s turned to the 1960s, racial violence and segregation continued to shape housing authority decision-making. White voters and politicians blocked public housing projects in white and middle-class communities, isolating public housing to primarily African American neighborhoods.¹⁵⁹

In addition to racial segregation, Chicago's public housing suffered from resource problems and political cronyism that led to shoddy apartments that quickly deteriorated after being built.¹⁶⁰ Stories of facilities deteriorating to the harm of residents became more frequent.¹⁶¹ For example, one story from the early 1980s described the lack of funds for a deteriorating property and its harm to its inhabitants:

One time, when I was very young, this girl, my older sister's friend, was playing around in the front of the building and the gate actually fell on her. It was a really big, wrought iron fence gate and it fell on her. And it messed her leg up. It's still messed up to this day. She broke her leg, and afterwards it was just a back and forth argument with the management office to try and get who was responsible for the accident. Management staff would say, "Well, she shouldn't have been playing on the gate." But the gate was broke. It had been leaning for months, maybe more, and nobody ever came to fix it.

¹⁵⁷ LAWRENCE VALE, PURGING THE POOREST: PUBLIC HOUSING AND THE DESIGN POLITICS OF TWICE-CLEARED COMMUNITIES 199–204 (2013) [hereinafter VALE, PURGING]; Lawrence Vale & Yonah Freemark, *From Public Housing to Public-Private Housing: 75 Years of American Social Experimentation*, 78 J. OF THE AM. PLANNING ASS'N. 379, 385–86 (2012) [hereinafter Vale & Freemark]; Joseph Heathcott, *The Strange Career of Public Housing: Policy, Planning, and the American Metropolis in the Twentieth Century*, 78 J. OF THE AM. PLANNING ASS'N. 360, 366 (2012); PETTY, *supra* note 67, at 19.

¹⁵⁸ See Vale & Freemark, *supra* note 157, at 385–86; PETTY, *supra* note 67, at 19.

¹⁵⁹ Heathcott, *supra* note 157, at 366.

¹⁶⁰ See PETTY, *supra* note 67, at 19.

¹⁶¹ *Id.* at 155.

We always complained about it, and nobody ever did anything. It took the gate falling on a child and her breaking her leg for building management to actually do something. They fixed it a couple of days after the accident. And it was a really big deal in that neighborhood because we always, always, always told them to fix that gate, and they just wouldn't do it.¹⁶²

Alongside the deteriorated conditions was a significant crime presence in the public housing corridors. Police soon deemed the public housing facilities to be too dangerous to intercede, leaving rival gangs, drug pushers, and others unchecked. As Edward Goetz writes, “[f]amilies lived in constant fear, devising plans for what to do when the next gun battle broke out between rival gangs.”¹⁶³

Another story from Cabrini Green describes the reluctance of police to even enter the housing property:

The thing about ambulance and police at Cabrini is that when there were reports of shooting, they'd come eventually, but they didn't come right away. It wasn't a hurry. Police knew that shootings happened in the neighborhood on a constant basis. Nine times out of ten, they weren't going to risk their lives when they knew it was plain-out gang activity going on. It was the norm, so to speak. I'm sure that's how a lot of them looked at it. *They'll just kill each other off. They didn't care.*¹⁶⁴

In 1996, the public housing authority decided to start over at the site of its prior infamous high rises—Cabrini Green, Henry Horner Homes, Robert Taylor Homes, Ida B. Wells, and others would be leveled, residents would be moved, and new public housing developments would be constructed elsewhere.¹⁶⁵ The results have been mixed. While crime rates in those neighborhoods have significantly decreased (some studies show by as much as 70%), the overall crime rate in Chicago has been reduced only by a modest 1%.¹⁶⁶ Some critiques of the Chicago redevelopment plan argue that crime was merely relocated through the rest of the city, rather than being concentrated in one place as it was in the segregated public housing days.

¹⁶² PETTY, *supra* note 67, at 158.

¹⁶³ EDWARD G. GOETZ, *NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY* 79 (2013).

¹⁶⁴ PETTY, *supra* note 67, at 119.

¹⁶⁵ VALE, *PURGING*, *supra* note 157, at 263.

¹⁶⁶ Dionissi Aliprantis & Daniel Hartley, *Blowing it Up and Knocking it Down: The City Wide Effects of Demolishing High Concentration Public Housing on Crime*, 36–43 (Fed. Reserve Bank of Cleveland, Working Paper No. 10-22R, 2015).

What is striking in these decisions is how they reveal the lack of property rights or property-like protections for residents. In much the same way that homeless persons challenging displacement actions rarely have access to remedies other than inalienable entitlements (the weakest of all legal entitlements), public housing residents were unable to assert any property entitlements to the space they occupied and were left with challenges to whether the demolition violated a general due process theory.

The demolition trend of federal public housing reveals these challenges in three specific settings. First, the legal claims that residents of public housing have to challenge a housing authority's decision to tear down an existing unit for other development. Second, the failure of certain federal programs to account for on-the-ground challenges that relocation creates. And third, the reality that public housing, as it has evolved, reflects social choices about which persons in poverty are deemed worthy of social assistance; this has transformed the relationship of the local housing authority from one that is designed to facilitate improvement for its residents, to one that becomes a landlord jealously guarding its properties. Each of these realities reflect systematic decisions to reclaim space used for public housing, while managing shrinking fiscal resources to accomplish such ends.

1. Tearing Down Public Housing

In an irony that perhaps only the writer of Ecclesiastes might appreciate, public housing's history has been bookended by controversial tear-down phases.¹⁶⁷ The very first public housing bill originally intended to require local housing authorities with the power of eminent domain to clear vital city space, but that provision became too controversial. Twelve years later, the Housing Act of 1949 provided for \$1 billion in loans and \$500 million in capital grants to further slum clearance for new construction. The bill required that "half the area cleared or half the units be residential" and did not mandate replacements for those who were displaced.¹⁶⁸ Justice Douglas, writing for the majority at the Supreme Court, would affirm that Title I of the Housing Act of 1949 was a proper exercise of eminent domain.¹⁶⁹

¹⁶⁷ VALE, PURGING, *supra* note 157, at 32–33 (describing the twice-cleared community as a function of reimagining the community, constrained by public views of housing).

¹⁶⁸ Heathcott, *supra* note 157, at 366.

¹⁶⁹ See *Berman v. Parker*, 348 U.S. 26, 32 (1954). The court writes:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific

Title I's central aim was to provide the funding power of the federal government to further slum clearance at the local level. Justice Douglas in *Berman v. Parker* describes this end by saying:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it. *See Noble State Bank v. Haskell*, 219 U.S. 104, 111. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, blight on the community, which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.¹⁷⁰

Like the property in *Berman v. Parker*, Title I authorized significant reorganization of land for the purposes of urban renewal. Among the beneficiaries of this renewal were downtown businesses and commercial interests in cities that aimed to benefit from increased value through the

constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block v. Hirsh*, 256 U.S. 135) or the states legislating concerning local affairs.

Id. Justice Douglas tied the power of eminent domain to effectuate city reconstruction to the Supreme Court's prior decision in *Village of Euclid v. Ambler Realty Co.*, where Justice Sutherland notes that zoning by local cities is consistent with the preservation of police powers reserved to the states. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

¹⁷⁰ *Berman*, 348 U.S. at 32. In Washington D.C., the housing that concerned the tract of land being cleared was a type of housing found in the Washington D.C. and Baltimore region known as Alley Houses. Justice Douglas points this out when he writes:

By § 2 of the Act, Congress made a 'legislative determination' that 'owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.'

Id. at 28. Justice Douglas also specifically points out the authorization of the Act to clear "slums," leaving to the localities to define what constituted a slum. *Id.* at 28 n.1. For a history of alley houses in D.C., see JAMES BORCHERT, *ALLEY LIFE IN WASHINGTON: FAMILY, COMMUNITY, RELIGION, AND FOLKLIFE IN THE CITY 1850-1970* (1982).

removal of blighted or harmful properties the city labeled as slums.¹⁷¹ But as they benefited, often these changes left the prior inhabitants of the land behind with no place to go. Heathcott writes:

Most of the targeted districts were long-established working class communities, predominantly African American or multi-ethnic, replete with homes, small businesses, churches and synagogues, and civil and cultural institutions. Redevelopment authorities only had to demonstrate that they were making efforts to relocate families, but had no legal obligation to rehouse them either in the redeveloped sites or in public housing. In the end, more housing would be destroyed by slum clearance than would ever be created through the public housing program.¹⁷²

African Americans particularly felt the assault on the slums. Their housing prospects were reduced systematically by the destruction of their existing housing, segregationist rules that allowed white owners to refuse sales to African Americans, and existing segregationist rules and policy within the housing authority itself.¹⁷³ To be sure, the entire housing stock was reduced through slum clearance. One stark reality is that while Congress set a target of 810,000 units to be constructed under the Housing Act of 1949, it wouldn't be until 1975 (twenty-six years later) that this number was actually achieved.¹⁷⁴

Through the Housing Act of 1949, Congress provided the resources and legal arm to municipalities for the largest public housing construction boom in history to date. As said above, Congress set an initial target of 810,000 units of housing to be constructed, and thanks to the Act, famed public housing units changed the landscapes of American cities, most notably Pruitt-Igoe in St. Louis, Missouri. So it's ironic then, that the demolition of Pruitt-Igoe starting in 1972 triggered a shift towards viewing public projects as doomed experiments from the start. In fact, its demolition gave permission to local housing officials to allow properties they deemed to be deficient to fall further into disrepair so that the city had no other choice but to tear them down.

¹⁷¹ Heathcott, *supra* note 157, at 366. Heathcott noted that city and town planners, contractors, labor unions, and city politicians also benefited from removing slums from the cities. *Id.*

¹⁷² *Id.* (citation omitted).

¹⁷³ Arnold Hirsch, quoting Senator Robert Wagner of New York, refers to this as the "triple threat" of housing policy. See Arnold R. Hirsch, "Containment" on the Home Front: *Race and Federal Housing Policy from the New Deal to the Cold War*, 26 J. URB. HIST. 158, 166 (2000).

¹⁷⁴ Heathcott, *supra* note 157, at 368.

This strategy climaxed around the Fort Dupont Housing Project in the District of Columbia. By 1979, the housing development had deteriorated to such a point that city officials labeled it "one of the worst public housing projects in the city."¹⁷⁵ City housing director, Robert Moore, described the unit as a place of "death, destruction, and drugs," and the costs to repair the unit from neglect by both residents and the city were estimated to run near \$60 million.

Because the 1937 Housing Act restrained housing authorities to demolish housing only upon application and approval of the housing secretary, housing authorities began allowing their properties to deteriorate so to ensure approval of their applications. Local housing authority officials would allow the project conditions to deteriorate until it reached a tipping point that the project had to be demolished due to the substantial costs to bring the property back into repair. This came to a head in 1987 in *Edwards v. District of Columbia*.

In *Edwards*, current and former residents brought claims that the District of Columbia Housing Authority improperly demolished the Fort Dupont Public Housing units.¹⁷⁶ The residents alleged that the housing authority allowed the units to fall into disrepair so as to satisfy the requirements under § 1437. Under § 1437, a PHA could apply to HUD for permission to demolish a public housing unit where the:

project or portion of the public housing project is obsolete as to physical condition, location, or other factors, making it unsuitable for housing purposes; and no reasonable program of modifications is cost-effective to return the public housing project or portion of the project to useful life; and an application proposing the demolition of only a portion of a public housing project, that the demolition will help to ensure the viability of the remaining portion of the project.¹⁷⁷

Although § 1437 placed certain constraints on the ability to demolish a public housing unit, the court in *Edwards* held that the residents did not have a legal right to bring a claim against the housing authority.¹⁷⁸

¹⁷⁵ LaBarbara Bowman, *Life in the D.C. Projects*, WASH. POST (Aug. 24, 1979), https://www.washingtonpost.com/archive/local/1979/08/24/life-in-the-dcprojects/4a0a0ec1-887c-41e5-aa1b-dffcf632d5d0/?utm_term=.a1bf78a78978.

¹⁷⁶ *Edwards v. District of Columbia*, 821 F.2d 651, 653 (1987). Plaintiffs claimed that the demolition section of the United States Housing Act of 1937 established in tenants of public housing a private right of action when a Public Housing Authority's action or inaction leads to a 'de facto' demolition of public housing. *Id.*

¹⁷⁷ 42 U.S.C. § 1437(p)(a)(1).

¹⁷⁸ *Edwards*, 821 F.2d at 659–60. Both the District Court and the Court of Appeals disagreed with the plaintiffs that the demolition section of the United States Housing Act of 1937 established in tenants of public housing a private right of action when a Public Housing Au-

Over the next several years, Congress and the courts would debate whether residents had legal remedies. After the *Edwards* decision, Congress passed an amendment to § 1437 that required housing authorities to meet certain requirements before demolishing a unit.¹⁷⁹ Courts would tussle over whether that amendment gave residents a viable claim against housing authorities or whether the *Edwards* rule still remained in place. Finally, in 1998, Congress again amended section 1437, this time taking out the prior amendment and seemingly returning the state of tenant rights to its post-*Edwards* state.¹⁸⁰

One brief observation is pertinent at this point of the public housing story. Like other areas governing legal relationships of the impoverished, the fact of living in a place does not afford one rights relating to the outcome of that place. Thus, even though residents of public housing projects banded together to avoid the destruction of their communities, their claims were often short-lived, or had no life at all, because of the view that the city's or the housing authority's plan for that land preempted the residents' attempts at community-making.

2. Forcing the Poor to Internalize the Burdens of Community Change

These choices to reconstruct public housing or shift to privatized models of public assistance are built on the belief that the community's patience with deteriorating crime conditions has been exhausted. What they rarely take into account are the negative impacts these changes have on families that live in those public units. Said a different way, demolition of public housing often places a greater burden of costs on the residents of public housing than on the community itself. This scale

thority's action or inaction leads to a 'de facto' demolition of public housing. *Id.* at 652–54. The court wrote: “[p]laintiffs maintain, however, that the conditions in the statutory section on demolition themselves impose independent duties on local agencies and secure to the affected tenants correlative rights to the performance of those duties, regardless of whether or not the Secretary has approved the application. We, disagree, and affirm the District Court’s dismissal of plaintiff’s complaint.” *Id.* at 652.

¹⁷⁹ Following the rejection of this claim, the Legislature immediately responded (within the same year) adding § (d), “[t]he goal of . . . [which] is to prevent any action that results in demolition or disposition in order to preserve the number of available units.” Julia Clayton Powell, *De Facto Demolition: The Hidden Deterioration of Public Housing*, 44 CATH. U. L. REV. 885, 933 (1993) (citing H.R. REP. NO. 100-122(I), at 25–26 (1987)). In doing so, the legislature very clearly disapproved of the decision in *Edwards*, but they were very vague about what part they disapproved of and gave no guidance as to how they foresaw § (d) being used. See H.R. REP. NO. 100-122(I), at 25–26.

¹⁸⁰ In 1998, § (d) was removed from 42 U.S.C. 1437(p), along with other important changes, such as the addition of § (e) and an expanded § (a)(4). See Housing Act of 1937, Pub. L. NO. 105-276, § 531, 112 Stat. 2461, 2570–73 (1998). This completely changed the landscape of de facto demolition, as § (d) was where the previous courts had derived the existence of a tenant's implied cause of action for a de facto demolition.

problem—like the one suggested above in relation to homeless persons—suggests that the costs imposed on individuals in public housing are far greater in proportion to those imposed on other actors enduring similar costs. One former resident of Robert Taylor Homes describes this phenomenon quite well:

In Robert Taylor, Henderson lived with her mother, who was not on the lease but who provided her free childcare. Several local storeowners offered her credit when she ran out of money for food and household items. And, in her building she bartered with friends, exchanging a few diapers for a cup of sugar. As she often says, “poor people help poor people. They have no one else, so they know how to help each other get by.” Leaving Robert Taylor [Homes] in 2002 meant saying goodbye to neglectful police and violent gangs, but it also meant leaving behind all these invisible social supports.¹⁸¹

The lack of funding for public housing has left our poorest citizens occupying decaying structures where community is supposed to be created, only to find out later that this community was not the type that the city deemed appropriate to create. Alex Kotlowitz captured this dichotomy perfectly in relation to Chicago’s crumbling high-rise housing:

Reading the accounts within this book of the physical decay and danger of now demolished high rises, I recall my own first glimpse of non-working elevators that became steel traps, open breezeways that cut through buildings, overheated apartments, caged-in walkways, and over-flowing trash chutes. I remember one building at [Henry] Horner [Homes] where tenants complained of a stench emanating from the toilets, the odor of rotting meat. And so the Chicago Housing Authority sent workers into the basement where they found carcasses of dead cats and dogs, along with a trove of 2,000 rusting, never-used refrigerators, stoves, and kitchen cabinets that had long ago been forgotten. The high rises were structures simply too massive, too ignored, and too underfunded to become places where people could thrive. Indeed, at times their very existence seemed like a crime against humanity.

¹⁸¹ Whet Moser, *Did the Destruction of Chicago’s Public Housing Decrease Crime, or Just Move It Elsewhere?*, CHI. MAG. (Apr. 5, 2012), <http://www.chicagomag.com/Chicago-Magazine/The-312/April-2012/Did-the-Destruction-of-Chicagos-Public-Housing-Decrease-Violent-Crime-Or-Just-Move-It-Elsewhere>.

Yet, here's the other thing about high rise public housing: these were rich, vital neighborhoods. It was, to be sure, an odd paradox. Here were places marked at times by utterly inhuman conditions, and yet residents considered these buildings home. Tenants in high rises often felt they belonged to something—they were among family and friends, and they had neighbors to lean on.¹⁸²

Cities just simply do not contemplate how these changes create exponentially harder conditions for former residents. Instead, the residents are deemed to be fungible, able to move other places regardless of the ties they leave, turmoil they face, or tax they pay to do so.

3. Rejecting Service Delivery over Landlord/Land Manager Roles

Over time, the role of the local housing authority has shifted from government service delivery agent to land manager and rule enforcer. The primary tool that housing authorities used to enforce those rules and manage the land was the eviction proceeding. Over time, that shift in relationship began to dominate the way local housing authorities viewed their residents—instead of partners towards transformation, they became the ills themselves and, like the buildings, had to be eliminated from the space.

In the 1930s, as Congress and housing advocates embraced a more robust public housing project, the belief was that social ills would be resolved by repairing the land. Reformers and government officials saw the decaying slums and inhumane environments that people lived in as the primary cause of their poverty. Thus, early public housing policy was conducted by land managers whose primary responsibility was to ensure that the land was cared for because the health of the land would reflect the social health of the community on which it resides. It would be easy to draw from this that public housing always focused on the land to the detriment of the residents that occupied its spaces. But that conclusion would miss the broader point—that in the 1930s the predominant view was that protecting the land was primarily geared towards helping the resident. After all, if the land returned to the slum-like conditions that prompted its remediation, the public housing could not be expected to pull people out of poverty.

But over time, local housing authorities began to grow skeptical that the new projects were sufficient in themselves to extract people out of poverty. This skepticism was due in part to the rhetorical lure that public housing was particularly susceptible to—that public housing's primary

¹⁸² PETTY, *supra* note 67, at 11–12.

service clientele should be the “deserving poor” over the undeserving.¹⁸³ As time stretched on, and as housing authorities found their populations further entrenched in poverty, they began turning to social services as a potential solution.¹⁸⁴ This was because of the recognition on the ground that the poorest and most marginal in public housing came with other social issues that contributed to their poverty.¹⁸⁵ Unwed mothers, poor health, low-education or low-skilled labor, illiteracy, unstable family support systems, and the lack of furniture all were common problems that faced housing authorities as they encountered the poor they were required to serve.¹⁸⁶ But if providing social services to the poor was a potential lifeline, housing authorities would find that those programs would suffer under the same budgetary limits that their buildings and environment suffered under.¹⁸⁷

¹⁸³ Vale & Freemark, *supra* note 157, at 379. In the 1940s, the deserving poor were viewed as white working class families that needed assistance to make financial matters a bit better. As the 1940s turned to the 1950s and 1960s, racial integration shifted the primary demographic from serving working class white families to African American families. After that, the meaning of deserving has shifted over time to include at times working moms, the elderly, young couples with children, or veterans, all the while retaining a basic ideological commitment to invest public resources on only the deserving—however, we might define that term. After World War II, for example, the Chicago Housing Authority gave explicit preference to “higher income war workers and, after the war, gave the highest priority to returning veterans.” *Id.* at 385. Even still today, much of the discourse around housing and poverty is directed towards evolving attitudes about what deserving poor means. See discussion of Quality Housing and Work Responsibility Act of 1998, *infra* note 222 and accompanying text.

¹⁸⁴ Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. 263, 268 (“The private sector has long played an important role in providing health care, education, welfare, job training, housing, and other social services. As early as the late nineteenth century, local governments were contracting with private entities to supply social services, in some cases for the bulk of their poverty-relief efforts. And most significant federal social welfare programs have included some measure of public-private partnering—sometimes a great deal.”).

¹⁸⁵ See Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 586–87 (2001) (“During the 1960s . . . [s]ocial and demographic shifts, including the flow of rural populations into the cities, the increasing number of persons on public assistance, and especially the civil rights movement, heightened public awareness of inequities in American society. In his bid for the presidency, Kennedy expressly made poverty and hunger a campaign theme. Once elected, Kennedy, and then President Johnson, enacted significant welfare reform measures based on a ‘service strategy,’ which aimed to provide the poor with services to gain employment, such as job training and placement, rather than with money. The strategy, set forth in the Economic Opportunity Act of 1964 and administered by the Office of Economic Opportunity, was carried out by a vast network of private social service providers and community action agencies.”).

¹⁸⁶ See John Goering et al., *Recent Research on Racial Segregation and Poverty Concentration in Public Housing in the United States*, 32 URB. AFF. REV. 723, 724 (1997) (“Over the past several decades, public housing projects have been described by social scientists and others as *vertical ghettos*, government-supported slum housing, and one of the chief causes of the emergence of the urban underclass.” (internal citation omitted)).

¹⁸⁷ Alana Semuels, *New York City’s Public-Housing Crisis*, THE ATLANTIC (May 19, 2015), <https://www.theatlantic.com/business/archive/2015/05/new-york-citys-public-housing-crisis/393644/> (New York City Housing Authority is “trying to figure out how to maintain

Importantly, HUD and local housing authorities disagreed on what resources were needed to address systematic poverty. Joseph Shuldiner, former Assistant Secretary of HUD's Public and Indian Housing (and later Interim Director of Chicago's Housing Authority), said in a 1994 interview that part of the problem was putting "populations with tremendous amount[s] of needs in a concentrated place. So we need to find some way to provide for them. I think we're *beginning* to see some relationships."¹⁸⁸ If local housing authorities noticed that there was a social service problem in the 1960s and 1970s, it would take HUD another twenty years to come to the same view.

In short, there were not enough federal budget dollars to sustain the aging buildings, much less conduct additional programs for residents. To the extent that there would be a social service function of the housing authority, it was aimed at eliminating residents deemed to be harmful—to the property, to other residents, or both.¹⁸⁹

These bipolar views of poverty—one that sees land relationships as the primary means of reform, and the other that sees land relationships as important, but not the only reformation means—often make local housing directors complicated figures in the face of public outcries for change. On the one hand, local housing directors are often lauded for their ability to navigate federal funding mechanisms to rehabilitate or redo a housing project that is known for crime, that is an eyesore, or that is no longer serving the community.¹⁹⁰ In this view, housing directors embrace their role as land managers, even articulating blame for the property's deterioration on residents or promising to get tough on protecting the new project.¹⁹¹ They are encouraged by a city discourse whose rhetoric towards growth and reclaiming land measures a project's worth by whether it has achieved the highest and best use.¹⁹² This typi-

decades-old buildings and reduce the number of people on the waiting list for public housing, all as federal funding for public housing continues to drop").

¹⁸⁸ Interview by Chester Hartman with Joseph Shuldiner, Assistant Secretary for Public and Indian Housing (Sept. 1, 1994) (emphasis added).

¹⁸⁹ Alicia Werning Turman, *Unexpected Evictions: Why Drug Offenders Should Be Warned Others Could Lose Public Housing if They Plead Guilty*, 89 IOWA L. REV. 1753, 1758 (2004) ("Federal law provides for termination of public housing leases for 'any drug-related criminal activity, on or off [public housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control' (the 'Eviction Rule'). Under this 'one strike and you're out' policy an entire family can be removed from public housing because a friend, who at one time slept on their couch, was arrested for drug activity miles away from the housing premises. This collateral consequence . . . can have devastating repercussions not only on the person pleading guilty, but also directly upon uninvolved and entirely innocent third parties.") (emphasis omitted) (citations omitted).

¹⁹⁰ See John R. Logan & Harvey L. Molotch, *Urban Fortunes: The Political Economy of Place* 167 (1987).

¹⁹¹ *Id.*

¹⁹² Roark, *Human Impact*, *supra* note 28, at 670.

cally means economic growth over social growth.¹⁹³ As Leah Goodridge and Helen Strom write, in the new era of public housing land development, “eviction is not only part of a bureaucratic process, but also a business” decision.¹⁹⁴

On the other hand, these same directors often articulate and lament that the same lack of funding that led to deteriorated buildings also has limited the housing authorities’ ability to direct necessary and life-altering change in the communities they manage. These improvements are rarely noticed by the public because one doesn’t notice social service delivery like job assistance, mental health betterment, or family reconciliation the same way that one clearly notices a new building.

Asserting boundaries is a way of shouting to the world your chosen identity. Our private property system’s endorsement of value making as the highest best use of property affords cities and landlords validation when they choose to reject occupants. When cities reclaim homeless camps and public housing sites, they are exclaiming displeasure with what has happened in those places. Landlords jealously guard the value-making enterprise that low-cost rentals produce, evicting tenants that either are short on the rent or pose threats to the status quo. Waste gives cities and owners a claim that the highest and best use of property is a morally sufficient reason to reassert control of their property. In doing so, they conscript the poor to alien status—those who are passing through and, therefore, have no moral claim to places they occupy anyway.

II. NUISANCE AND COMMUNITY-MAKING

Property owners interested in protecting their claims to space often look to extrinsic rules for why someone should be excluded from that space. Protecting property becomes often a vehicle for protecting other values, such as morals, personhood, and safety. Just as the doctrine of waste furthers our understanding of how property aids in a person’s autonomy, the doctrine of nuisance helps shape our understanding of what it means to be a property owner in the midst of a community. This aspect of community-making surfaces in how courts approach nuisance issues, sometimes finding that community interests overwhelm the right of the

¹⁹³ See Larry Keating, *Redeveloping Public Housing*, 66 J. AM. PLAN. ASS’N 384 (2000) (describing public housing policy built on tearing down public housing and rebuilding higher income housing).

¹⁹⁴ Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty?: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F. FOR L. & SOC. CHANGE 1, 5 (2016).

landowner to conduct an activity, or that community interests are greater than a landowner's right to be free of a so-called nuisance. The harm may be an invasion, such as trespass, or a harm that occurs when one neighbor uses his property to injure another, such as in private nuisance. Property owners may also have access to remedies for public nuisance, where the harm is one that is equally shared by the public.

Nuisance has often been critiqued as a catch-all remedy for harms otherwise difficult to locate under another legal remedy. *Prosser and Keaton on Torts* describes the action as an "impenetrable jungle," and says that it means "all things to all people," "has been applied indiscriminately," and notes that there is a "general agreement that it is incapable of any exact or comprehensive definition."¹⁹⁵ There is something else notable about nuisance though—it only runs in favor of property holders. Through nuisance actions, the state channels the interests of collective aims against private harms by asking whether the burdens imposed on private property holders are justifiable due to larger collective interests. When this happens in the wake of poverty, under-propertied persons are often lost to the surge of collective community-making.

I have articulated in other places how nuisance not only interacts with community-making but how that process impacts the individual identity of homeless persons.¹⁹⁶ Importantly, that role of community-making tends to do three specific things through rules like nuisance. First, it represents sectional interests as collective interests. For example, in the nuisance case *Carpenter v. Double R Cattle Company*,¹⁹⁷ a cattle feedlot grew beyond its footprint bringing smells and flies to a nearby residential area. The court denied that the property owner was committing a nuisance, reasoning that "[t]he state of Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining, and industrial development. To eliminate [their consideration] would place an unreasonable burden on these industries."¹⁹⁸ In short, Idaho is about cattle, even if some of the property owners are not.

Second, rules like nuisance that further collective community-making deny or transmute contradictions. What nuisance rules allow us to do is focus on particular intrusions on property and ignore other issues that may be more difficult to solve. One of the many critiques of the *Boomer v. Atlantic Cement Company*¹⁹⁹ case is that it afforded a company the right to purchase a nuisance. It did so because it was, in its own words, attempting to "resolve the litigation between the parties before it as equi-

¹⁹⁵ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* §§ 86, 616 (5th ed. 1984).

¹⁹⁶ Roark, *Homelessness*, *supra* note 19, at 68.

¹⁹⁷ *Carpenter v. Double R. Cattle Co.*, 701 P.2d 222, 224 (Idaho 1985).

¹⁹⁸ *Id.* at 228.

¹⁹⁹ *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970).

tably as seems possible [rather than] channel private litigation into broad public objectives.”²⁰⁰ By focusing on the distinctive issues of the property owners, the court was able to articulate what it believed was a collective community-making rule amongst distinctive property owners.

Third, rules like nuisance naturalize or reify existing social structures. In *Trueheart v. Parker*,²⁰¹ a San Antonio jazz club lost to local homeowners on appeal after the trial court found that the jazz club did not create a nuisance.²⁰² As Amy Wilson points out, *Trueheart v. Parker* is less about the property rights involved between the parties and more about the fear of what jazz and jazz culture meant for the ruling elite.²⁰³ Rachel Godsil helps explain this outcome when she observes that:

Some scholars have suggested that our national commitment to property rights dictated the outcome of property disputes even when race was involved. The problem with this argument is that in most property disputes, both parties will have a property interest at stake. In the nuisance context, the plaintiff is seeking to protect her interest in her enjoyment of her land, while the defendant is defending his use of his land. Both are “sticks” in the property “bundle.” Similarly, in racially restrictive covenant cases, the plaintiff is a property owner with an interest in enforcing a covenant that presumably bolsters her property value, while the defendant is a current or prospective property owner seeking the right to alienate or purchase property.²⁰⁴

In each of the categories of under-propertied persons, the ability to engage in community-making is often cut short by nuisance-like barriers.

One reason that nuisance becomes a powerful rule-making authority for those reclaiming land is its moldability to whatever society doesn’t like. In the poverty context, nuisance rules often gravitate to discourse around poverty—identities we assign those that live in public housing, in gap rentals, or who are homeless. Teresa Gowan describes these as kinds of talk. “Sin talk” is discourse that focuses on something the subject has done that puts him or her into deep poverty. “Sick talk” is discourse about some inadequacy of the subject. And “system talk” is discourse that levels blame on the way the person is able to navigate certain bu-

²⁰⁰ *Id.* at 871.

²⁰¹ *Trueheart v. Parker*, 257 S.W. 640 (Tex. Civ. App. 1923).

²⁰² *Id.* at 641–42.

²⁰³ Amy Leigh Wilson, *A Unifying Anthem or Path to Degredation? The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425, 439–40 (2004).

²⁰⁴ Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 508 (2006).

reaucratic solutions to the perceived problem. As public housing agencies, cities, and landlords have attempted to address nuisance issues around their property, their attention is primarily drawn to these points of discourse. By and large, the solutions for poverty tend to be to repair the land and resolve the nuisance—capturing many impoverished people in the middle.

A. *Homelessness, Community-Making, and Citizenship*

In homeless cases, homeless persons are often unable to articulate a property entitlement and are thus limited to legal relief based on inalienable entitlements—the broadest and least specific of all entitlements. On the other hand, cities, landowners, and even service providers are able to assert broader property-based entitlement rules to achieve a desired result—namely, the removal of homeless persons from valuable land. In fact, by articulating the problem as one impacting a “property entitlement,” parties other than homeless persons are able to assert their individual identity into the space-resolution process, while homeless persons cannot.²⁰⁵

Additionally, this construct of entitlement shifting due to choice (rather than due to accident) tends to reify rhetoric about homeless persons. That rhetoric implicating some sickness, wrongdoing, or systematic failure is often deemed outside that set of concerns that the individual landowner should be required to internalize. Courts and legislative bodies regularly apply nuisance concepts to places where people in poverty congregate. For instance, courts have noted the tendency for cities to treat homeless as “social pariahs” and to engage in “crusade[s] against the homeless” in order to evict them.²⁰⁶ Other courts have used the term nuisance to describe homeless activities or presence on city land.²⁰⁷ Homeless persons have been isolated in communities as elements to be controlled, whether that includes the space they occupy, the places they visit, or the services they receive. General policy surrounding homelessness tends to presume individual actions of the homeless person led to

²⁰⁵ This captures the essence of Nicolas Blomley’s point that:

[P]eople who do not own property . . . are treated with a good deal of ambivalence, suspicion, and even hostility. This treatment extends to whole categories of people who do not enjoy the full exercise of private property rights, whether they be renters, occupants of social housing, or at an extreme, homeless.

BLOMLEY, *supra* note 24, at 4.

²⁰⁶ *Roulette v. City of Seattle*, 97 F.3d 300, 311 (9th Cir. 1996) (Kozinski, J., dissenting) (noting that Seattle’s ordinance prohibiting homeless sitting on sidewalks was an effort to “sweep its commercial zones clear of homeless people and other social pariahs”); *Tobe v. City of Santa Anna*, 892 P.2d 1145, 1177–79 (Cal. 1995) (Mosk, J., dissenting) (describing the tendency to treat homeless as today’s pariahs, an urban blight, given to colonizing public spaces, thereby provoking municipal crusades to evict them).

²⁰⁷ See Roark, *Homelessness*, *supra* note 19, at 84–85.

her/his impoverished state, treating them individually as problems to be dealt with, rather than as a systematic problem for the city to correct. The choice then leaves the homeless to lie in the beds they made, often in conflict with landowners, the police, or other government agencies. This binary view of homeless persons, without understanding the multiple causes leading to poverty, instability, and eventually homelessness, leads courts and local governments measuring homeless persons' rights against those of responsible citizens who have "paid their dues."

This creates what Marianna Valverde has termed a problem of social scale or dimensionality.²⁰⁸ Legal entitlements create different interactions amongst different orders—"each with its own scope, its own logic, and its own criteria for what is to be governed, as well as its own rules for how to govern."²⁰⁹ This allocation of legal entitlements "organizes legal governance, initially by sorting and separating."²¹⁰ This means, as Valverde writes, that state-scale or global-scale constitutional rights are "rarely coordinated and harmonized with low-level regulations governing specific urban spaces."²¹¹ When rights and regulations are coordinated, their impact is rarely transmitted or internalized. Instead, because legal rules appear to be scaled, legal powers and legal knowledge obtained from precedent of other courts still may not be meaningful in a jurisdiction applying similar constraints because the local scale suggests its action is different, appropriate, or validated by its own experience. It becomes self-perpetuating.

A key component in the scale problem that homeless governance presents is the tension between the inherently local large-scale interest of the property owner (whether individual or city) and the objective small-scale interest of the homeless community. Solving that scale problem requires looking beyond the legally adopted identities of property owners and homeless persons and instead to their actual identities. One important lens where this tension is apparent is in the context of defining what it means to be an American citizen. Anoya Roy notes that homelessness, when pitted against propertied citizenship, distorts the view of homeless persons as "aberrant," and requiring disciplinary action.²¹² She goes on to write that "expressions of identity—one claiming membership in democratic citizenship and the other excluded by propertied citizenship—are rooted in systems of rights."²¹³

²⁰⁸ Mariana Valverde, *Analyzing the Governance of Security: Jurisdiction and Scale*, 1 BEHEMOTH J. ON CIVILIZATION 3, 4 (2008).

²⁰⁹ *Id.* at 5.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Roy, *supra* note 24, at 471.

²¹³ *Id.* at 474.

And yet, the assertion of citizenship or the rights language of citizenship is pervasive within the homeless experience. For example, in the documentary *Under the Bridge: The Criminalization of Homelessness*, the producers show footage of a standoff between persons in a homeless camp and city officials charged with clearing the camp. The homeless occupants remained in place while the city brought in a trash truck, and police officers lined the perimeter. Maurice, the lead voice in the camp in describing the scene, said “we stood our ground,” until the city officials grew weary and left without conflict. Later he describes the overwhelming pride the veterans felt in the camp when they hung an American flag by the overpass after their victory. Looking back, he said that the flag “was for us to remember that we took a stand on our Constitutional rights and here we still are today.”²¹⁴

Later, the documentary depicts the many ways that homeless are rooted out from these camps when cities decide to do so, including law enforcement raids supposedly targeting an individual and “cleaning work on city property.”²¹⁵ Like so many other ways, homeless interactions with cities are largely about which identity local governments will validate in their community-making activities. In the documentary, Indianapolis chose to validate the identity of a local property owner that abutted next to the homeless camp. The development of new condos was a more pressing use of the nearby space than the homeless persons occupying a bridge nearby. The conflict between what it meant to be an American citizen notably was bound up between conflicts on two adjacent parcels—not in the same parcel. In short, the homeless’s ability to assert their community-making was rejected by the city’s choice to validate a local property owner’s citizenship interest in property the homeless were not even occupying. The rejection of that community-making activity²¹⁶ is in turn a rejection of homeless persons’ ability to participate as American citizens.²¹⁷

B. Institutionalizing and Public Housing

Cities’ decisions to tear down public housing are not just about reclaiming land. Often, they are built on the conclusion that the land be-

²¹⁴ UNDER THE BRIDGE, *supra* note 1.

²¹⁵ *Id.*

²¹⁶ Notably, interviews of homeless persons taken as the camp is being broken up describe their community-making activities. One person responds to claims that some would view their camp as merely the street: “This is a community back here. We all ate together.” Later when asked why he felt safe in the camp and why he wanted to stay there, he says “we had a tight community.” *Id.*

²¹⁷ Roy, *supra* note 24, at 474. In *Under the Bridge*, one ejected homeless camp member says as he walks away, “That’s y’all’s tax dollars. They call this place America. I’d rather go to Russia.” UNDER THE BRIDGE, *supra* note 1.

came toxic under the control of public housing, despite attempts to shape its community. In 1972, the first three of thirty-three eleven-story buildings known as the Pruitt-Igoe Public Housing Complex in St. Louis, Missouri, were leveled. Over the next five years, the remaining thirty buildings would likewise be demolished, and Pruitt-Igoe would forever be known as a failure—architecturally,²¹⁸ economically,²¹⁹ and socially.²²⁰ Indeed, Pruitt-Igoe exemplified the Yogi Berra adage, “if you don’t know where you’re going, you’ll end up somewhere else.” But the demolition of the Pruitt-Igoe towers marked a transition period in public housing in the American landscape—one that began to seriously question whether public housing (at least the way it was being carried out) was successful. Starting with the demolition of Pruitt-Igoe, the answer was largely shaping up to be “no,” and it was the residents who bore the blame.

That blame largely shaped the way those in public housing are viewed by outsiders. That view has shaped the way housing reforms have approached residents, stripping away more and more autonomy. Lawrence Vale observes that public housing invites a moment to question the nature of what “public-ness” means in the context of a housing program—something that is supposed to primarily arrange life around private-ness. Vale writes:

[p]ublicly sponsored institutions distribute both rewards and sanctions, and public housing has inherited from both sides of the coin. On the reward side, the public housing project occupies a place among the interventions that include public schools, parks, libraries, baths, and hospitals. More painfully, it is descended from publicly sponsored “houses of correction” for those found to have engaged in deviant or dangerous behaviors including prisons, mental asylums, and poorhouses.²²¹

The publicness-as-sanction side of public housing directly confronts residents’ autonomy by creating living conditions that communicate that they are less than autonomous. Thus, the boundaries of public housing become walls where private actions are scrutinized. Moreover, despite the promises that public housing would help citizens find new opportunity, they often become places where wealth accumulation becomes stag-

²¹⁸ Katherine G. Bristol, *The Pruitt-Igoe Myth*, 44 J. OF ARCHITECTURAL EDUC. 163, 166 (1984).

²¹⁹ Comerio, *supra* note 69, at 26–27.

²²⁰ Bristol, *supra* note 218, at 167.

²²¹ LAWRENCE J. VALE, *FROM THE PURITANS TO THE PROJECTS: PUBLIC HOUSING AND PUBLIC NEIGHBORS* 3 (1959).

nant. In short, the publicness of housing predominates over the ability of its residents to maintain a sense of privacy at home.

One reason for why public housing predominantly produces sanctions rather than benefits are the rules that its residents must accept. All housing that is not owned outright comes with certain rules that its occupant must accept. However, it's both the nature of the rules and the ways in which they are communicated that remind residents that their autonomy is limited. Additionally, the environment of public housing—from its architecture to its location in a city—becomes a challenge for public housing residents to accumulate wealth compared to other residents in the city. These rules and the environment have led to a stigmatization of public housing that reinforces that residents lack autonomy over themselves and their environment.

1. Rules and Public Housing

Public housing greets residents with a series of rules that are designed to curtail problems that are believed to negatively impact public housing. In 1998, Congress passed the Quality Housing and Work Responsibility Act,²²² which not only continued to encourage the development of private-public transition to public housing reform that Hope IV encouraged, but also mandated that housing authorities enforce new lease provisions that eliminated so-called bad actors from public housing.²²³ The so-called One Strike rule made criminal felonies and drug convictions (or possessions) eviction offenses from public housing.²²⁴ Addi-

²²² Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2518, 2520–2521 (1998). Congress found that “public housing is plagued with problems,” and that “the Federal method of oversight of public housing has aggravated [those] problems,” as a basis for passing the Act. *Id.* The Act purported to do a number of things such as, “deregulate PHAs,” “facilitate mixed income communities,” “decrease concentrations of poverty in public housing,” “increase accountability and reward effective management of PHAs,” “create incentives and economic opportunities for residents assisted by PHAs to work and become self-sufficient,” “remedy the problems of troubled PHAs,” and “replace or revitalize severely distressed public housing projects.” *Id.*

²²³ The mandated provisions require that “[e]ach housing assistance payment contract entered into by the public housing agency and the owner of a dwelling unit shall provide . . . that during the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any violent or drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” *Id.* at 2599–2600. These provisions are still provided as default provisions in the generic HUD leases. See *Model Lease for Use*, DEP’T OF HOUSING AND URB. DEV. (Dec. 2007), <https://portal.hud.gov/hudportal/documents/huddoc?id=90105b.pdf>

²²⁴ In his State of the Union Address in 1996, President Clinton addressed the One Strike rule, saying:

I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the

tionally, public housing residents would be required to provide public service in exchange for their housing.²²⁵ Like public housing offices, Section 8 landlords would have similar freedom to evict troubled tenants. Richard Bourdon of the Congressional Research Service wrote of the Act that its new provisions would bolster public housing because:

well-run public housing agencies will have more freedom to operate, while poorly run agencies will be held more accountable; more working families with higher incomes will live in public housing that is now largely occupied by the poorest of the poor; and some residents will be required to perform 8 hours a month of community service, while there will be more incentives and opportunities for tenants to improve their lives. In both public housing and the Section 8 program, it will be easier to evict tenants who commit crimes and cause problems. A home rule flexible grant demonstration program will allow some local governments (rather than public housing agencies) to receive federal housing funds to develop creative approaches for providing affordable housing. A new Section 8 housing voucher program will be more landlord-friendly and more market-driven.²²⁶

As a result, public housing evictions went up. One month after the Act was passed, evictions rose 84%, from 9,835 to 19,405.²²⁷ Leah Goodrich and Helen Strom describe anecdotally how one-strike evictions impact distinctive housing authorities:

Data regarding the New York City Housing Authority (NYCHA), for example, showed that in one calendar year (2011), NYCHA initiated 1,581 one-strike cases against tenants. Data released by the Public Housing Authority in Chicago tracked all one-strike cases from August 2000 through April 2002. During that time, 717 one-strike cases were concluded and an additional 847 one-strike cases were pending. In 328 (46%) of the cases

rule for residents who commit crime and peddle drugs should be one strike and you're out.

William Jefferson Clinton, President of the United States, State of the Union Address (Jan. 23, 1996).

²²⁵ 24 C.F.R. § 960.600-09 (2000).

²²⁶ Richard Bourdon, *Public Housing and Section 8 Reforms: The Quality Housing and Work Responsibility Act of 1998*, CONG. RES. REP., [http://congressionalresearch.com/\(follow "Public Housing and Section 8 Reforms" hyperlink\)](http://congressionalresearch.com/(follow%20Public%20Housing%20and%20Section%208%20Reforms)) (last visited: July 17, 2017).

²²⁷ ACLU Drug Policy Litigation Project, *Collateral Consequences on the War on Drugs*, ACLU (Jan. 2003), <https://www.aclu.org/other/collateral-consequences-war-drugs>.

that were concluded, the entire family was evicted, and in 273 (37%) of the cases, one of the family members was evicted from the home.²²⁸

As pointed out by Goodrich and Strom, these numbers highlight an inequality in public housing residents as residents in non-public housing rarely are subjected to eviction for an arrest or even a conviction, unless that conviction interferes with their ability to pay the rent.²²⁹ And even if evictions might happen, housing authorities use access to public courts to keep tabs on residents so that the moment an arrest is made an eviction may be moments behind. What the rules communicate is that residents surrender pieces of their autonomy to live in a place where their economic fortunes are not wholly stripped away.

2. The Environment and Public Housing

If the rules were not enough to communicate that a person's autonomy is being taken away, certainly the environment and architecture might suggest that what they occupy looks more like a prison than a home. There is an irony when comparing public housing to other areas of public architecture. While other areas of public architecture seek to reduce the institutional nature of their surrounds—prisons seek to look less like jails, city halls try to look more like business offices, etc.—public housing tends over the years to emphasize greater images of institutional forms. Windows become less accessible when a resident's child has an accident; gates and walls may be built to keep wrongdoers out, ignoring the fact that the housing authority just walled in the residents; and living surroundings may be either so barren that they expose industrialized building materials or the materials are so shoddy that they remain in a state of disrepair for years on end. After several accidents, the Chicago Housing Authority erected chain-link fences along the exterior of Cabrini-Green, literally caging its residents into their homes.²³⁰

From the very beginning, public housing was the site for whether the limited budget provided by Congress should produce fewer high quality units or more modest units.²³¹ The United States Housing Au-

²²⁸ Goodridge, *supra* note 194, at 4–5.

²²⁹ *Id.* Strom and Goodrich's conclusion may be a bit too strong, as we know similar sanctions are often applied to gap renters under the threat of nuisance citations from the city. See DESMOND, *supra* note 57, at 332.

²³⁰ Flynn McRoberts, *Robert Taylor Homes – Public Housing Project*, CHI. TRIB. (Feb. 8, 2017), <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-robert-taylor-story-story.html>. See also VALE, PURGING, *supra* note 157, at 226–27 (describing the galleries as once an attraction for family activities, later giving them the “appearance of long cages rather than usable outdoor space”).

²³¹ The U.S. Housing Act of 1937 was the first bill to provide for federally funded housing at the local level. The bill required numerous compromises to pass, including vesting control of housing decisions at the local level through state and city created local housing

thority from the beginning chose the latter approach and maximized the number of units produced.²³² As a result, most housing projects saved money by following directives from the United States Housing Authority to “eliminate most community spaces, abandon novel building configurations, [and] reduce room sizes and quality of appurtenances.”²³³ As a result,

[s]uch extensive cuts yielded stripped down environments that were far more austere than those created by [the Public Works Administration]. Projects such as Ida B. Wells Homes in Chicago, San Felipe Courts in Houston (TX), Elyton Village in Mobile (AL), and Puerta de Tierra in San Juan (Puerto Rico) arrayed relatively featureless buildings in barracks formations with minimal landscaping or amenities.²³⁴

The Housing Act of 1949 did no better. In fact, one specific provision in the Housing Act of 1949 prohibited projects with “elaborate or extravagant design or materials.”²³⁵ Thus, while the Housing Act of 1949 was the vehicle for the largest increase in public housing in the history of American housing and would shape the landscape of cities’ public housing stock well into the 1990s, it was also the “most stripped-down, cost-conscious federal housing program yet enacted.”²³⁶

This led to housing projects in the 1950s and 1960s designed as high-rise buildings rather than their low-rise counterparts of the 1930s and 1940s. Typically, housing constructed during this time followed similar patterns nationwide—large tracts were reserved to construct tall buildings holding hundreds of units. For example, St. Louis spent its entire post-war allotment to build four large high-rise projects—the largest being the thirty-three-building complex known as Pruitt-Igoe. Likewise, building projects in Chicago, Baltimore, Boston, and New York chose to build up in concentrated form than build out. As Joseph Heathcoat observes, “in all cases, the austere, regimented, and massive towers stood in

authorities. It also required a compromise authored by Senator Henry Byrd of Virginia that imposed “drastic costs ceilings on new projects that amounted to [a funding limit of] \$5,000 per constructed unit.” Heathcott, *supra* note 157, at 363.

²³² *Id.* at 364. Heathcott notes that the decision to produce more units rather than fewer units of higher quality was controversial amongst housing advocates and was opposed by figures such as Lewis Mumford and Catherine Bauer. *Id.*

²³³ *Id.*

²³⁴ *Id.* Heathcott notes that while these projects were built to save costs they did offer residents generally an “increase in the quality of their living environment.” Heathcott writes that “[m]any experienced indoor plumbing, central heat, and onsite services for the first time.” *Id.*

²³⁵ *Id.* at 367.

²³⁶ *Id.* Part of the reason that the 1949 Housing Act was so stripped down was the post-World War II recession, rising land values, and material shortages due to the Korean War. *Id.*

sharp contrast to the older low-rise neighborhoods that surrounded them.”²³⁷ This contrast was bolstered by another reality over time—that evidence existed that the low-rise complexes fared better socially and economically than their high-rise counterparts.²³⁸

No individual site reflected how architecture could impact public housing debate more than the Pruitt-Igoe homes in St. Louis. Pruitt-Igoe was designed by Minoru Yamasaki, who later would go on to design New York’s World Trade Center. The design was lauded as a new “precedent,” and would “change the pattern of public housing.”²³⁹ Yet, by 1972, the promise of “saving people and saving money” vanished as the buildings began their four-year process towards demolition. Much of the problems with Pruitt-Igoe have been associated with its design. For example, the design included what were referred to as stop-gap elevators which were designed to create “individual neighborhoods” to encourage residents to use the gallery spaces between floors for community-making.²⁴⁰ Galleries were located at every third floor where residents would get off the elevator to take stairs up one flight or down one flight to their individual units. What was initially praised as a “innovative compensation for the shortcomings of high-rise living” soon gave way to the reality of living. One critique in the 1960s wrote about Pruitt-Igoe’s elevator conditions:

The undersized elevators are brutally battered, and they reek of urine from children who misjudged the time it takes to reach their apartments. By stopping only on every third floor, the elevators offer convenient settings for crime. . . . The galleries are “gauntlets” through which they must pass to reach their door. . . . Heavy metal grilles now shield the windows, but they were installed too late to prevent three children from falling out. The steam pipes remain exposed both in the galleries and the apartments, frequently inflicting severe burns. The adjoining laundry rooms are unsafe and little

²³⁷ *Id.*

²³⁸ *Id.* at 372 (noting that most of the low rise public housing projects built in the 1930s and 1940s remain viable and contribute to the housing stock today). Notably, architectural scholars point out that while the critique of these buildings as “insensitive” and enduring the machine aesthetic and psychological dangers from inhuman indefensible spaces,” is warranted, they also suggest that laying the blame for public housing’s woes at the feet of designers is misapplied. As one critique notes, these views focus on “buildings as objects in themselves and ignore the societal processes that govern the development of [the] environment.” Comerio, *supra* note 69, at 26 (“[T]o criticize buildings for what is wrong with cities is equivalent to citing government safety standards as what is wrong with the American auto industry. It may arguably be part of the problem; it is certainly not the entire problem.”).

²³⁹ Comerio, *supra* note 69, at 26.

²⁴⁰ Bristol, *supra* note 218, at 165.

used. . . . The storage rooms are also locked—and empty. They have been robbed of their contents so often that tenants refuse to use them.²⁴¹

Other architectural problems also made Pruitt-Igoe an easy target of hindsight design. For example, Mary Comerio points out these design problems. She writes that the

kitchen-living-dining area of a four-bedroom apartment that housed up to ten people was the same size as the one in the two-bedroom unit, and families needing five bedrooms rarely had more than one bathroom. Outside the “park-like” setting was treeless and filled with rubble. There were no gymnasiums, no barbeque pits, no soda fountains, no decent places for people to sit and gather.²⁴²

Architectural failings such as these became easy evidence to suggest that federal housing policy was doomed from the start. Besides the architecture though, the location of public housing often landed in areas where economic opportunity was less available. I discuss more of this in the next part on community making and growth rhetoric, but by and large public housing often found itself in depressed areas where access to jobs or other economic opportunity required residents to travel greater lengths than either their incomes or time could afford.

3. Public Housing's Stigma

Both the environment of public housing and the rules that govern public housing's order have reinforced barriers to wealth accumulation and privacy for residents. About ten years before Pruitt-Igoe's demolition, sociologist Lee Rainwater observed how the physical environment led to what he described as a diminished sense of autonomy:

Their physical world is telling them they are inferior and bad just as effectively perhaps as their human interactions. Their inability to control the depredation of rats, hot steam pipes, balky stoves, and poorly fused electrical circuits tells them they are failures as autonomous individuals. The physical and social disorder of their world presents a constant temptation to give up or retaliate in kind. And when lower class people do try to do something about some of these dangers, they are generally exposed in their interactions with caretakers and outsiders

²⁴¹ *Id.* at 166 (quoting James Bailey, *History of a Failure*, 123 ARCHITECTURAL F. 22, 22–23 (1965)).

²⁴² Comerio, *supra* note 69, at 26 (citing Bailey, *supra* note 241).

to further moral punitiveness by being told that their troubles are their own fault.²⁴³

This stigma is transferrable in other ways that the community views public housing and its residents.

For example, Lawrence Vale and Yonah Freemark note that even though public housing and publicly subsidized private housing draw similar residents (and draw from the same funding source), there is a difference in the way violent acts are reported in the two different locations:

Although some members of the urban public will group these Section 8 projects under the same umbrella of projects, confusing them with those managed by their city's housing authority, to a surprising extent these categories seem to have remained conceptually separate. Whenever there is a violent act or crime in a particular public housing development, for instance, the press is often quick to identify the problem location by project name rather than their street address and to implicate the larger public housing system. By contrast, when incidents occur in privately owned but publicly subsidized projects, there is no comparable effort to suggest that something known as the Project-Based Section 9 system might be a source of larger societal blame.²⁴⁴

The programs look very similar. Architecturally, the buildings sometimes even resemble high-rise public housing projects. Yet, public housing has endured continued stigmas while publicly subsidized private housing has largely evaded such labels.

C. *Gap Renters and Community-Making*

This same phenomenon exists in gap rental arrangements where tenants often live under the specter of being treated as a nuisance to be remedied, rather than residents with a stake in their community. In the late 1990s, cities implemented property nuisance statutes that penalized landlords for tenants' criminal conduct.²⁴⁵ Matthew Desmond describes the common features of property nuisance ordinances:

Although nuisance ordinances vary across jurisdictions, most share three common features. First, they designate properties as nuisances based on excessive service calls made within a certain timeframe. Second, they include a

²⁴³ LEE RAINWATER, *SOCIAL POLICY AND PUBLIC POLICY: INEQUALITY AND JUSTICE* 153 (1974).

²⁴⁴ Vale & Freemark, *supra* note 157, at 392.

²⁴⁵ DESMOND, *supra* note 57, at 190–92.

broad list of “nuisance activities” that provoke the calls. And third, they coerce property owners to abate the nuisance or face fines, property forfeiture, or even incarceration.²⁴⁶

Under the power of these ordinances, landlords, merchants, and other private citizens stand as a “third governmental sector” policing the activities of the poor.²⁴⁷ The idea of third party policing extracts non-criminal consequences on third parties who are deemed to share a level of responsibility for someone’s criminal conduct. The pawn-shop broker that sells the gun to the armed robber, or the unobservant parent for the truant school-aged child are just some examples of how third party policing incentivizes proactive steps by uninvolved persons. Landlords themselves may face citations on their property or potential condemnation if the property is deemed to be a “nuisance property.” For example, in Oakland, California, the BEAT Health program provides for the power to inspect suspected drug locations, enforcing local health, fire and safety, and housing codes as a “lever” on the owner. Moreover, under the pretext defined by the Uniform Controlled Substances Act that declares every building where drug use occurs as a nuisance, the city levies fines against the owner of the property to remedy the nuisance. Remediating the nuisance means evicting the drug-using tenant.²⁴⁸

This incentivizing, however, has other adverse consequences. Weary landlords may use excessive police calls to a home as an excuse to evict a tenant, even where the tenant is not responsible for wrongdoing.²⁴⁹ For example, Matthew Desmond points out that a domestic abuse victim’s 9-1-1 call for help was more likely to get her landlord a nuisance citation if she lived in a poor neighborhood. Desmond follows up with this sobering statistic:

In the vast majority of cases (83 percent) landlords who received a nuisance citation for domestic violence re-

²⁴⁶ Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 120 (2012) (citing Cari Fais, *Denying Access to Justice: The Cost of Applying Chronis Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181 (2008).

²⁴⁷ LORRAINE MAZEROLLE & JANET RANSLEY, *THIRD PARTY POLICING* 55 (2005) (“A defining feature of third-party policing is the presence of some type of third person (or third collectivity) that is utilized by the police in an effort to prevent or control crime.”). Notably, third-party policing happens not only in gap rentals, but is a primary means of eviction in public housing, see Goodridge, *supra* note 194, at 12 (noting the deference of traditional policing duties under the one strike policy), and is at least an underlying theory of how homeless persons are excluded from citizenship. See Roy, *supra* note 24, at 476 (“[A]s the paradigm of citizenship has come to be tied to property ownership, so the homeless have been seen as trespassers in the space of the nation-state.”).

²⁴⁸ MAZEROLLE, *supra* note 247, at 149–51.

²⁴⁹ DESMOND *supra* note 57, at 190–92.

sponded by either evicting the tenants or by threatening to evict them for future police calls. Sometimes, this meant evicting a couple, but most of the time landlords evicted women abused by men who did not live with them.²⁵⁰

And then, Desmond describes the responses landlords filed with local police after being cited as a nuisance property stemming from a domestic violence complaint:

One landlord wrote to the Milwaukee PD: "This is one girl in one apartment who is having trouble with her boyfriend. She was a good tenant for a long time—until her boyfriend came around. Probably things are not going to change, so enclosed please find a copy of a notice terminating her tenancy served today." Another wrote: "I discussed the report with [my tenant] . . . her boyfriend had threatened her with bodily harm and was the reason for the 911 call. We agree that he would not be allowed in the building, and she would be responsible for any damage to the building property and evicted if he returned to the property." Another wrote: "First, we are evicting Sheila M, the caller for help from police. She has been beaten by her 'man' who kicks in doors and goes to jail for 1 or 2 days. (Catch and release does not work). We suggested she obtain a gun and kill him in self-defense, but evidently she hasn't. Therefore we are evicting her."

Each of these landlords received the same form letter from the Milwaukee PD: "This notice serves to inform you that your written course of action is accepted."²⁵¹

The law effectively renders sub-prime tenants as nuisances to be abated, rather than those suffering alongside the nuisance.

CONCLUSION: LIVING IN THE SHADOWS

People that live in poverty live in the shadows of a property system. They have property and sometimes they have access to other persons' property. But what they lack are the instrumentalities of property—the ends for which property serves as a means. Having property furthers identity-making and community-making through legal doctrines that fa-

²⁵⁰ *Id.* at 191.

²⁵¹ *Id.*

cilitate autonomy, boundary control, and rule-making. David Fleming writes that one of the challenges associated with the theory of public discourse is “determining exactly who, in any given case, the public is, who belongs to the community of argument, who is accorded the right to speak, listen, read, write and deliberate in it.”²⁵² Autonomy and creation of value insure that property owners are able to participate in the collective community-making activities of the city. They talk about poverty, write laws, and choose whose voice to listen to. And while they speak, all the while, we have a class of people walking amongst us who are in a very real sense under-propriety—whose voices are not heard, whose burdens are not felt, and whose memories are forgotten,²⁵³ and whose autonomy, boundaries, and privacy can be interrupted when they are deemed inconvenient.

²⁵² See Fleming, *supra* note 29, at 207.

²⁵³ GOETZ, *supra* note 163, at 15–17.