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# THE INFLUENCE OF EXILE

Sara K. Rankin

*Associate Professor of Lawyering Skills*

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## THE INFLUENCE OF EXILE

Sara K. Rankin<sup>\*</sup>

*Belonging is a fundamental human need. But human instincts are Janus-faced: equally strong is the drive to exclude. This exclusive impulse, which this Article calls “the influence of exile,” reaches beyond interpersonal dynamics when empowered groups use laws and policies to restrict marginalized groups’ access to public space. Jim Crow, Anti-Okie, and Sundown Town laws are among many notorious examples. But the influence of exile perseveres today: it has found a new incarnation in the stigmatization and spatial regulation of visible poverty, as laws that criminalize and eject visibly poor people from public space proliferate across the nation. These laws reify popular attitudes toward visible poverty, harming not only the visibly poor, but also society as a whole. This Article seeks to expose and explain how the influence of exile operates; in doing so, it argues against the use of the criminal justice system as a response to visible poverty. In its place, the Article argues for more effective and efficient responses that take as their starting point an individual right to exist in public space, which for many visibly poor people is tantamount to a right to exist at all.*

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<sup>\*</sup> Associate Professor, Seattle University School of Law. J.D., New York University School of Law; M.Ed., Harvard Graduate School of Education; B.A., University of Oregon. Deep thanks to Kaya Lurie and Justin Olson for their exceptional support and research assistance.

# THE INFLUENCE OF EXILE

## TABLE OF CONTENTS

Introduction.....	1
I. The Influence of Exile: How We Perceive the Visibly Poor.....	5
A. Social Worthiness & Socio-Spatial Distance.....	8
B. The Stigma of Poverty.....	12
C. Poverty & the Transmutation of Discrimination.....	15
D. The Blameworthy Poor .....	20
E. The Criminal Poor .....	22
II. Our Views of Public Space: A Stage for the Influence of Exile.....	24
A. Socio-Political Constructions of Public Space.....	25
B. Legal Constructions of Public Space .....	28
1. Exile in Property Law .....	29
A. Property Zoning and Regulation .....	29
B. Progressive Property Critiques.....	30
2. Exile Under the First Amendment .....	32
C. The “Death of Public Space” .....	39
III. The Criminalization of Visibly Poor People:	
Where Public Space and the Influence of Exile Collide.....	43
A. The Contemporary Rise of Visible Poverty .....	44
B. Criminalization as a Response to the Crisis of Visible Poverty.....	47
C. The Persistence of Criminalizing Visible Poverty .....	50
IV. Confronting the Influence of Exile.....	55

# THE INFLUENCE OF EXILE

## INTRODUCTION

*True compassion is more than flinging a coin to a beggar.  
It comes to see that an edifice which produces beggars needs  
restructuring.*

—Martin Luther King<sup>1</sup>

Concepts of inclusion and exile—that is, whether one earns permission to participate as a recognized part of society or should be distanced from it—are at the core of human thought and motivation.<sup>2</sup> The exclusive side of this pervasive phenomenon, which this Article calls “the influence of exile,” often drives the regulation and restriction of the rights of the most vulnerable members of society;<sup>3</sup> however, legal discourse and decision-

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<sup>1</sup> Address at New York City’s Riverside Church: Beyond Vietnam -- A Time to Break Silence (April 4, 1967, a year to the day before he was assassinated).

<sup>2</sup> See, e.g., Naomi I. Eisenberger, Matthew D. Lieberman, & Kipling D. Williams, *Does Rejection Hurt? An fMRI Study of Social Exclusion*, 302 SCI. 290 (2003) (examining the painfulness of ostracism); Lisa Zadro, Kipling D. Williams, & Rick Richardson, *How Low Can You Go? Ostracism by a Computer is Sufficient to Lower Self-Reported Levels of Belonging, Control, Self-Esteem, and Meaningful Existence*, 40 J. OF EXPERIMENTAL SOC. PSYCHOL. 560 (2004) (concluding people are negatively impacted even by rejection even if they know their exclusion comes from a random computerized algorithm); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497–529 (1995) (observing that a sense of belonging is a fundamental human need).

<sup>3</sup> Public opinion has been shown to influence both legislative policymaking and judicial decision-making. See, e.g., Paul Burnstein, *The Impact of Public Opinion on Public Policy: A Review and An Agenda*, 56 POL. RES. Q. 1 (2003) (discussing the relationship between public opinion and policymaking); Hans Kelsen, *On the Basis of Legal Validity*, 26 AM. J. JURIS. 178 (1981) (observing that criminal laws are primarily a codification of social norms and are thus justified by reference to common social beliefs); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. OF POL. 169 (U. Chic. Press 1996) (establishing the influence of public opinion on Supreme Court jurisprudence). Public opinion also influences the enactment of laws that impact commonly marginalized and stigmatized groups such as racial minorities, immigrants, LGBTQ, and homeless individuals. See, e.g., David Leonhardt & Alicia Parlapiano, *Why Gun Control and Abortion are Different from Gay Marriage*, NEW YORK TIMES (June 30, 2015) (synthesizing Pew Research Center and Gallup poll data on changes over time regarding social views of equality relating to various marginalized groups and concluding “public opinion and legal changes feed on each other”); Javier Ortiz & Matthew Dick, Seattle University Homeless Rights Advocacy Project, *THE WRONG SIDE OF HISTORY: A*

making does not sufficiently account for it. The human drive to exile is perhaps most clearly expressed when empowered groups restrict access to public space through legal<sup>4</sup> or extra-legal<sup>5</sup> means. American history shows a persistent commitment to exiling “undesirable” people from public space: Jim Crow, Anti-Okie, and Sundown Town laws are among many notorious examples.<sup>6</sup>

But another increasingly popular and deleterious manifestation of the urge to exile persists today: the proliferation of laws and policies that effectively banish visibly poor people from urban centers.<sup>7</sup> For purposes of this Article, the term “visibly poor” and related iterations encompass individuals currently experiencing homelessness, but also include individuals experiencing poverty in combination with housing instability, mental illness, or other psychological or socio-economic challenges that deprive them of reasonable alternatives to spending all or the majority of their time in public.<sup>8</sup> Similarly, the hallmark of homelessness is a lack of private seclusion, so people experiencing homelessness endure conditions of persistent, nearly inescapable visibility.<sup>9</sup> As explained below, evidence of human struggle or desperation commonly provokes fear, annoyance, disgust, or anger from those who witness it.<sup>10</sup> Thus, people experiencing homelessness and

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COMPARISON OF MODERN & HISTORICAL CRIMINALIZATION LAWS (Sara K. Rankin ed., 2015), *available at* <http://ssrn.com/abstract=2602533> (reviewing historical and contemporary efforts to purge marginalized groups from public space, including correlations between legal developments and public opinion); *see also* Marie-Eve Sylvestre & Celine Bellot, *Challenging Discriminatory and Punitive Responses to Homelessness in Canada*, in *ADVANCING SOCIAL RIGHTS IN CANADA 1* (Martha Jackman and Bruce Porter, eds., Irwin Law 2014), *available at* <http://ssrn.com/abstract=2484975> (observing that “punitive responses to homelessness were largely based on negative stereotyping, prejudices, and discrimination). The relationship between popular societal attitudes and perceptions and the development of laws and policies is also implicated in discussions of institutional discrimination. *See, e.g.*, EDWARD ROYCE, *POVERTY & POWER: THE PROBLEM OF STRUCTURAL INEQUALITY* 17 (2009) (discussing how discrimination is largely a structural problem since “these obstacles ... originate from the combined workings of the economic, political, cultural, and social systems”).

<sup>4</sup> Legal means may include contemporary homeless criminalization laws or historical exclusion laws. *See infra* Part III.

<sup>5</sup> Examples of extra-legal means include the government-sponsored provision of one-way bus tickets to take homeless people out of town or the use of “hostile architecture.” *See infra* Part III.C.

<sup>6</sup> Ortiz & Dick, *supra* note 3.

<sup>7</sup> *Infra* note 241.

<sup>8</sup> *See, e.g.*, JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* (Oxford U. Press 1993).

<sup>9</sup> *See generally* BLAU, *supra* note 8.

<sup>10</sup> *See* Part I.A–C; Part IV.

visibly poor people are particularly vulnerable to the influence of exile precisely because of their visibility and sustained occupation of public space.<sup>11</sup> Such battles for “tactical control”<sup>12</sup> of public space are fueled by the influence of exile—deeply-ingrained class and status distinctions that can inconspicuously, even unconsciously—undermine the constitutional, civil, and human rights of visibly poor people.

Despite America’s disturbing heritage of exiling marginalized groups from public space, contemporary legal discourse largely ignores such analogies when laws and policies similarly marginalize poor or homeless people. This Article contends that 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 re-examination of such laws and policies, which not only push poor people to the literal fringes of society but also condemn them to stay there.

This Article is organized in four parts. Part I introduces the influence of exile in the context of societal perceptions of the visibly poor. This section surveys sociological and psychological studies that clearly establish the human instincts to organize, include, and exclude each other, especially around perceived status and class lines.<sup>13</sup> This section suggests that common stereotypes and prejudices can influence societal judgments regarding one’s

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<sup>11</sup> Joel Blau explains:

[P]ublic displays of poverty are somehow improper. Since only the most desperate people exhibit their poverty, the slightest glimpse of their desperation makes others feel uneasy. Witnesses to homelessness then become like the unwilling spectators of an intimate domestic quarrel. They know these things occur, but firmly believe they should be kept private if at all possible.

BLAU, *supra* note 8, at 4.

<sup>12</sup> Talmadge Wright, *New Urban Spaces and Cultural Representations: Social Imaginaries, Social-Physical Space, and Homelessness*, in 5 RESEARCH IN URBAN SOCIOLOGY 23, 53 (Ray Hutchinson ed., 1999).

<sup>13</sup> See generally SUSAN T. FISKE, *ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US* (New York: Russell Sage Foundation 2012) (discussing a wide range of scholarship and studies).

worthiness,<sup>14</sup> and, in turn, these perceptions affect the restrictions of rights and resources of poor people generally, but visibly poor people in particular.<sup>15</sup>

Part II examines interdisciplinary definitions and perceptions of public space as a stage for the influence of exile. This section examines questions like, what is public space? Who should have access? Who gets to decide the scope and terms of access? What do these inquiries mean for democratic principles, diversity, tolerance, and social justice? This inquiry reveals disquieting tensions in American constructions and valuations of public space.

Part III connects our societal attitudes toward the poor with contests over public space, surveying the increasing prevalence and popularity of laws that regulate the presence of poor people in public space. These spatial-hierarchical responses to visible poverty not only raise legal and policy concerns,<sup>16</sup> but they have been shown to be ineffective and more expensive than the provision of non-punitive alternatives, such as social services and affordable housing.<sup>17</sup> Still, many jurisdictions continue to favor laws and policies of exclusion to mitigate visible evidence of poverty, such as the removal of homeless people from public space

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<sup>14</sup> See generally FISKE, *supra* note 13; see also Mina Cikara, Rachel A. Farnsworth, Lasana T. Harris & Susan T. Fiske, *On the Wrong Side of the Trolley Track: Neural Correlates of Relative Social Valuation*, 5 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 404–13 (2010) (observing the types of harm that come from economically well-off people who determine that a homeless person's life is not worth as much as a higher class person's life).

<sup>15</sup> Burnstein, *supra* note 3; Carolyn J. Tompsett, Paul A. Toro, Melissa Guzicki, Manrique Manuel & Zatakia Jigna, *Homeless in the United States: Assessing Changes in Prevalence and Public Opinion, 1993-2001*, 37 AM. J. OF COMMUNITY PSYCHOL. 29 (2006) (explaining that the views of domiciled individuals influences social and legal policy).

<sup>16</sup> See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2014), *available at* [http://nlchp.org/documents/No\\_Safe\\_Place](http://nlchp.org/documents/No_Safe_Place) [hereinafter NAT'L LAW CTR.]; Justin Olson & Scott MacDonald, Seattle University Homeless Rights Advocacy Project, WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (Sara K. Rankin ed., 2015), *available at* <http://ssrn.com/abstract=2602318>; *Robinson v. State of California*, 370 U.S. 660, 666–67 (1962) (holding that a state cannot punish a person for his or her status). Following *Robinson*, the Court invalidated a Texas law criminalizing homosexual acts through anti-sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>17</sup> NAT'L LAW CTR., *supra* note 16; Josh Howard & David Tran, Seattle University Homeless Rights Advocacy Project, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE & SPOKANE (Sara K. Rankin ed., May 2015), *available at* <http://ssrn.com/abstract=2602530>.

through the use of “move along” warnings, civil infractions, or incarceration.<sup>18</sup>

Part IV contends that the influence of exile must be better understood and confronted as a matter of public awareness, but especially as a matter of law and policy. Many non-legal disciplines confront the influence of exile, but legal discourse, by contrast, fails to adequately account for its impact on the rights of visibly poor people. The influence of exile on the regulation of public space has profoundly negative impacts, not only on the visibly poor, but also on society as a whole. This section argues for the reconceptualization of the presence and integration of homeless and visibly poor people as vital to American democratic principles and the revitalization of truly public space.

#### I. THE INFLUENCE OF EXILE: HOW WE PERCEIVE THE VISIBLY POOR

*Status is everywhere... This process is so basic that we automatically judge the dominance of another individual in a fraction of a second, using certain cues, such as physical strength... All known organizations gravitate toward status and power hierarchies because the structure makes them run more smoothly. At the macro level, human societies stratified social groups by dominance hierarchies, especially social class.*<sup>19</sup>

Common perceptions of poor people can fuel their marginalization. Poverty is relative; in America, income inequality shapes American society in significant ways. Different measures of wealth or poverty correlate to different outcomes concerning health,<sup>20</sup> housing,<sup>21</sup> transportation,<sup>22</sup> education,<sup>23</sup> even water,<sup>24</sup> and

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<sup>18</sup> See, e.g., NAT'L LAW CTR., *supra* note 16; Olson & MacDonald, *supra* note 16; Marina Fisher, Nathaniel Miller, Lindsay Walter & Jeffrey Selbin, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE (2015), available at <http://ssrn.com/abstract=2558944>.

<sup>19</sup> FISKE, *supra* note 13, at 26.

<sup>20</sup> See, e.g., Anne Lowery, *Income Gap, Meet the Longevity Gap*, NEW YORK TIMES (Mar. 15, 2014), available at <http://www.nytimes.com/2014/03/16/business/income-gap-meet-the-longevity-gap.html> (discussing the relationship between income disparity and health); Brenda Major & Laurie O'Brien, *The Social Psychology of Stigma*, 56 ANN. REV. OF PSYCHOL. 393 (2005) (observing the relationship between social belonging and health); Neil Schneiderman, Gail Ironson & Scott D. Siegel, *Stress and Health: Psychological, Behavioral, and Biological Determinants*, 1



of course, the law.<sup>25</sup> Differential allocations of rights and resources are no accident. Empowered groups, which control access to political and financial resources, also control decisions about the allocation of rights and resources, even though these decisions clearly impact disempowered groups as well.<sup>26</sup>

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ANN. REV. OF CLINICAL PSYCHOL. 607 (2005) (observing the relationship between social belonging, psychosocial stressors, and health).

<sup>21</sup> See, e.g., Rajini Vaidyanathan, *Why Don't Black and White Americans Live Together?*, BBC NEWS (Jan. 8, 2016), <http://www.bbc.com/news/world-us-canada-35255835> (discussing trends in housing segregation and noting that across the nation, “people of other races simply don’t mix, not through choice but circumstances. And if there’s no interaction between races, it’s harder for conversations on how to solve race problems to even begin.”); William H. Frey, *Census Shows Modest Declines in Black-White Segregation*, THE BROOKINGS INSTITUTION (Dec. 8, 2015), <http://www.brookings.edu/blogs/the-avenue/posts/2015/12/08-census-black-white-segregation-frey> (observing that even modest declines in segregation “are still high measures—more than half of blacks would need to move to achieve complete integration”).

<sup>22</sup> See, e.g., Mike Maciag, *Public Transportation Demographic Divide*, GOVERNING: THE STATES AND LOCALITIES (Feb. 25, 2014), <http://www.governing.com/topics/transportation-infrastructure/gov-public-transportation-riders-demographic-divide-for-cities.html>; Kirk Johnson, *Targeting Inequality, This Time on Public Transit*, NEW YORK TIMES (Feb. 28, 2015), available at [http://www.nytimes.com/2015/03/01/us/targeting-inequality-this-time-on-public-transit.html?\\_r=0](http://www.nytimes.com/2015/03/01/us/targeting-inequality-this-time-on-public-transit.html?_r=0).

<sup>23</sup> See, e.g., NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA (Harriet Newburger et al. eds., 2013) (examining the impact of poverty and neighborhood on a variety of measures, including educational attainment and equal opportunity).

<sup>24</sup> Stephanie Pincetl & Terri S. Hogue, *California's New Normal? Recurring Drought: Addressing Winners and Losers*, 20 LOC. ENVTL. 850 (2015), available at <http://dx.doi.org/10.1080/13549839.2015.1042778> (highlighting the widening gap of inequality between the wealthy and the poor of California, specifically in relation to the State's current drought).

<sup>25</sup> For example, poor people struggle with access to justice issues. See, e.g., Deborah Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001) (examining the access to justice crisis). Poverty is also likely to result in unequal treatment under the law when compared to legal outcomes for more affluent defendants. See, e.g., MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (2014) (exploring how “basic rights are now determined by our wealth or poverty”); GLENN GREENWALD, *WITH LIBERTY AND JUSTICE FOR SOME: HOW THE LAW IS USED TO DESTROY EQUALITY AND PROTECT THE POWERFUL* 268–69 (2011) (“The greater the disparities in wealth and power become, the more unequal the law becomes — and the more unequal the law is, the more opportunities it creates for the wealthy and powerful to reinforce their advantages.”).

<sup>26</sup> See, e.g., Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 581 (1994) (discussing the danger of a tyrannical majority); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506, 1513–31 (1989) (discussing the popular belief that direct democracy is an authoritative expression of majority will and identifying significant problems associated with this conception); Stephen R.

Naturally, empowered groups cannot be assumed to be disinterested in such decisions;<sup>27</sup> moreover, empowered groups' perceptions of the social worth of disempowered groups influence these decisions.<sup>28</sup> This relationship between power and rights informs many socio-political theories, which maintain that empowered groups consciously or unconsciously use such power

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Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, 18–20 (1997) (discussing ways the views and interests of the visible poor are discounted in societal calculations of maximizing "public welfare").

<sup>27</sup> Many economic theories paint a stark portrait of self-interest, suggesting that people make decisions in order to maximize their wealth and other material goals. See, e.g., Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, in ADVANCES IN BEHAVIORAL ECONOMICS 271, 271 (Colin F. Camerer et al. eds., 2004); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 247 (1980) ("Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically."). See also Sanford Schram & Joe Soss, *Demonizing the Poor*, JACOBIN (Sept. 3, 2015), available at <https://www.jacobinmag.com/2015/09/welfare-republicans-sam-brownback-race-corporations/> ("Harsh restrictions on welfare don't limit fraud and abuse. They advance the interests of the rich and powerful."). Of course, these assumptions are often contradicted by examples where people prioritize social goals over economic self-interest. See, e.g., Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821, 842–44, 854–56 (2009) (discussing examples in the context of property law). Because disempowered people are, by definition, not an actively engaged political majority, their preferences—whether driven by self-interest or not—do not control the allocation of rights and resources. Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 AM. POL. RES. 29, 29 (2012) (concluding that lower income individuals "receive little substantive political representation (compared to more affluent citizens).").

<sup>28</sup> The allocation of resources based on social worth is often studied and critiqued in the context of economics and ethics. See, e.g., *Advanced Application of Ethics: Types of Resource Allocation*, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN: ENGINEERING ETHICS, <http://www.scs.illinois.edu/~eseebauer/ethics/Advanced/Allocation.html> (last visited Jan. 24, 2016); see also Roger Matthews & John Pitts, *CRIME, DISORDER AND COMMUNITY SAFETY: A NEW AGENDA?* (Psychology Press 2001). Relatedly, social worth is also frequently examined under the rubric of distributive justice in philosophy and social sciences. See Linda J. Skitka & Faye J. Crosby, *Trends in the Social Psychological Study of Justice*, 7 PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW, no. 4, 2003, at 282–285. Distributive justice may occur when individuals get what they deserve, a calculation based in part on norms and an individual's perceived worthiness according to those norms. See, e.g., Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?*, 31 JOURNAL OF SOCIAL ISSUES 3, 137–149 (1975). As discussed *infra*, Part II, legal interpretations of social worth—especially the allocations of rights relating to social worth—often manifest in doctrines of property and constitutional law.

to reproduce class relations and hierarchies.<sup>29</sup> Simply put, the powerful generally stay in power, the rich stay rich, and the poor stay poor.<sup>30</sup>

#### A. Social Worthiness & Socio-Spatial Distance

The engine of this hierarchical system may be human psychology, plain and simple. People perceive and organize each other through the formation of powerful “in-groups” and marginalized “out-groups.” Powerful in-group members may exclude people as “others” having undesirable attributes, thus warranting their rejection from the accepted core of the in-group and their placement on the margins.<sup>31</sup> Commonly recognized out-groups include racial or ethnic minorities,<sup>32</sup> LGBTQ individuals,<sup>33</sup> people

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<sup>29</sup> For more on the systemic reproduction of hierarchies, see, for example, PAULA S. ROTHENBERG, *RACE, CLASS, AND GENDER IN THE UNITED STATES* 593 (2007) (noting “the stereotypes and values transmitted through education and the media have played a critical role in perpetuating racism, sexism, heterosexism, and class privilege even at those times when the law has been used as a vehicle to fight discrimination rather than maintain it.”). Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 138 (2013) (arguing that “racial wealth and housing disparities are dramatic and probably best explained as a result of systemic racial discrimination and related preferences.”). For more on unconscious aspects of structural discrimination, see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2002) (examining “organizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent”).

<sup>30</sup> Income inequality is particularly pronounced along racial lines. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CENTER (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> (documenting significant disparities in median household net worth by race). Such structural inequalities are relentlessly persistent. See Ezra Rosser, *supra* note 29, at 135 (discussing the work of Professor Daria Roithmayr and others as “show[ing] how racial advantage and disadvantage need not be tied to intentional discrimination; instead such advantages and disadvantages can remain stable because the effects of prior discrimination and related early advantages get locked into place.”).

<sup>31</sup> See, e.g., Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. OF SOC. 363 (2001); FISKE, *supra* note 13, at 26.

<sup>32</sup> See, e.g., SUSAN WELCH, LEE SIGELMAN, TIMOTHY BLEDSOE & MICHAEL COMBS, *RACE AND PLACE: RACE RELATIONS IN AN AMERICAN CITY* (2001).

<sup>33</sup> See Gregory M. Herek & John Capitanio, “Some of My Best Friends”: *Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians*, 22 PERSONALITY AND SOC. PSYCHOL. BULL. 412 (1996).

with physical or mental disabilities,<sup>34</sup> as well as homeless and visibly poor people.<sup>35</sup>

These sorts of judgments demonstrate “social distancing,” a phenomenon well explained in social psychology. Social distancing examines “the ways in which individual preferences, based in a person’s membership in specific social in-groups, influences social relations with people from other out-groups. These judgments are often measured along a continuum with nearness, intimacy or familiarity at one end and far less, difference and unfamiliarity at the other end.”<sup>36</sup> Sociologist Georg Simmel famously advanced the concept of a “stranger” as an archetype of social distancing: the stranger often is perceived to transgress social norms and thus lives at the fringes of society, wavering in and out of visibility at the periphery.<sup>37</sup> Even when strangers are physically near, they are perceived as “far.”<sup>38</sup> In this respect, social distancing is both a psychological and hierarchical act of organization, reinforcing one’s perceptions of in-group and out-group membership. But social distancing also reinforces the likelihood of forming basic emotional and moral associations, such as whether one might feel empathy, anger, disgust, or pity for

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<sup>34</sup> Elaine Makas, *Getting in Touch: The Relationship Between Contact with an Attitude Toward People with Disabilities*, in PERSPECTIVES ON DISABILITY 121 (Mark Nagler ed., 1993).

<sup>35</sup> See, e.g., Barrett A. Lee, Bruce Link & Chad R. Farrell, *Revisiting the Contact Hypothesis: The Case of Public Exposure to Homelessness*, 69 AM. SOC. REV. 40 (Feb. 2004).

<sup>36</sup> Darrin James Hodgetts et al., “Near and Far”: *Social Distancing in Domiciled Characterisations of Homeless People*, 48 URBAN STUDIES 1739, 1740 (2011). Professor Paul Gorski translates years of considerable research about stereotyping people in poverty:

Stereotypes may grow from how we’re socialized. They are the result of what we are taught to think about poor people, for instance, even if we are poor, through celebrations of “meritocracy” or by watching a parent lock the car doors when driving through certain parts of town. They grow, as well, from a desire to find self-meaning by distinguishing between social and cultural in groups with which we do and do not identify.

PAUL GORSKI, REACHING AND TEACHING STUDENTS IN POVERTY: STRATEGIES FOR ERASING THE OPPORTUNITY GAP (2013) (internal citations omitted).

<sup>37</sup> Georg Simmel, *The Sociological Significance of the “Stranger,”* in INTRODUCTION TO THE SCIENCE OF SOCIOLOGY (R. Park & E. Burgess eds., 1921). For more on Simmel’s theories of social distancing, see GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL (1950).

<sup>38</sup> See, e.g., D. Levine, E. Carter & E. Gorman, *Simmel’s Influence on American Sociology*, 81 AM. J. OF SOC. 813 (1976) (explaining the tension between the near and far embodied in strangers).

another based on perceived group membership.<sup>39</sup> Higher degrees of social distance facilitate negative associations.<sup>40</sup>

But social distancing is not only a psychological phenomenon; it can manifest as a physical one. Social distancing is associated with increased spatial distancing,<sup>41</sup> such as the evolution of racially segregated neighborhoods and schools.<sup>42</sup> Naturally, spatial

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<sup>39</sup> FISKE, *supra* note 13, at 26 (discussing the association of these reactions based on perceptions of social worth). Stigma literature closely examines how in-groups assign stigma, a sort of “spoiled identity that encourages their devaluation and rejection by ‘normal’ others.” Barrett A. Lee, Bruce Link & Chad R. Farrell, *supra* note 35.

<sup>40</sup> As Princeton psychologist Susan Fiske explains, “Distance has the effect of belittling people, making them appear smaller. Hence, keeping our distance should make it easier for us to look down on other people. Indeed, it is easier to dehumanize someone at a distance. Scorn looks down and distances.” FISKE, *supra* note 13, at 51 (internal cites omitted).

<sup>41</sup> Interdisciplinary scholarship in law and geography presumes a reciprocal relationship between the law and the spatial conception of social life. *See, e.g.*, Austin Sarat, Lawrence Douglas & Martha Merrill Humphrey, *Where (or What) Is the Place of Law? An Introduction*, in *THE PLACE OF LAW* 1, 1–20 (U. Mich. Press 2003). For an excellent legal-spatial analysis applied to law regulating the presence of homeless people in Seattle, see KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* (Oxford University Press 2011). Other scholars have documented the international application of spatial laws to marginalized groups by class and social status. *See, e.g.*, Marie-Eve Sylvestre, *Disorder and Public Spaces in Montreal: Repression (and Resistance) Through Law, Politics, and Police Discretion*, 31 *URBAN GEOGRAPHY* 803, 803 (2010) (surveying studies from the United States, Canada, Western Europe, and South America). Stand your ground laws, frequently infused with debates about racial discrimination, are one of many of potential sites of inquiry about how proximity in physical space, combined with bias, can influence discretionary decisions with potentially devastating consequences. *See* Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 *RUTGERS J.L. & PUB. POL'Y* 504, 536–37 (2007) (noting that Miami’s urbanization has exposed individuals to violence at a much closer proximity than when living situations were previously more rural).

<sup>42</sup> History is replete with examples of exclusionary laws that minimize the presence of “undesirable people” in public space. *See, e.g.*, Ortiz & Dick, *supra* note 3. For more on the relationship between discrimination and current trends in racial segregation, *see, e.g.*, Center for American Progress, *An Opportunity Agenda for Renters: The Case for Simultaneous Investments in Residential Mobility and Low-Income Communities* (Dec. 16, 2015) (finding “the lack of available affordable housing and deeply rooted patterns of residential segregation have created a situation in which where people live depends in large part on their income, race, and ethnicity”); Matthew Hall, Kyle Crowder & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, *AM. SOC. REV.*, April 21, 2015, at 1–24 (observing that racialized segregation “fueled” the foreclosure crisis, which in turn, “may have significantly disrupted trajectories toward residential integration”); PAUL JARGOWSKI, *ARCHITECTURE OF SEGREGATION: CIVIL UNREST, THE*

distance depresses opportunities for interaction among groups. Indeed, physical segregation may be either an unintended consequence or an explicit motivation associated with social distancing.<sup>43</sup>

Although social distancing may be a hard-wired human phenomenon, it not only invites discrimination and compromise of the rights of perceived out-groups, but it also comes at a significant cost to the personal growth and understanding of in-group members. Socio-spatial distancing decreases interaction and integration among groups; however, contact theory shows that contact between in-group and out-group members generally improves “the attitudes of the former toward the latter by replacing in-group with first-hand knowledge that disconfirms stereotypes.”<sup>44</sup> In other words, social-spatial segregation further entrenches stereotyping, misunderstanding, and the stigmatization of marginalized groups.<sup>45</sup> Such self-perpetuating consequences of socio-spatial distancing are troubling.

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CONCENTRATION OF POVERTY, AND PUBLIC POLICY (The Century Foundation 2015) (noting that discriminatory housing, zoning, and other policy choices are driving a dramatic increase in racialized poverty and segregation across the U.S.); Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus Separation: Deepening Double Segregation for More Students*, THE CIVIL RIGHTS PROJECT (Sept. 19, 2012), available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf) (finding segregation has “increased seriously” for Latino students and is a persistent problem of “double segregation” by race and poverty for African-American students).

<sup>43</sup> Jim Crow era segregationists were arguably transparent about the goal of physically separating the races. Ortiz & Dick, *supra* note 3, at 6–8. But the oppressive impacts of systemic discrimination are not always conscious choices; this observation is well-developed in literature concerning unconscious bias. See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L.J. 345, 359 (2007). The law accommodates the influence of unconscious bias in race cases by allowing proof of intentional discrimination or discriminatory impact. See, e.g., Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2525, 192 L. Ed. 2d 514 (2015) (holding that, under the Fair Housing Act, a plaintiff may establish disparate-impact liability based on evidence of disproportionate impact instead of proof of intentional discrimination).

<sup>44</sup> Barrett A. Lee, Bruce Link & Chad R. Farrell, *supra* note 35. See also Vaidyanathan, *supra* note 21 (discussing trends in racial segregation and observing “if there’s no interaction between races, it’s harder for conversations on how to solve race problems to even begin”).

<sup>45</sup> For more on the process of stigmatization, see Bruce G. Link & Jo C. Phelan, *supra* note 31; see also Brenda Major & Laurie T. O’Brien, *supra* note 20.

## B. The Special Stigma of Poverty

Socio-spatial instincts have particular significance when applied to societal perceptions of poor people. Of all commonly identified out-groups, visibly poor and homeless people may be at the bottom of the chain. Social neuroscientists confirm that today, society tends to regard homeless and visibly poor people with disgust and rejection at higher rates than most any other perceived status.<sup>46</sup> Other studies consistently suggest that of all marginalized groups, homeless and visibly poor people are the most severely and persistently stigmatized.<sup>47</sup>

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<sup>46</sup> “In the United States, by far the most extreme out-group is homeless people, but drug addicts, welfare recipients, and immigrants, especially undocumented ones, are also among society’s default bad guys.” Fiske, *supra* note 13 at 131. See also Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 10, 848 (2006) (describing study results placing homeless people in the “lowest” category lacking warmth and competence, which “elicits the worst kind of prejudice—disgust and contempt—based on moral violations and subsequent negative outcomes that these groups allegedly caused themselves”); ALEXANDER TODOROV, SUSAN FISKE & DEBORAH PRENTICE, SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND 3 (2011) (describing how study participants “dehumanized [homeless people] as ill-intentioned, inept, unfamiliar, dissimilar, strange, and not uniquely human or quite typically human”); Lasana T. Harris & Susan T. Fiske, *Social Groups That Elicit Disgust Are Differentially Processed in mPFC*, 2 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 45, 45–51 (2007) (finding study participants dehumanize homeless people as stimuli that elicit “disgust”). Some scholars attribute these perceptions to negative stereotyping, prejudices, and discrimination, often associated with moral judgments and assumptions that visibly poor people are to blame for their condition. See, e.g., BLAU, *supra* note 8; see also Sylvestre & Bellot, *supra* note 3. Sylvestre & Bellot describe common views of homeless people as “inferior, lazy, and dishonest individuals (the ‘moral deprivation’ discourse), blamed for their own misfortunes (the ‘choice’ discourse), and are treated as criminals or potential serious offenders needing to be repressed and confined rather than as equal citizens worthy of respect and consideration (the ‘criminality discourse’).” *Id.* at 2.

<sup>47</sup> See, e.g., Fiske, *supra* note 13 (reviewing various studies and concluding that societal disdain for the homeless and visible poor is the most severe). See also Jo Phelan, Bruce Link, Robert E. Moore & Ann Stueve, *The Stigma of Homelessness: The Impact of the Label “Homeless” on Attitudes Toward Poor Persons*, 60 SOC. PSYCH. Q. 323, 323–37 (1997) (concluding that “homelessness is stigmatized more severely than poverty and, generally, more severely than mental illness”); Leon Anderson, David A. Snow & Daniel Cress, *Negotiating the Public Realm: Stigma Management and Collective Action Among the Homeless*, in RESEARCH IN COMMUNITY SOCIOLOGY: THE COMMUNITY OF THE STREETS (S.E. Chaill & L.H. Lofland eds., JAI Press 1994) (documenting that homeless or visibly poor people are commonly not perceived as human beings). Of course, the intersectionality between homelessness and other marginalized

But don't just take the word of social scientists. America's deep disdain for poor people is commonly acknowledged in popular media as well. Celebrated Rolling Stone journalist and best-selling author of *The Divide: American Injustice in the Age of the Wealth Gap*, Matt Taibbi, recently declared that Americans have "a profound hatred of the weak and the poor."<sup>48</sup> Linguist and philosopher Noam Chomsky apparently agrees, describing a "class war" in a recent article, partly titled, *America Hates Its Poor*.<sup>49</sup> Television commentators frequently suggest that shaming and stigmatizing poverty is vital to the national economy.<sup>50</sup> Television

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groups complicates the question of which perceived traits or out-group membership might trigger negative associations of in-group members. For more on the intersectionality of homelessness and other commonly stigmatized groups, see Kaya Lurie & Breanne Schuster, Seattle University Homeless Rights Advocacy Project, *DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS* (Sara K. Rankin ed., 2015), available at <http://ssrn.com/abstract=2602532>.

<sup>48</sup> Emily Tess Katz, *Matt Taibbi: America Has a "Profound Hatred of the Weak and the Poor,"* THE HUFFINGTON POST (Apr. 16, 2014, 2:48 PM), [http://www.huffingtonpost.com/2014/04/16/matt-taibbi-the-divide\\_n\\_5159626.html](http://www.huffingtonpost.com/2014/04/16/matt-taibbi-the-divide_n_5159626.html).

<sup>49</sup> Chris Steele & Zuccotti Park Press, *Noam Chomsky: America Hates Its Poor*, SALON MEDIA GROUP (Dec. 1, 2013, 4:00 AM), [http://www.salon.com/2013/12/01/noam\\_chomsky\\_america\\_hates\\_its\\_poor\\_partner/](http://www.salon.com/2013/12/01/noam_chomsky_america_hates_its_poor_partner/).

<sup>50</sup> Examples abound, but Fox News is a prolific showcase. On a recent edition of Fox Business's *Varney & Co. at Night*, Stuart Varney reflected on his earlier statement that "99.6% of [poor people] have a refrigerator." Varney opined, "The image we have of poor people as starving, living in squalor really is not accurate. Many of them have things, what they lack is the richness of spirit." Media Matters Staff, *Fox's Stuart Varney on the Poor: "Many of Them Have Things – What They Lack Is the Richness of Spirit,"* MEDIA MATTERS FOR AMERICA (Aug. 25, 2011, 9:56 PM), <http://mediamatters.org/video/2011/08/25/foxs-stuart-varney-on-the-poor-many-of-them-hav/138530>. On *America's Newsroom*, Fox Business host Charles Payne alleged that federal benefit programs trap people in poverty and complained that there wasn't enough "stigma" directed at poor Americans for using food assistance programs: "I know there's a big thing trying to destigmatize food stamps, but the good part about the stigma is it actually does serve as an impetus to get people off of it. They're trying to take that stigma away." Media Matters Staff, *Fox's Charles Payne Laments Lack of "Stigma" Surrounding Food Stamps*, MEDIA MATTERS FOR AMERICA (Mar. 28, 2013, 10:29 AM), <http://mediamatters.org/video/2013/03/28/foxs-charles-payne-laments-lack-of-stigma-surro/193311>. Similarly, in a recent segment of Fox News' *Happening Now*, Fox Business co-contributor Charles Gasparino explained that he wished more stigma was attached to welfare. Media Matters Staff, *Fox's Gasparino Calls Public Pensions "Ponzi Schemes," Wishes More "Stigma" Was Attached to Welfare*, MEDIA MATTERS FOR AMERICA (Aug. 24, 2014, 4:39 PM), <http://mediamatters.org/blog/2014/08/21/foxs-gasparino-calls-public-pensions-ponzi-sche/200506>. New York Post columnist Michael



producers commonly gamble on the popularity of so-called “poverty porn,” which entertains through the spectacle of poor people enduring hardships, all for the viewing pleasure of the public.<sup>51</sup>

Contemporary politics also demonstrate an appetite for only stigmatizing the poor.<sup>52</sup> Recently, an Oklahoman political party compared food stamp recipients to wild animals.<sup>53</sup> Maine placed a cap on the savings accounts of food stamp recipients, a move some criticized as discouraging poor people from saving money.<sup>54</sup> Wisconsin recently passed a so-called “food nanny” bill<sup>55</sup>

Goodwin recently lamented that “the sense of shame is gone” from enrolling in government anti-poverty programs. See Noah Rothman, *NY Post Columnist: “Sense of Shame is Gone” for Entitlement Recipients*, Mediaite, LLC (May 21, 2012, 9:45 AM), <http://www.mediaite.com/tv/ny-post-columnist-sense-of-shame-is-gone-for-entitlement-recipients/>.

<sup>51</sup> A recent but controversial and short-lived example was CBS’s *The Briefcase*. See, e.g., Douglas Cobb, “*The Briefcase*” Takes Poverty Porn to “*Hunger Games*” Level, *GUARDIAN LIBERTY VOICE* (May 31, 2015), <http://guardianlv.com/2015/05/the-briefcase-takes-poverty-porn-to-hunger-games-level/>; HuffPost Live, *Dave Broome, Creator of “The Briefcase,” Says Show is Not “Poverty Porn,”* *THE HUFFINGTON POST* (June 25, 2015, 5:28 PM), [http://www.huffingtonpost.com/2015/06/25/the-briefcase\\_n\\_7666440.html](http://www.huffingtonpost.com/2015/06/25/the-briefcase_n_7666440.html).

<sup>52</sup> GLENN GREENWALD, *supra* note 25, at 13–14 (“It is now quite common for American political discourse to include arguments expressly justifying the elites’ legal impunity and openly calling for radically different treatment under the law for various classes of people based on their power, status, and wealth.”).

<sup>53</sup> The Facebook page on the “Oklahoma Republican Party” website, which has since been removed, criticized what it described as an increase in the distribution of food stamps, noting that “[m]eanwhile, the National Park Service ... asks us ‘Please Do Not Feed the Animals.’ Their stated reason for the policy is because ‘[t]he animals will grow dependent on handouts and will learn to take care of themselves’ ... . Thus ends today’s lesson in irony.” Steve Benen, *State GOP Equates Food-Stamp Recipients, Wild Animals*, *MSNBC.COM* (July 14, 2015, 7:14 PM), [http://www.msnbc.com/rachel-maddow-show/state-gop-equates-food-stamp-recipients-wild-animals?cid=sm\\_fb\\_maddow](http://www.msnbc.com/rachel-maddow-show/state-gop-equates-food-stamp-recipients-wild-animals?cid=sm_fb_maddow).

<sup>54</sup> Roberto A. Ferdman, *How Maine Will Punish the Poor for Trying to Save Money*, *THE WASHINGTON POST* (October 1, 2015), available at <http://www.msn.com/en-us/money/markets/how-maine-will-punish-the-poor-for-trying-to-save-money/ar-AAeZLLs?li=AAa0dzB&ocid=wispr>. Maine pursued these restrictions despite the fact that the state’s “poor timeliness” in processing food stamps applications prompted the United States Department of Agriculture to threaten the state with penalties. Alan Pyke, *Feds Threaten Maine with Big Fines Over Food Stamps*, *THINKPROGRESS* (Dec. 16, 2015, 9:19 AM), <http://thinkprogress.org/economy/2015/12/16/3732595/maine-food-stamps-processing-fine/>.

<sup>55</sup> The bill became known as the “food nanny bill,” presumably for its paternalistic approach to managing the food purchases of the poor. See WSAU-Wheeler News, “*Food Nanny*” Bill Comes Up for Vote, *WXERFM.COM* (May 13, 2015, 8:17 AM), <http://wxerfm.com/news/articles/2015/may/13/food-nanny-bill-comes-up-for-vote/>.

prohibiting food stamp recipients from buying a long list of staple food items, including beans, spaghetti sauce, and nuts;<sup>56</sup> the state joined many others in requiring applicants for “food stamps, unemployment benefits, jobs training,” and similar state benefits or training to submit to drug screening, despite strong evidence that welfare recipients have a lower positive test rate for illicit drug use than the general population.<sup>57</sup> Several states cap the size of welfare families to discourage poor women from having children, despite evidence that families receiving welfare are no larger than those in the general public and that such caps actually exacerbate poverty.<sup>58</sup> Critics contend such regulations are expensive and ineffective and instead primarily serve to punish poor people for, well, being poor.<sup>59</sup> Ultimately, such punitive constructions codify and legitimize the instinct to condemn people for their poverty.

### C. Poverty & the Transmutation of Discrimination

Given the disproportionate representation of other various marginalized groups within poor and homeless populations, the higher rates of negativity associated with poverty (as opposed to other commonly stigmatized traits) is curious. Studies show visible poverty elicits higher rates of disgust than nearly any other commonly marginalized trait, including racial or ethnic indicia.<sup>60</sup> But poverty is more likely to be associated with racial minorities, people with physical and mental disabilities, and single-female-

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<sup>56</sup> Assemb. B. 117, 2015–2016 Leg., 102d Reg. Sess. (Wis. 2015), available at <http://docs.legis.wisconsin.gov/2015/related/proposals/ab177>.

<sup>57</sup> W.S.A. 49.79; Bryce Covert, *Wisconsin Begins Drug Testing for Unemployment and Food Stamp Applicants, Which May Be Illegal*, THINKPROGRESS (Nov. 9, 2015, 10:50 AM), <http://thinkprogress.org/economy/2015/11/09/3720495/wisconsin-begin-drug-tests/>.

<sup>58</sup> Welf. & Inst. Code, § 11450.04. See also Bryce Covert, *An “Ugly Policy” Systematically Devalues Poor Children. One State is Ready to Stop It.*, THINKPROGRESS (Jul. 1, 2015, 8:00 AM), <http://thinkprogress.org/economy/2015/07/01/3675655/california-family-cap/>.

<sup>59</sup> See, e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (NYU Press, 2011) (discussing the criminalization of welfare); Kaaryn S. Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (discussing laws and policies that punish and marginalize poor people); JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (U. Chicago Press 2011) (cataloguing the systemic oppression and regulation of the poor).

<sup>60</sup> Fiske, *supra* note 13. Indeed, neurological studies suggest that people demonstrate higher degrees of support or tolerance for racial minorities that show indicia of higher socio-economic status. *Id.*

headed families.<sup>61</sup> Similarly, homeless populations are disproportionately comprised of these and other commonly marginalized groups.<sup>62</sup> The special stigma reserved for poor and homeless people, then, seems at odds with such evidence of intersectionality. Why does viewing people through the lens of poverty trigger especially negative reactions?

Perhaps this special stigma serves as a sort of release valve for the contemporary American conscience: as many forms of discrimination find less space in a normative framework, the stigmatization of poverty may present an attractive path of less resistance.<sup>63</sup> National public opinion seems to accept the normative proposition that (at least overt) discrimination on the basis of race, ability, or sexual orientation and identity is wrong—or that it is supposed to be.<sup>64</sup> The Black Lives Matter movement; continuing battles over women’s reproductive rights; debates over the relationship between immigration, religion, and national security; and the fight for marriage equality are just a few examples of struggles that continue to clarify the contours of America’s commitment to diversity, inclusion, and social justice. These high-visibility clashes certainly do not reflect national consensus around racism, sexism, or xenophobia; however, these controversies at least register in the American conscience.<sup>65</sup>

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<sup>61</sup> Lurie & Schuster, *supra* note 47 (examining the disproportionate representation of various marginalized groups in poor and homeless populations when compared to the general population).

<sup>62</sup> *Id.* (examining the disproportionate representation of various marginalized groups in homeless populations when compared to the general population).

<sup>63</sup> SOSS, FORDING & SCHRAM, *supra* note 59 (noting the gradual morphing of poverty governance, “marginalization itself does not have a static relationship to race, class, gender, or other axes of social division.”).

<sup>64</sup> See, e.g., Steve Holland, *Most Americans Side With Gays in Religious Freedom Disputes: Reuters/Ipsos Poll*, Reuters (Apr. 9, 2015), <http://www.reuters.com/article/2015/04/09/us-usa-religion-poll-idUSKBN0N00A720150409> (supporting marriage equality for LGBTQ individuals); SOSS, FORDING & SCHRAM, *supra* note 59 (noting that “[e]galitarian racial norms are now widely promoted, and explicit racism is rarely tolerated in the discourses of the market and polity”) Sara K. Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 Rutgers L. Rev. 563 (2014) (noting legislative evidence of the relationship between public opinion, overtly expressed views of perceived social worth by legislators, and laws that support or protect these marginalized groups).

<sup>65</sup> Maggie Haberman, *Poll: Anti-Discrimination Law Support*, POLITICO (Sept. 30, 2013, 5:05 AM), <http://www.politico.com/story/2013/09/poll-big-support-for-anti-discrimination-law-097540>. Hate crime protections are commonly afforded to marginalized groups, except for the visible poor. See Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV.

Of course, the American conscience cannot and should not be oversimplified. The passage of civil rights and anti-discrimination laws does not moot the existence of overt or implicit bias against protected groups; in fact, some persuasively contend that such laws stand as testaments to the continuing crises of discrimination.<sup>66</sup> But studies suggest the American public is growing more aware of how unconscious bias might be perceived by others, which may make people more reflective regarding overt expressions of discrimination. Still, this awareness could result in the expression of more subtle and nuanced—but still potent and damaging—

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383 (2015) (comparing Congressional allocations of hate crime protections on the basis of race, ethnicity, national origin, gender, sexual orientation, gender identity, and homelessness). Many marginalized groups, but not the poor, are considered suspect or quasi-suspect classes worthy of heightened judicial scrutiny. See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008) (reviewing suspect classification analyses with various marginalized groups and arguing that the classification of the poor is still unsettled). Sylvestre & Bellot, *supra* note 3, at 1, 4 (arguing that homelessness should be recognized as a protected class under Canadian law because, among other reasons, “it is, like several other enumerated or analogous grounds of discrimination, a social construct attached to some individuals that is not immutable, but that is difficult to change.”). Another example of legal recognition afforded commonly marginalized groups (but not the visible poor, at least so far) is disparate impact analysis under Equal Protection theories. Most recently, the Supreme Court reiterated the availability of disparate impact analysis on the basis of race in *Texas v. Inclusive Communities*. Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015). In this case, plaintiffs argued that the Texas Department of Housing and Community Affairs distributed federal tax credits for low-income housing in a way that disproportionately affected minorities. *Id.* at 2514. The Supreme Court considered whether the language of the Fair Housing Act, which makes it illegal to refuse to sell, rent, or “otherwise make available or deny” a property because of race and other categories, required that the discrimination be intentional or whether it permitted plaintiffs to claim a discriminatory effect, regardless of intent. *Id.* at 2518. The Court held that the Act permitted disparate impact claims. *Id.*

<sup>66</sup> The prevalence of unconscious bias is well-established. See, e.g., Pew Research Center, *King’s Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PewSocialTrends.org (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/>; see also, Eben Harrell, *Study: Racist Attitudes Are Still Ingrained*, TIME MAGAZINE (Jan. 8, 2009), available at <http://content.time.com/time/health/article/0,8599,1870408,00.html>. “The authors say the results suggest attitudes so deeply ingrained that protective legislation and affirmative-action programs are required to overcome them. The results may even offer clues as to how other societies have spiraled into genocide.” *Id.*; see Kerry Kawakami, Elizabeth Dunn, Francine Karmali & John F. Dovidio, *Mispredicting Affective and Behavioral Responses to Racism*, 323 SCIENCE 276 (2009).

forms of discrimination. In other words, reductions in overt expressions of bias might suggest that people are learning to outwardly censor their implicit biases with respect to race and gender, and perhaps increasingly, with respect to sexual orientation and identity. The annual survey of Racial Attitudes in America, which has been conducted since 1997, reports that “the survey record on trends in racial attitudes shows improvement, stagnation, or declines” in American attitudes about race.<sup>67</sup> The principal researchers recently observed that:

questions of social distance and stereotyping show perhaps the clearest signs of improvement: fewer and fewer white Americans readily endorse statements that Blacks are less intelligent and hard-working than whites; and fewer verbally object to increasing levels of interracial mixing in neighborhoods and in marriage partners. These trends must be interpreted with caution, for they may reflect at least to some extent changes in social norms about what kinds of answers ought to be reported on surveys rather than changes in actual levels of stereotyping and an openness to living with and marrying African Americans... This in itself reflects a change in racial attitudes in this country even if it does not reflect changes in the hearts and minds of Americans.<sup>68</sup>

And so, perhaps many forms of discrimination are improving; perhaps they are simply evolving and growing more sophisticated.

But in the context of poverty, discrimination is still largely unrecognized as discrimination.<sup>69</sup> Americans commonly disregard evidence that racism, able-ism, sexism, and homophobia are major contributors to poverty and homelessness,<sup>70</sup> and instead embrace the belief that poor people are to blame for their own conditions.<sup>71</sup>

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<sup>67</sup> See Maria Krysan & Nakesha Faison, *Racial Attitudes in America: A Brief Summary of the Updated Data*, Institute of Government & Public Affairs, UNIVERSITY OF ILLINOIS (1997), available at <http://igpa.uillinois.edu/programs/racial-attitudes/brief>.

<sup>68</sup> *Id.*

<sup>69</sup> A majority of Americans report negative views of homeless and visibly poor people, associating them with moral weaknesses, disorderly conduct, or bad choices that warrant their misfortunes. See discussion and notes *supra* Part I.B. The increasing popularity of homeless criminalization laws are just one example of the codification of discrimination and exile based on the low perceived social worth of the visible poor. Ortiz & Dick, *supra* note 3.

<sup>70</sup> Lurie & Schuster, *supra* note 47 (reviewing a range of studies).

<sup>71</sup> See *infra* Part I.D.

Punitive treatment of poor people on account of their poverty does not warrant the same legislative or judicial protections afforded to many other marginalized groups.<sup>72</sup> Somehow, as further illustrated below, constructions of the poor as less worthy—as expressed in popular media, in political circles, or even in the enactment or enforcement of laws and policies that target or disproportionately impact poor people—do not generate the same level of societal introspection or caution.<sup>73</sup> But given the intersectionality of poverty, homelessness, and other marginalized groups, this phenomenon may simply represent the transmutation of normatively “bad” discrimination into a normatively “more acceptable” form of discrimination against the poor.<sup>74</sup> Thus, through the special stigmatization of poverty, the American

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<sup>72</sup> See Nice, *supra* note 65, at 631–36 (contesting that judicial and legislative omissions of the poor from legal protections results in a “dialogic default” where the constitutional rights of poor people are neglected). See also Rankin, *supra* note 64 (comparing Congressional deliberations over hate crime protections for various marginalized groups compared to homeless people).

<sup>73</sup> See generally Rankin, *supra* note 65 (comparing homeless and visibly poor people are largely omitted state and federal anti-discrimination legislation that often protects other commonly marginalized groups various forms of discrimination); Rankin, *supra* note 64 (reviewing various but limited legislative efforts to advance homeless rights advocacy, including anti-discrimination legislation, across various United States and Puerto Rico). Certainly, the omission of poverty from suspect classification analysis is another problematic expression of the relative social worth ranking of poor people compared to other commonly marginalized groups. See, e.g., Nice, *supra* note 65, at 631–36 (contesting that judicial and legislative omissions of the poor from legal protections results in a “dialogic default” where the constitutional rights of poor people are neglected); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 787 (1991) (noting that judicial distinctions between “justifiable [and] unjustifiable disadvantaging quite plainly requires a substantive value choice”). Other overt calculations of the low social worth of poor people are plentiful. See, e.g., Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.L. L. REV. 1, 11 (2011) (describing a tension in Portland, Oregon, which “capitalizes upon its image as an exceptionally livable, an extraordinarily progressive and tolerant city, while at the same time consolidating systems of disgust, phobia, and abandonment used against certain (non)members of the urban community.”). Social worth calculations as a policy decision-making guide is illustrated in a recent statement by one Florida state senator, who explained his support for cutting mental health funding: “When it comes to funding, an 85-year-old woman in a nursing home matters more to me than a 45-year-old guy with a substance abuse problem,” he said. “It’s all about priorities.” Tia Mitchell, *Senate Plan Includes Big Cuts to Mental Health Programs*, TAMPA BAY TIMES (Feb. 14, 2012), available at <http://www.tampabay.com/news/health/senate-plan-includes-big-cuts-to-mental-health-programs/1215489>.

<sup>74</sup> See, e.g., *The Criminalization of Poverty*, *supra* note 59, at 648 (“The criminalization of welfare recipients entails a long historical process of public discourse and welfare policies infused with race, class, and gender bias.”).

conscience may be sanitizing many forms of discrimination to appear as something less objectionable or actionable: judgments about social worthiness.<sup>75</sup>

#### D. The Blameworthy Poor

Judgments about social worthiness are closely tied to the construction of blame. Public support or tolerance for certain groups may turn on the degree to which society believes individuals are responsible for a particular trait.<sup>76</sup> This relationship between perceptions of causal responsibility and perceptions of social worthiness resonates with traditional suspect classification analyses, which afford higher degrees of judicial scrutiny when a law discriminates against a member of a suspect group who is marked by an involuntary trait that cannot be changed.<sup>77</sup> In other words, the judiciary extends such enhanced protection only to those who are not to blame for who they are.<sup>78</sup>

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<sup>75</sup> Societal recognition of and response to evidence of discrimination against common outgroups—such as racial minorities, physically or mentally disabled individuals, LGBTQ individuals, and women, for example—is so well established that a review of this extensive body of literature is not necessary here. For a starting point, consider Rankin, *supra* note 65 (comparing Congressional deliberations over hate crime protections for various marginalized groups compared to homelessness).

<sup>76</sup> See Gail Sahar, *On the Importance of Attribution Theory in Political Psychology*, 8 SOCIAL AND PERSONALITY PSYCHOLOGY COMPASS 229, 229–49 (May 2014) (discussing how “judgments of causal responsibility ... pervade our understanding of the social world,” including about poverty and homelessness and explaining “how perceptions of responsibility are linked to ideology and how they influence policy attitudes”). Sahar calls for “increased communication among fields and a more systematic application of attributional models to the study of political judgments.” See also FISKE, *supra* note 13. The relationship between causal responsibility and social or legal judgments about worthiness resonate with traditional suspect classification analyses, which afford higher degrees of judicial scrutiny when a law has a discriminatory impact or intent on a “suspect” group that cannot change a trait. Neurological studies suggest that people inherently have higher degrees of support or tolerance for certain racial minorities, especially when of higher socio-economic status. See *Id.*; see also Electronic Urban Report, *Census Data Shows Black Women and Children Impacted by Poverty More*, <http://www.eurweb.com/2015/10/census-data-shows-black-women-and-children-impacted-by-poverty-more/> (last visited Feb. 14, 2016).

<sup>77</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>78</sup> See, e.g., *Robinson v. State of California*, 370 U.S. 660, 666–67 (1962) (striking down statute punishing individuals based on their status rather than conduct).

Blame plays a significant role in Americans' constructions of poverty.<sup>79</sup> Compared to other countries, the United States is particularly enamored with the "bootstrap" work ethic: the belief that, if you just work hard enough, you can avoid poverty.<sup>80</sup> Approximately a quarter of Americans believe the most significant cause of income inequality is the failure of the poor to work as hard as the more affluent.<sup>81</sup> Accordingly, American sentiment might "urge pity for those who are worse off, and we do pity certain unfortunates, but only those who have landed at the bottom through no fault of their own. Otherwise, under meritocracy, they deserve their fate and are beneath consideration."<sup>82</sup>

Blame also plays into theories of property—that is, whether one's work and productivity justifies the acquisition or ownership of property. The labor-desert "principle rests on a conception of persons as agents, who, by their actions in the world, are responsible for changes in it and so deserve or are entitled to something."<sup>83</sup> Placed in the context of poverty, the labor-desert principle fits neatly with American attitudes: a poor person likely did something (like make bad decisions) or failed to do something (like work hard enough) that caused his or her poverty. The labor-desert principle does not account for institutional or structural discrimination that limits meaningful opportunities, nor does it contemplate health or social conditions (such as addiction or

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<sup>79</sup> MICHAEL KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* (Oxford U. Press 2d. ed. 2013) (explaining the role of blame and other related moral judgments in Americans' constructions of poverty). The visible poor and homeless are particularly vulnerable to this judgment. *See, e.g.*, Sylvestre & Bellot, *supra* note 46. Homelessness is often "explained and addressed as in individual moral failure rather than in relation to its structural causes, so that the victims of economic changes leading to displacement or unemployment were blamed for their predicament, suspected of being a threat to society and likely to engage in serious criminality." *Id.* at 10.

<sup>80</sup> *See, e.g.*, Bruce Stokes, *Is Laziness the Cause of Economic Inequality? Americans and the British Lean Toward Moral Weakness, But the Rest of the World Blames Government Policies*, FOREIGN POLICY (Oct. 22, 2014), <http://foreignpolicy.com/2014/10/22/is-laziness-the-cause-of-economic-inequality/>.

<sup>81</sup> *Most See Inequality Growing, but Partisans Differ over Solutions*, PEW RESEARCH CENTER (Jan. 23, 2014), <http://www.people-press.org/2014/01/23/most-see-inequality-growing-but-partisans-differ-over-solutions/>.

<sup>82</sup> FISKE, *supra* note 13, at 27. Some scholars attribute these perceptions to negative stereotyping, prejudices, and discrimination, often associated with moral judgments and assumptions that visibly poor people are to blame for their condition. *See, e.g.*, BLAU, *supra* note 8; *see also* Sylvestre & Bellot, *supra* note 3.

<sup>83</sup> Munzer, *supra* note 26, at 4.



mental illness) that undercut the labor-desert calculation. Thus, blame serves as a blunt but effective instrument, partitioning those who deserve the benefits of full membership in society from those who have not earned the privilege.<sup>84</sup>

#### E. The Criminal Poor

Blame also facilitates a host of other negative associations, commonly expressed in the broken windows theory, a criminal justice framework that equates visible, undesirable people with criminality. The broken windows theory suggests that if a community fails to swiftly and adequately respond to the first signs of disorder in a neighborhood (such as a broken window), those signs then serve as a beacon, signaling to hungry lawbreakers that the neighborhood does not attend to public order.<sup>85</sup> These signals attract new potential offenders, more disorder and crime, and drive away any remaining law abiding citizens.<sup>86</sup> Due to inadequate social and legal responses to the first broken window, the neighborhood steps onto a greased slope, facing downhill, sliding into urban decay.<sup>87</sup>

Even in its earliest iterations, the broken window theory had special application to “street people,”<sup>88</sup> who are commonly associated with disorderly acts such as being “disreputable or obstreperous or unpredictable.”<sup>89</sup> Thus, homeless and visibly poor

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<sup>84</sup> Like laws and policies writ large, legal scholarship often reflects tensions in ideological or normative judgments about the social worthiness of homeless and visibly poor people. Compare Robert C. Ellickson, *The Homelessness Muddle*, 99 PUB. INTEREST 45, 59 (Spring 1990) (expressing conservative social and economic policy critiques of homelessness); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1165–1248 (1996) (same); and Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991) (critiquing “liberal” advocacy positions with respect to homelessness) with Steven Wizner, *Homelessness: Advocacy & Social Policy*, 45 U. Miami L. Rev. 387 (critiquing Ellickson’s theories and observing rifts between typical “conservative” and “liberal” perspectives on homelessness); and MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* 167–85 (Routledge 2004) (critiquing Ellickson’s and Waldron’s theories and advocating for more inclusive public space).

<sup>85</sup> James Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, 249 ATLANTIC MONTHLY 29 (1982).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> GEORGE KELLING & CATHERINE COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 8 (Martin Kessler Books 1996).

<sup>89</sup> Wilson & Kelling, *supra* note 85.

people themselves actually become “broken windows,” threatening to undermine the order and safety of public space. In this way, the broken window theory supports a normative judgment that such people should be removed from view because “their choice to live on the streets is disruptive to others.”<sup>90</sup> Although the broken windows theory has been widely discredited as fundamentally flawed,<sup>91</sup> anti-democratic,<sup>92</sup> and discriminatory,<sup>93</sup> it continues to play a potent and persistent role in criminal justice and policymaking circles—especially in application to marginalized groups, including homeless and visibly poor people.<sup>94</sup>

Thus, complex dynamics—economic, psychological, sociological, and spatial—feed American perceptions of poor people. Indeed, perceptions of poverty may be the most salient factor in American determinations of social worthiness; perceived poverty generally depresses judgments of social worth.<sup>95</sup> This moral calculation may

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<sup>90</sup> KELLING & COLES, *supra* note 88, at 66. Studies belie suggestions that homelessness and poverty are voluntary conditions. See, e.g., Lurie & Schuster, *supra* note 47 (finding that certain marginalized groups are disproportionately impacted by homelessness because of systemic discrimination); Suzanne Skinner & Dana Peterson, Seattle University Homeless Rights Advocacy Project, WHAT WOULD YOU GIVE UP FOR SHELTER? THE EMERGENCY SHELTER RESTRICTIONS THAT KEEP HOMELESS INDIVIDUALS ON THE STREETS (Sara K. Rankin ed., forthcoming 2016).

<sup>91</sup> See, e.g., Gary Blasi, *Policing Our Way out of Homelessness? The First Year of the Safer Cities Initiative on Skid Row*, THE UCLA SCHOOL OF LAW FACT INVESTIGATION CLINIC (Sept. 24, 2007), <http://www.lafla.org/pdf/policinghomelessness.pdf>; THE CRIME DROP IN AMERICA 207 (Alfred Blumstein & Joel Wallman, eds., Cambridge U. Press 2000); BERNARD HARCOURT, *ILLUSIONS OF ORDER: THE FALSE PROMISES OF BROKEN WINDOWS POLICING* (Harvard U. Press 2001).

<sup>92</sup> See, e.g., STEVE HERBERT, *CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY* (U. of Chicago Press, 2006).

<sup>93</sup> The broken window theory is understood as a major driver of stop-and-frisk policies, which are roundly criticized as racially discriminatory. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *Fordham Urb. L.J.* 457, 464 (2000); Daniel Bergner, *Is Stop-and-Frisk Worth It?*, THE ATLANTIC (April 2014), <http://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/>.

<sup>94</sup> Olson & MacDonald, *supra* note 16; Ortiz & Dick, *supra* note 3; see also Marie-Eve Sylvestre, *Narratives of Punishment: Neoliberalism, Class Interests and the Politics of Social Exclusion*, 7 *EUROPEAN JOURNAL OF HOMELESSNESS* 363, 364 (2013), available at <http://ssrn.com/abstract=2463836> (agreeing with others that the repression of poor and homeless people cannot be totally attributed to broken windows policing, but maintaining that broken windows theories have “been widely and conveniently used as legitimating discourses to justify existing repressive practices” in the US and elsewhere).

<sup>95</sup> For example, neurological studies suggest that people show higher degrees of support or tolerance for certain racial minorities when those

be even more pronounced for homeless and visibly poor people, even when compared to the generic poor.<sup>96</sup> Before we can understand how this special stigma influences the increasing exile of visibly poor people from public space, it helps to next investigate concepts of public space itself.

## II. OUR VIEWS OF PUBLIC SPACE: A STAGE FOR THE INFLUENCE OF EXILE

*Place can be a powerful weapon of social and political control.*<sup>97</sup>

A specific lightning rod for apportioning rights based on one's perceived worthiness is the negotiation of public space. Public space fascinates a broad range of disciplines, including urban studies, sociology, geography, political science, anthropology, peace studies, architecture, and philosophy.<sup>98</sup> The interdisciplinary attraction may be due to the fact that public space has such crucial physical, social, legal, and political meaning. This section briefly surveys interdisciplinary perspectives on human contests to control and define it.

In a purely physical sense, public space refers to any combination of a built and natural environment that is accessible to the *public as a whole* for collective or personal activities.<sup>99</sup> But public space may be more accurately defined as “all areas that are open and accessible to all members of the public in a society, in principle

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individuals are associated with indicia of higher socio-economic status. See FISKE, *supra* note 13.

<sup>96</sup> Many sociological theories suggest that stigma and inequality-legitimizing ideologies result in higher degrees of stigma for homeless people versus poor people generally. See, e.g., Phelan, Link, Moore & Stueve, *supra* note 47 (reviewing such theories and related studies).

<sup>97</sup> Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581 (2006).

<sup>98</sup> See generally Judit Bodnar, Editorial, *Reclaiming Public Space*, URBAN STUDIES JOURNAL (2015) (reviewing decades of cross-disciplinary obsessions with the topic of public space); see also Zachary Neal, *Seeking Common Ground: Three Perspectives on Public Space, Urban Design and Planning*, URBAN DESIGN AND PLANNING (2010), available at <https://www.msu.edu/~zpneal/publications/neal-seekingcommon.pdf> (reviewing various disciplinary perspectives on public space).

<sup>99</sup> See MATTHEW CARMONA, PUBLIC PLACES, URBAN SPACES: THE DIMENSIONS OF URBAN DESIGN (2003); STEPHEN CARR, PUBLIC SPACE (1992). See also Black's Law Dictionary (10th ed. 2014) (defining *public* as “open or available for all to use, share, or enjoy”).

though not necessarily in practice.”<sup>100</sup> This addendum—“in principle though not necessarily in practice”—is key. In theory, truly public space should be equally accessible to everyone, but in reality, who controls and defines access to public space is a complicated playground for the influence of exile. In constructions of public space, who is a member of the public? Who decides the terms of this membership and correlated access to public space?

#### A. Socio-Political Constructions of Public Space

Socio-political constructions of public space often center on diversity, difference, and democratic function. Public space, according to these commentators, is a bastion of democratization.<sup>101</sup> The fundamental purpose of public space in a democratic society goes beyond being a shared forum equally accessible to all people; sharing public space actually challenges our instincts to create social segregation by physically integrating us with diverse strangers.<sup>102</sup> Public space is a unique forum for self-expression and the creation of identity, which requires interaction with others, especially strangers.<sup>103</sup> Thus, sharing public space tests our tolerance for diversity, including our exposure to and engagement with “otherness.” But it also presents opportunities to advance our social growth, our understanding of ourselves, and the world around us. Indeed, “democracy requires physical space for its performance.”<sup>104</sup>

Indeed, the difference and diversity values of public space are unique and irreplaceable: “Public streets and sidewalks are the

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<sup>100</sup> COMMON GROUND? READINGS AND REFLECTIONS ON PUBLIC SPACE 1 (Anthony Orum & Zachary Neal eds., Routledge 2010). For more on the definitional complexity of the public/private distinction, see Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 7 (U. of Chicago Press, 1997).

<sup>101</sup> See, e.g., JOHN R. PARKINSON, DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE 24 (Oxford U. Press 2012).

<sup>102</sup> Some scholars frame a democratic ideal of public space as “the commons.” See DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH 2–3 (New York: Routledge, 2002) (describing public, or common, space as “the vast range of resources that the American people own”). Similarly, Professor Lawrence Lessig describes the commons for “joint use or possession to be held or enjoyed equally by a number of persons.” LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 19 (Vintage 2002); PARKINSON, *supra* note 101.

<sup>103</sup> As one scholar observes, “It is easy to forget that public space thrives on diversity and the lack thereof can kill it.” Bodnar, *supra* note 98, at 6.

<sup>104</sup> PARKINSON, *supra* note 101, at 4.

only remaining sites of public expressions and ‘unscripted political activity,’ and their main function is making poverty and inequality visible.”<sup>105</sup> Many critics reject a monolithic, normative construction “of the public sphere, suggesting that it should include not just a single, dominant public, but also a variety of sub alternative or counter publics.”<sup>106</sup> Even frictions with others is of significant value; “in the presence of difference people have at least the possibility to step outside themselves,”<sup>107</sup> creating opportunities for personal growth. But the price of this opportunity is engagement with strangers and their associated differences, which can produce feelings of anxiety or fear.<sup>108</sup>

And yet proximity to different people, views, and behaviors may also be the key to overcoming fear and to forming new socio-spatial connections. In social science, for example, the contact hypothesis suggests that exposure of empowered in-groups to highly-stigmatized out-groups can result favorably change the attitudes and perspectives of in-groups with respect to out-groups.<sup>109</sup>

City centers, exemplars of public space, hold the promise to engage us in the reality of “living among strangers, [creating] the very basis of public space where civility towards diversity and difference rules.”<sup>110</sup> In this sense, public space teaches us the value of tolerance, cultivating “the constant and intense proximity of difference” that “make civility a pressing moral and sociological requirement.”<sup>111</sup> Engaging diverse strangers “presupposes an active and affirmative moral relationship between persons... The moral equality it suggests is instrumental in the rise of a democratic public sphere.”<sup>112</sup> Such socio-political constructions of

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<sup>105</sup> Bodnar, *supra* note 98, at 8 (quoting KOHN, *supra* note 84, at 3).

<sup>106</sup> Neal, *supra* note 98, at 5 (citing to and discussing many of these theories).

<sup>107</sup> Bodnar, *supra* note 98, at 4 (internal citations omitted).

<sup>108</sup> Judit Bodnar, Editorial, *Reclaiming Public Space*, 52 URBAN STUDIES JOURNAL, 2015, at 3 (describing how interactions with strangers or other evidence of difference can be “unpleasant and sometime even frightening ... Unknown and unassimilated otherness can produce cognitive and emotional shocks”).

<sup>109</sup> See, e.g., Barrett A. Lee, Bruce G. Link & Chad Farrell, *supra* note 35 (concluding that “multiple types of ingroup exposure” to homeless people can have a positive influence on ingroups’ opinions and beliefs about people experiencing homelessness).

<sup>110</sup> Bodnar, *supra* note 98, at 2.

<sup>111</sup> Richard Boyd, ‘*The Value of Civility?*,’ 43(4) URBAN STUDIES, 871 (2006).

<sup>112</sup> *Id.* at 875.

public space suggest an ideal of city centers as a crucial venue for interaction, difference, and exercising tolerance.

But such ideals conflict with America's commitment to disorder-suppression or broken windows-type policies. Robert Ellickson starkly animates the spatialization of social order in his influential article, *Controlling Chronic Misconduct in City Spaces*. He argues that certain behaviors associated with visibly poor people, such as begging, violate community norms of civility and appropriateness; accordingly, cities should confine certain non-conforming people to specific zones where undesirable people can be more effectively policed.<sup>113</sup> Ellickson proposes a color-coded zoning system to allocate downtown space, a system "modeled on traffic lights with red signaling caution to the ordinary pedestrian, yellow, some caution, and green, a promise of safety."<sup>114</sup> Red zones would allow noise, public drunkenness, prostitution, and other forms of "disorderly conduct."<sup>115</sup> Yellow zones would prohibit "offensive" activities such as panhandling and other "public nuisances," but some "flamboyant and eccentric conduct" would be permitted.<sup>116</sup> Green zones would serve as a refuge for the "unusually sensitive" members of society, such as children and elderly people.<sup>117</sup> Strict social controls in green zone sanctuaries would prohibit any potentially "disruptive" activities, such as dogwalking. According to Ellickson's logic, segregating people based on their compliance with community norms would ensure that downtown space is most efficiently enjoyed.

Such "zoning by behavior" proposals have been both embraced<sup>118</sup> and vigorously critiqued as discriminatory or Orwellian,<sup>119</sup> and yet, as further explained below, they are also fairly characterized as the "prevailing logic" behind contemporary regulations of public space.<sup>120</sup> Clear tensions exist between the ideals of creating and

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<sup>113</sup> Ellickson, *supra* note 84, at 1208–09.

<sup>114</sup> KOHN, *supra* note 84, at 168 (discussing Ellickson, *supra* note 113 at 1120).

<sup>115</sup> Ellickson, *supra* note 113, at 1221.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1221–22.

<sup>118</sup> See, e.g., Sheila Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 60–61, 72–73 (2011) (discussing Ellickson's zoning proposal and describing the presence of "transient homeless populations[s]" in public space as undesirable and requiring heightened governmental or private management to "enforce social norms").

<sup>119</sup> Munzer, *supra* note 26, at 40.

<sup>120</sup> KOHN, *supra* note 84; see also, Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 2–4 (2004) (describing the persistence of broken windows theory in public zoning regulations).

maintaining inclusive and diverse public space that encourages difference and discomfort when compared to ideals that segregate people based on their perceived compliance with in-group norms. Marginalized groups—by the very nature of their marginalization—have little power in the negotiation of this tension or its manifestation in the American conscience, laws, and policies.

## B. Legal Constructions of Public Space

The law has long been fascinated with the regulation of public space. Part of this fascination concerns the thorny exercise of distinguishing between public and private property and the constitutional rights or obligations attendant to a property's categorization. In the property context, governmentally-owned property is frequently construed as "public" property in contrast to "everything else."<sup>121</sup> But "in the modern world of qualified public entities and governmental privatization, attempts to categorize entities, properties, and activities as strictly public or private have led to frustration and uncertainty."<sup>122</sup>

Legal narratives commonly center on the right to exclude. Legal scholarship frequently reflects on the "tragedy of the commons," an economically-oriented belief that public space ultimately degrades when governmental or private managers fail to exclude potential users who lack incentives to conserve or sustain the space as a shared resource.<sup>123</sup> As further explained below, some narratives challenge the law's obsession with exclusion, arguing for a construct more consistent with inclusion and diversity. But these critiques are themselves outliers because, in most respects, they do not represent the current state of the law.

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<sup>121</sup> See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 29 (2002).

<sup>122</sup> Paul M. Shoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635, 636 (2008). Shoenhard surveys other commentary on the "decline of the public private distinction," including Justice Sandra Day O'Connor's regret over the majority decision in *Kelo v. City of New London*, 545 US 469, 494 (2005) (O'Connor, J., dissenting) (opining that the majority reasoning served to "wash out any distinction between private and public use of property").

<sup>123</sup> The "tragedy of the commons" was coined by Garrett Hardin in *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). Illustrative commentary includes Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (reviewing the history of legal doctrine concerning public access to private property) and Foster, *supra* note 118 (contending that the tragedy of the commons occurs "during periods of 'regulatory slippage'—when the level of local government oversight ... significantly declines").

## 1. Exile in Property Law

Property law is a fundamental node in American hierarchical constructions of space. Indeed, the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>124</sup> Through exclusion, property expresses its meaning in terms of the acquisition, access, occupation, use, and ownership of resources, including physical space.

### a) *Property Zoning and Regulations*

Broken windows policies—which, as previously discussed, suppress evidence of normatively defined disorder and feed the stigmatization of visibly poor people—not only permeate the American approaches to criminal justice and community policing, but they also influence American property regulations. Nicole Garnett investigates the relationship between “order-maintenance efforts” and property regulation in her article, *Ordering (and Order in) the City*.<sup>125</sup> She acknowledges that “disorder suppression” is the “first function of property regulation.”<sup>126</sup> Efforts such as the authorization of private property inspections<sup>127</sup> and public nuisance lawsuits<sup>128</sup> codify the priority of suppressing disorder. Indeed, Garnett goes further, suggesting that “our dominant form of property regulation—Euclidean zoning—has addressed the spatial separation of different land uses rather than property conditions. That is, the point of ubiquitous zoning laws is to put ‘everything in its place,’ to segregate economic from noneconomic activities, rich from poor, etc.”<sup>129</sup>

Garnett challenges the codification of disorder-suppression ideologies, which erroneously “equate ordered land uses with the absence of a disorder.”<sup>130</sup> She shows that collectively, such pervasive property regulations devastate “the social and economic

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<sup>124</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). *See also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (arguing “the right to exclude others is more than just one of the most essential constituents of property— it is its *sine qua non*.”).

<sup>125</sup> Garnett, *supra* note 120, at 1.

<sup>126</sup> *Id.* at 7.

<sup>127</sup> *Id.* at 13-19.

<sup>128</sup> *Id.* at 20-21.

<sup>129</sup> *Id.* at 21.

<sup>130</sup> *Id.* at 5.



prospects of poor people.”<sup>131</sup> Such over-regulation or “misregulations” of property actually “impede efforts to restore a vibrant, healthy, and organic public order.”<sup>132</sup> Having laid bare some of the potentially negative impacts of property regulations on marginalized communities, Garnett stops short of examining why property law might operate this way. Instead, she endeavors to reconcile her critique of property regulation rules with “the social norms justifications for the order-maintenance agenda”;<sup>133</sup> accordingly, her recommendations fall in line with the economic compass that predictably guides so much of property law.<sup>134</sup> This approach, like that of the law generally, leaves the influence of exile undisturbed.

*b) Progressive Property Critiques*

Perhaps a collection of “progressive property” scholars come closest to exposing the influence of exile on property law. These scholars critique American law and policy as not only generally obsessed with exclusion, but as specifically bent on the exclusion of marginalized groups.<sup>135</sup> Professor Ezra Rosser describes this emerging “school of thought [as] consist[ing] of two linked propositions: (1) that conventional law and economics and the related assumption of a single metric — efficiency — should not be the sole means of evaluating laws and establishing property norms, and (2) that alternative, progressive frameworks should be used.”<sup>136</sup> Rosser further explains that progressive property scholars represent “both a reaction against the particularly strong influence of economic approaches to the law and an assertion that property law must be more nuanced, more expressly political, and less preoccupied with the owner’s right to exclude.”<sup>137</sup>

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<sup>131</sup> *Id.* at 26.

<sup>132</sup> *Id.* at 5.

<sup>133</sup> *Id.* at 42.

<sup>134</sup> For example, Garnett suggests that single-use zoning laws, such as those that prohibit in-home childcare or other entrepreneurial efforts, should be revisited because they stifle “community renewal.” *Id.* at 57-58. Compare Garnett’s critique with Marc Roark’s in *Homelessness at the Cathedral*, 80 MO. L. REV. 53 (2015) (critiquing norm-driven frameworks of property law on the basis that the “dominant community identity” influences the regulation of public and private space to the exclusion of people experiencing homelessness).

<sup>135</sup> Indeed, Rosser describes progressive property as the “contemporary site of intervention to challenge the extent to which property rights trump the interests of the propertyless.” Rosser, *supra* note 29, at 114.

<sup>136</sup> *Id.* at 110.

<sup>137</sup> *Id.*

Instead, progressive property theorists argue that American property law should be reconstructed to reflect owners' social<sup>138</sup> and moral<sup>139</sup> obligations, including the call to better support civility<sup>140</sup> and democratic principles.<sup>141</sup> Property expresses and reproduces power,<sup>142</sup> so progressive property theorists argue that the law "should promote the ability of each person to obtain the material resources necessary for full social and political participation."<sup>143</sup>

By pushing such radical reconstructions of the law and legal discourse, progressive property norms challenge deep American conceptions of property. Still, some think progressive property theories are not radical enough. For example, Rosser claims that progressive property theories still fails to adequately emphasize "the troubling origins of ownership in the United States,"<sup>144</sup> which limits progressive property scholars' analysis and advocacy, especially around the redistribution of property rights to atone for "prior wrongful acquisition" and to correct or "related, currently experienced inequality."<sup>145</sup> Rosser offers examples of "the racialized nature of acquisition and distribution"<sup>146</sup> in American history, including the forced dispossession of Indian lands and "the systematic exploitation of African Americans, first as slaves and later as second-class citizens."<sup>147</sup> According to Rosser, American property law not only fails to appreciate this tainted history, but also continues to perpetrate such oppression and exploitation through doctrines and practices of inheritance.<sup>148</sup>

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<sup>138</sup> *Id.* (discussing Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009)).

<sup>139</sup> Eduardo M. Peñalver, *supra* note 27.

<sup>140</sup> Alexander calls this "human flourishing." Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 770 (2009).

<sup>141</sup> Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1047 (2009). For Prof. Joseph Singer, property law should reflect democratic principles, such as our social obligations to one another and the need to "treat[] each person with equal concern and respect." *Id.* at 1037.

<sup>142</sup> Rosser, *supra* note 26, at 126.

<sup>143</sup> Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009).

<sup>144</sup> Rosser, *supra* note 142, at 127.

<sup>145</sup> *Id.* at 111.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 128–33 (examining the role of colonialism and the dispossession of Indian land); *Id.* at 133–40 (examining the role of slavery and racism).

<sup>148</sup> *Id.* at 128 ("Society ... treats property acquisition as a given, disconnected from past wrongs, even as new generations inherit the benefits and harms of property's racial legacy.").

Despite progressive property's common focus on private property, the critiques translate to laws and policies concerning public space. Integrating Rosser's critique, progressive property scholars not only challenge property law's codifications of the instinct to exclude, but they also suggest how dominant groups may express unconscious biases and discrimination against marginalized groups through the rules of property.

## 2. Exile Under the First Amendment

First Amendment jurisprudence ostensibly implicates values of diversity and difference in public space; however, as explained herein, it also fails to adequately address the influence of exile.<sup>149</sup> At first blush, things seem promising for marginalized groups: governmental decisions about how to regulate public space are generally presumed to be constitutional,<sup>150</sup> but when First Amendment rights are implicated, the burden shifts to the State to justify any restriction on speech.<sup>151</sup> In reviewing a free speech challenge to a governmental regulation of public space, courts will modify the level of judicial scrutiny depending on just how "public" the property is deemed to be.<sup>152</sup> This inquiry—commonly referred to as public forum analysis—turns on the value of the public space as a site of expression and communication of ideas.<sup>153</sup>

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<sup>149</sup> See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." U.S. CONST. amend. I. Generally First Amendment rights only extend to the expression of speech on public but not private property. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972). Of course, the constitutionality of governmental regulation of public spaces is challenged under many other theories than free speech. See *infra* Part III.C (surveying various legal challenges to criminalization laws).

<sup>150</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973); *U.S. v. Bollinger*, 966 F. Supp. 2d 568, 571 (W.D.N.C. 2013); see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

<sup>151</sup> *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1208–09 (E.D. Cal. 2015).

<sup>152</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>153</sup> See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). Critiques of the public forum doctrine abound. See, e.g., Zick, *supra* note 97, at 586 n. 26 & 27 (citing several such critiques).

Quintessential public fora include places like streets, sidewalks, and parks, which “have immemorially been held in trust for the use of the public and... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>154</sup> Indeed, the First Amendment protects the expression of offensive and disagreeable speech in public fora as essential to American democracy.<sup>155</sup> Accordingly, a governmental regulation of speech in a public forum is subject to stricter scrutiny<sup>156</sup> if it is content-based<sup>157</sup> than if it is content-neutral time, place, or manner restrictions because the former “raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing.”<sup>158</sup> In this sense, First Amendment concerns appear consistent with socio-political values of diversity and difference in public space, even when the protection of those values might result in confrontation, tension, and discomfort.<sup>159</sup> Such protection is particularly vital to the rights of marginalized groups, political outsiders whose views and interests fall outside of or conflict with the priorities of governing in-groups.<sup>160</sup> Accordingly, marginalized groups frequently rely on

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<sup>154</sup> *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

<sup>155</sup> “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989); “[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>156</sup> Content-based restrictions “must be the least restrictive means of achieving a compelling state interest.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502 (2014); *compare with* *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2231, 192 L. Ed. 2d 236 (2015) (requiring “the Government to prove that [a content-based] restriction furthers a compelling interest and is narrowly tailored to achieve that interest”).

<sup>157</sup> *Reed* also distinguished between “viewpoint discrimination” and content discrimination.” Viewpoint discrimination, which regulates speech based on “the specific motivating ideology or the opinion or perspective of the speaker...” *Reed*, 135 S. Ct. at 2230. By contrast, content discrimination prohibits a broad topic from discussion. *Id.* A law “targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter.” *Id.*

<sup>158</sup> *Cutting v. City of Portland, Me.*, 802 F.3d 79, 84 (1st Cir. Sept. 11, 2015).

<sup>159</sup> For First Amendment purposes, a person walking down a street or sidewalk might be “confronted with an uncomfortable message” that they cannot avoid; this “is a virtue, not a vice.” *McCullen*, 134 S. Ct. at 2529.

<sup>160</sup> See *supra* Part I about systemic discrimination and power hierarchies. See also Zick, *supra* note 97, at 584–85 (“Social and political movements often require disruption and a degree of confrontation with authority in order to be

public space as a venue to effectively communicate their needs to wide audiences.<sup>161</sup>

But the First Amendment may not adequately protect marginalized groups who represent dissention from social norms or who offend common sensibilities—the very sort of speech the First Amendment is supposed to protect.<sup>162</sup> Courts often construe speech restrictions as content-neutral;<sup>163</sup> accordingly, courts often defer to governmental proffers that such restrictions are necessary to maintain order or security.<sup>164</sup> Through a functionally “weak strain of rationality review,”<sup>165</sup> city and state governments “have learned to manipulate geography in a manner that now seriously threatens basic First Amendment principles.”<sup>166</sup> In other words, spatial regulations are evolving and adapting in order to effectively mitigate speech critical of the status quo and still avoid potential constitutional liability.

Although visibly poor people engage in various forms of protest that cities increasingly prohibit or restrict despite the First Amendment,<sup>167</sup> consider a threshold example: visibly poor people

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even marginally effective.”). Zick contends that the problem is particularly acute in America, noting that First Amendment jurisprudence routinely allows for the “neutering [of] political dissent, [while] protesters in countries deemed far less friendly to dissent are discovering the power that comes with the ability to access, even commandeer, public spaces.” Zick, *supra* note 153, at 583.

<sup>161</sup> See Michael Lipsky, *Protest as a Political Resource*, 62 AM. POL. SCI. REV. 1144, 1144 (1968) (suggesting that public protest “represents an important aspect of minority group and low income politics”); see also LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 135 (1994) (charting the relationship between American territorial districting and the disempowerment of politically powerless groups).

<sup>162</sup> See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (describing the purpose of First Amendment protections). As discussed *infra*, Part III, visibly poor people engage in various forms of protest by virtue of their very existence in public space.

<sup>163</sup> Zick, *supra* note 97, at 583.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 583, 589–90 (“Political dissent has become spatial tactics’ principal casualty.”).

<sup>167</sup> See *id.* For example, anti-camping bans have been challenged under the First Amendment. Tents and other temporary structures have been found to be viable instruments of political speech. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Students Against Apartheid Coal. v. O’Neill*, 660 F. Supp. 333 (W.D. Va. 1987); *ACORN v. City of Tulsa*, 835 F.2d 735, 742 (10th Cir. 1987); *Univ. of Utah Students Against Apartheid v. Peterson*, 649 F. Sup. 1200, 1204–05 (D. Utah 1986); *Occupy Minneapolis v. Cnty. of Hennepin*, 866 F. Supp. 2d 1062, 1069, 1071 (D. Minn. 2011) (sleeping and overnight occupation of tents in a park was expressive conduct protected by

who speak in public, for example, by asking for help. City-wide bans against begging are on the rise,<sup>168</sup> despite the fact that begging is well-established as a constitutionally protected form of speech.<sup>169</sup> Although the judiciary offers some protection from violations of this First Amendment right, it has not been a consistently reliable refuge.<sup>170</sup>

Moreover, cities often attempt to avoid heightened judicial scrutiny by drafting their anti-begging laws “broadly, under the counterintuitive rationale that they can mitigate First Amendment problems... by restricting *more* speech.”<sup>171</sup> For example, Everett, Washington’s city council recently amended its “aggressive” panhandling law to be more expansive than the prior version, which had specifically provided that the defendant cause or attempt to cause “another person reasonably to fear imminent bodily harm or the commission of a criminal act upon their person, or upon property in their immediate possession.”<sup>172</sup> But in January of 2015, Everett’s city council inserted the word “charities” to suggest the aggressive panhandling law might apply to charitable organizations as well as individuals,<sup>173</sup> a move fairly criticized as

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First Amendment, although it could be regulated by a permit scheme that functions as a valid time, place, or manner restriction); *Occupy Fort Myers v. City of Fort Myers*, \_\_\_ F. Supp. 2d \_\_\_, 2011 WL 5554043, at \*5 (M.D. Florida) (same). Other potential First Amendment applications to visibly poor people, such as the right to assemble and protest, are further discussed *infra*, Part III.

<sup>168</sup> NAT’L LAW CTR., *supra* note 16.

<sup>169</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980); Julia Koestner, *Begging the (First Amendment) Question: The Constitutionality of Arizona’s Prohibition of Begging in A Public Place*, 45 ARIZ. ST. L.J. 1227, 1243 (2013); Charles Mitchell, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 698 (1994).

<sup>170</sup> See Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255 (1994); Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991); see also NAT’L LAW CTR., *supra* note 16.

<sup>171</sup> Joseph Mead, *The First Amendment Protection of Charitable Speech*, 76 OHIO ST. L.J. FURTHERMORE 57, 59 (2015) (emphasis in original).

<sup>172</sup> EVERETT, WASH., MUNICIPAL CODE ch. 9.52, § 010 (1987) (amended 2015), *available at* <https://everettwa.gov/AgendaCenter/ViewFile/Item/3260?fileID=18048>; Letter from Jennifer Shaw, Nancy Talner & Jon Cooper, American Civil Liberties Union, to Ray Stephanson, Mayor, City of Everett (Oct. 27, 2015), *available at* <https://aclu-wa.org/docs/aclu-says-everett-s-panhandling-law-punishes-free-speech-poor-people>.

<sup>173</sup> EVERETT, WASH., MUNICIPAL CODE ch. 9.52, § 010 (2015).

pretext.<sup>174</sup> Indeed, Everett went further, removing any concrete examples of when or how a defendant’s conduct might trigger reasonable fear, requiring simply that the defendant undertake “conduct that would make a reasonable person fearful or feel compelled.”<sup>175</sup> As explained earlier in this Article, social science and popular sentiment suggest that people increasingly find it reasonable to be fearful or feel compelled when confronted with visible poverty—even in the form of peaceable panhandling.<sup>176</sup> Accordingly, such a broad intent to intimidate standard is circular and problematic: panhandlers intend to ask people for money, and merely doing so often makes people feel compelled or fearful. Thus, such anti-begging laws fail to distinguish between truly dangerous or aggressive behavior and merely perceived danger, a common consequence of witnessing someone who appears to be in desperate circumstances. Accordingly, increasingly popular laws like Everett’s functionally conflate even peaceable begging—constitutionally protected speech—with criminality.<sup>177</sup>

Cities commonly invoke phrases like public safety to insulate themselves from First Amendment challenges, and courts frequently defer to such rationales.<sup>178</sup> Of course, public safety is a compelling interest because it is “the heart of the government’s function;”<sup>179</sup> however, the definition of “public safety” must also

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<sup>174</sup> Letter from the Homeless Rights Advocacy Project et al. to Ray Stephanson, Mayor, City of Everett (Oct. 27, 2015), *available at* <http://www.heraldnet.com/assets/pdf/DH3375111028.pdf>; Mead, *supra* note 171, at 60 (noting that “the very use of the word ‘panhandling’ lays bare the legislative purpose”).

<sup>175</sup> EVERETT, WASH., MUNICIPAL CODE ch. 9.52, § 010 (2015).

<sup>176</sup> *See supra* Part I.B–D.

<sup>177</sup> NAT’L LAW CTR., *supra* note 16, at 20 (noting 76 percent of surveyed cities prohibit begging in particular public places and a 25 percent increase of city-wide bans on begging in public). Cities are not only broadening their anti-begging laws; they often share model ordinance language with each other, allowing such restrictive laws to proliferate nationwide. *See, e.g.*, Mead, *supra* note 171, at 59; Nick Licata, *Inside the Conservative Plan to Take over City Politics*, CROSSCUT (Wed., Jan. 6, 2016), <http://crosscut.com/2016/01/a-seattle-liberal-ventures-into-a-den-of-conservative-activism/>.

<sup>178</sup> *See, e.g.*, Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014), (accepting city’s justification of public safety as basis for holding the anti-begging law was content-neutral), *vacated*, 135 S. Ct. 2887 (2015); Norton v. City of Springfield, 768 F.3d 713, 717 (7th Cir. 2014), *rev’d on reh’g*, No. 13-3581, 2015 WL 4714073, at \*2 (7th Cir. Aug. 7, 2015). *See also* Zick, *supra* note 153, at 440 (critiquing First Amendment jurisprudence and arguing that “[c]ourts routinely conclude that the government’s (unsubstantiated) interests outweigh the rights of speakers”).

<sup>179</sup> *Houston Chronicle Publishing Co. v. City of League City, Texas*, 488 F.3d 613 (5th Cir. 2007).

be understood in context of the instinct to construct poor people as blameworthy or criminal.<sup>180</sup> The potential for unconscious bias, especially in the context of judicial discretion,<sup>181</sup> means that courts may accept governmental rationalizations for reducing visible evidence of poverty—such as homeless encampments or panhandling—as including public safety (because visible poverty is perceived as dangerous) or the stimulation of tourism (because visible poverty is inconsistent with consumerism).<sup>182</sup> In other words, courts have upheld laws that effectively push visibly poor people out of public space merely because visible evidence of human desperation tends to undermine feelings of safety or the desire to shop.<sup>183</sup>

Things may be looking up for visibly poor people who ask for charity in public.<sup>184</sup> For some time, circuits have been split about whether such broad restrictions on charitable speech, including begging, are content-based restrictions subject to strict scrutiny.<sup>185</sup> However, in *Reed v. Town of Gilbert*, the United States Supreme Court recently clarified the definition of a content-based restriction in a way that should encourage courts to readily determine that anti-begging laws are content-based restrictions subject to strict scrutiny.<sup>186</sup> Thus, in the wake of *Reed*, courts should no longer defer to the government’s “benign motive[s],”<sup>187</sup> such as the invocation of public health or safety; instead, courts should more

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<sup>180</sup> See *supra* Part I (discussing views of poor people as blameworthy or criminal).

<sup>181</sup> The judiciary is not immune to unconscious bias. See, e.g., Jerry Kang et al, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013).

<sup>182</sup> NAT’L LAW CTR., *supra* note 16, at 12 (surveying these laws and noting they are “designed to move visibly homeless people out of commercial and tourist districts or, increasingly, out of entire cities, [and] are often justified as necessary public health and public safety measures”).

<sup>183</sup> BECKETT & HERBERT, *supra* note 41, at 21 (“Many simply do not wish to see those who appear disorderly or otherwise inspire trepidation. Nor is it pleasant to be reminded of the deprivations associated with homelessness, severe poverty, addiction, or mental illness.”).

<sup>184</sup> NAT’L LAW CTR., *supra* note 16, at 21 (noting that “[i]n the absence of employment opportunities or when homeless people are unable to access needed public benefits, panhandling may be a person’s only option for obtaining money”).

<sup>185</sup> See Mead, *supra* note 171.

<sup>186</sup> *Id.* at 61 (discussing and quoting *Reed*) (internal quotation marks omitted).

<sup>187</sup> *Id.*



aggressively scrutinize such rationales for evidence of pretext for discrimination against visibly poor people.<sup>188</sup>

The increasing prevalence of anti-begging laws is a helpful example of how common unconscious biases against poor people and deep-rooted associations between visible poverty and danger can become manifest in the law. Post-*Reed*, we shall see if First Amendment jurisprudence—with its expressed interest in protecting diversity and difference—adequately addresses one indicia of the influence of exile, at least in the limited context of anti-begging laws.

But even if the judiciary were to adequately protect certain First Amendment rights of visibly poor people, city governments appear unrelenting in their efforts to abridge such rights.<sup>189</sup> As these laws multiply at a viral rate, access to justice issues—which are particularly pronounced for homeless and visibly poor people—compound the problem.<sup>190</sup> Without adequate means to challenge these popular restrictions in court, visibly poor people are likely to remain First Amendment “constitutional castaways.”<sup>191</sup>

### C. The “Death of Public Space”

Political and legal theories aside, public space—and its appetite for diversity, difference, and social growth— is a quickly shrinking resource.<sup>192</sup> Economic theories commonly frame public space as a type of public good, “a resource that individuals cannot be prevented from consuming (i.e. non-excludable) and for which one individual’s consumption does not diminish its potential consumption by others (i.e. non-rivalrous).”<sup>193</sup> But when the

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<sup>188</sup> Courts most clearly scrutinize for pretext in the context of Title VII employment discrimination cases. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). But at least the Seventh Circuit has already responded to *Reed*, applying strict scrutiny and reversing an anti-begging law previously upheld as constitutional. *Norton*, 768 F.3d at 717.

<sup>189</sup> See NAT’L LAW CTR., *supra* note 16.

<sup>190</sup> *Supra* note 25.

<sup>191</sup> Millich, *supra* note 170.

<sup>192</sup> See generally Alex Glyman, Seattle University Homeless Rights Advocacy Project, *BLURRED LINES: THE INCREASING PRIVATIZATION OF PUBLIC SPACE* (Sara K. Rankin ed., forthcoming 2016); KOHN, *supra* note 84.

<sup>193</sup> See Neal, *supra* note 106, at 2 (citing Paul A. Samuelson, *The Pure Theory of Public Exposure*, 36 THE REVIEW OF ECONOMICS AND STATISTICS 357, 387 (1954)).

resource of public space becomes overcrowded or in high demand, it becomes less “public” and more “privatized.”

To manage the congestion, an organization charged with maintaining the space introduces regulations to restrict its use, thereby reducing consumption rivalries but also making the space more exclusive. As these regulations are incrementally expanded, assigning control over specific parts to certain individuals or groups, the public space takes on the character of a partly or completely private space.<sup>194</sup>

Thus, public space can also be understood in contrast to privatized space, which is distinguished by more exclusive degrees of access. In this context, access refers not only to physical access or entry into the space, but also to social accessibility—the accessibility of activities, information, and resources in the space.<sup>195</sup>

Government actors are not the only, or even the most influential, regulators of public space. Over the last century, the financing of public space has shifted from state and public expenditures to private developers.<sup>196</sup> Business improvement districts and other “public-private partnerships” continue to assume increasingly important roles in the financing and governance of public space.<sup>197</sup> As a result, public space is increasingly privatized.<sup>198</sup>

By the 1990s, the increasing privatization of public space prompted teams of interdisciplinary scholars to sound alarms predicting the “death of public space.” Such critics contend that the traditional purpose of public space as a center for social and political diversity was giving way to more contemporary promotions of consumerism.<sup>199</sup> This focus on consumerism seeks

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<sup>194</sup> Neal, *supra* note 106, at 2.

<sup>195</sup> See STANLEY BENN & GERALD GAUS, PUBLIC AND PRIVATE IN SOCIAL LIFE (1983); see also KOHN, *supra* note 84, at 1–14.

<sup>196</sup> Neal, *supra* note 106, at 2 (citing studies and noting the influence of zoning laws on the privatization of public space).

<sup>197</sup> Neal, *supra* note 106, at 3; Alex Glyman, *supra* note 192.

<sup>198</sup> See generally Alex Glyman, *supra* note 192; KOHN, *supra* note 84.

<sup>199</sup> Many urban studies scholars refer to this process of the privatization of public space in terms of “festivalization.” See e.g., Andrew Smith, “Borrowing” Public Space to Stage Major Events: The Greenwich Park Controversy, 51(2) URBAN STUDIES, 247 (2014); Sally Weller, *Consuming the City: Public Fashion Festivals and the Participatory Economies of Urban Spaces in Melbourne, Australia*, 50(14) URBAN STUDIES, 2853–2868 (2013). One particularly well-known critique of the privatization of public space is from Michael Sorkin’s edited collection, VARIATIONS ON A THEME PARK: THE NEW

to purge indicia of diversity from urban centers, in favor of a new, sanitized, and commercialized space that caters to middle- and upper-classes.<sup>200</sup> The economic concept of competing for the “fixed pie” of public space is particularly acute in the context of gentrification, which is “an essentially economic process of increasing land values but with wide ranging social consequences.”<sup>201</sup>

Contemporary conceptions of public space focus on leisure and creating shared fraternity with other like-minded individuals, but such expectations trend toward homogeneity and the exclusion of indicia of difference in order to create a relaxed, social atmosphere.<sup>202</sup> Public space then serves as a vehicle for socio-economic and class conformity,<sup>203</sup> referring to expectations about and enforcement of identities, actions, and appearances that are “normal” and acceptable.<sup>204</sup> In this sense, public space should uphold a mirror of sameness, or at least, similarity. Public space as a normative space not only contradicts the traditional hallmarks of “diversity and grittiness that the public entails,” but also inevitably moves toward the expulsion of such diversity and grittiness—visibly poor people and associated evidence of human suffering—as sources of tension that contradict the desired public stage of sociability, consumerism, and relaxed entertainment.<sup>205</sup>

Today’s sprawling shopping malls exemplify the hybridization of private and public space. The U.S. Supreme Court confronted the issue in *Pruneyard v. Robbins*, where the Court found that a shopping mall, unlike a conventional private space, issues an

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AMERICAN CITY AND THE END OF PUBLIC SPACE (New York: Hill and Wang) (1992) (concluding that urban centers were converting to theme parks).

<sup>200</sup> “Many simply do not wish to see those who appear disorderly or otherwise inspire trepidation. Nor is it pleasant to be reminded of the deprivations associated with homelessness, severe poverty, addiction, or mental illness.” BECKETT & HERBERT, *supra* note 41, at 21.

<sup>201</sup> Neal, *supra* note 106, at 5. See also KOHN, *supra* note 84, at 8 (noting “[t]he privatization of public space exacerbates the effects of racial and class segregation that already exists in housing patterns”).

<sup>202</sup> See Bodnar, *supra* note 98, at 8 (“The dialectics of community building is such that accepting members comes at the cost of excluding others.”).

<sup>203</sup> Marie-Eve Sylvestre, *Narratives of Punishment: Neoliberalism, Class Interests and the Politics of Social Exclusion*, 7 EUROPEAN JOURNAL OF HOMELESSNESS 363, 365 (2013), available at <http://ssrn.com/abstract=2463836> (noting “marginality corresponds, both historically and in the present, to certain empowered groups’ interests related to the preservation of a certain social and economic order.”).

<sup>204</sup> Gabrielle Pollini, *Element of a Theory of Place Attachment and Socio-Territorial Belonging*, 15(3) INT’L REV. OF SOCIOLOGY, 497–515 (2005).

<sup>205</sup> Bodnar, *supra* note 98, at 8.

invitation to the general public and, therefore, a mall opens itself up to certain regulations.<sup>206</sup> Many subsequent decisions seized on this notion of shopping malls as a the new, quintessential quasi-public space, reasoning that the traditional town centers—historically public sites for socializing and democratization—no longer exist in most contemporary areas; accordingly, the shopping mall was emerging as the new, contemporary heart of public space.<sup>207</sup>

But shopping malls are not ideals of public space: they remain fundamentally private spaces with commercial interests, corporate governance, and private security guards.<sup>208</sup> Private businesses exist for one primary purpose: to spur and feed consumerism. A key component of this process is to offer a controlled, sanitized, comfortable space that purges “troubled urbanity of its sting, of the presence of the poor, of crime, of dirt, of work.”<sup>209</sup>

The macrocosm of the shopping mall is the downtown area. Thus, a popular belief among private businesses, particularly coordinated businesses such as downtown business improvement districts, is that in order to maximize profits, they must remove any physical evidence that undercuts the desire to spend money. BIDs demonstrate the blurring of government and private action: first, BIDs heavily influence the lawmaking process, including the enactment of laws regulating public space.<sup>210</sup> Second, BIDs often assume quasi-governmental roles, such as deputizing private citizens to police downtown areas.<sup>211</sup> When private business interests reign over the governance of public space, visibly poor

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<sup>206</sup> *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

<sup>207</sup> See Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 1 (1999).

<sup>208</sup> Bodnar, *supra* note 98, at 8.

<sup>209</sup> Sorkin, *supra* note 199, at xv.

<sup>210</sup> Alex Glyman, *supra* note 192; Berkeley Policy Advocacy Clinic, BIDs Enabling Legislation (dated 10/29/15, working paper on file with the authors). Some may agree that the “death” or privatization of public space coincides with the “death” or privatization of democracy. Martin Giles and Benjamin Page drew data from over 1,800 different policy initiatives from 1981 to 2002 and concluded that rich, well-connected individuals steer American politics, regardless of or even contrary to the will of the majority of voters. See Martin Giles & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, Perspectives on Politics*, 12 PERSPECTIVES ON POLITICS 564 (Sept. 2014) (noting that “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy,” they write, “while mass-based interest groups and average citizens have little or no independent influence”).

<sup>211</sup> Alex Glyman, *supra* note 192.

people are often negatively impacted.<sup>212</sup> The increasing visibility of poor and homeless people in urban centers provokes significant backlash, especially from businesses.<sup>213</sup> City officials and businesses face pressure to create cosmetically attractive downtown areas that will attract shoppers and tourists.<sup>214</sup> Indeed, surveys consistently show that visibly poor people report more frequent harassment from private security or BID ambassador-type authority figures than from police officers.<sup>215</sup>

Thus, the increasing privatization of public space frustrates socio-political ideals of democracy and difference.<sup>216</sup> It reinforces the power to exclude and control marginalized groups as fundamental to property laws and policies.<sup>217</sup> As further explained below, over the past twenty years, the combination of economic conditions, broken window ideologies, and the human drive to exile created a perfect storm for the increasing enactment of laws that purge signs of visible poverty from public space.<sup>218</sup>

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<sup>212</sup> *Id.*; Berkeley Policy Advocacy Clinic, *supra* note 210.

<sup>213</sup> DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* (2003); *see also* Schweik, *supra* note 73, at 5 (noting “[m]ost of the current spatial policies and practices that do the work of old unsightly beggar ordinances route primarily through the mechanisms of rampant privatization and private control of ‘securescapes’ in the city”) (citing Beckett & Herbert, *supra* note 7 (discussing privatization); Lawrence Vale, *Securing Public Space [Awards Jury Commentaries]*, 17 *Places* 3 (2005) (discussing securescapes)).

<sup>214</sup> DON MITCHELL, *supra* note 213.

<sup>215</sup> TONY ROBINSON AND ALLISON SICKELS, *NO RIGHT TO REST: CRIMINALIZING HOMELESSNESS IN COLORADO* (Apr. 4, 2015), *available at* <http://www.cpr.org/sites/default/files/homelessness-study.pdf>; CHRIS HERRING & DILARA YARBOUGH, *PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO* (June 18, 2015), *available at* <http://ssrn.com/abstract=2620426>; Fisher, Miller, Walter & Selbin, *supra* note 18; NAT’L COAL. FOR THE HOMELESS, *DISCRIMINATION AND ECONOMIC PROFILING AMONG THE HOMELESS OF WASHINGTON, DC* (Apr. 2014), *available at* <http://nationalhomeless.org/wp-content/uploads/2014/04/DiscriminationReport20141.pdf>.

<sup>216</sup> KOHN, *supra* note 84; *see also*, Garnett, *supra* note 120, at 1–14 (describing the persistence of broken windows theory in public zoning regulations).

<sup>217</sup> *See supra* Part II.B.1; *see also* Kevin Francis O’Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 *FIRST AMEND. L. REV.* 201, 202 (2007) (noting “the increasing obsolescence of traditional public forums as a meaningful platform for citizen speech; and... the broad range of governmental efforts to eliminate or privatize our traditional public forums”).

<sup>218</sup> Olson & MacDonald, *supra* note 16; Fisher, Miller, Walter & Selbin, *supra* note 18; NAT’L COAL. FOR THE HOMELESS, *supra* note 215.

III. THE CRIMINALIZATION OF VISIBLY POOR PEOPLE:  
WHERE PUBLIC SPACE AND THE INFLUENCE OF  
EXILE COLLIDE

*The wealthy working people have earned their right to live in the city. They went out, got an education, work hard, and earned it... I shouldn't have to see the pain, struggle, and despair of homeless people to and from my way to work every day.*<sup>219</sup>

Is being visibly poor a crime? Should it be? Consider, for a moment, how you would live your life—perform the daily activities you must every day, such as sleeping, eating, drinking, sitting, resting, or even going to the bathroom—if you were forced to live each moment in public. Without resort to shelter, could you do perform any of these necessary, life-sustaining activities for hours, days, weeks, or years without offending or upsetting another person who observes you doing these things in public? In fact, a significant number of jurisdictions nationwide criminalize such conduct,<sup>220</sup> even if (and, as this Article suggests, especially because) you have no reasonable alternative because of a lack of shelter.

For hundreds of years, the United States and other countries have used laws and policies—purporting to protect public order—to move undesirable people from sight and control access to public space.<sup>221</sup> These laws are often called “criminalization laws” because they prohibit or severely restrict the ability of certain marginalized groups to exist in public space.<sup>222</sup> Jim Crow, Ugly

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<sup>219</sup> Open letter from Justin Keller, entrepreneur, developer and the founder of startup Commando.io, to San Francisco mayor Ed Lee and police chief Greg Suhr (Feb. 15, 2015), *available at* <http://justink.svbtle.com/open-letter-to-mayor-ed-lee-and-greg-suhr-police-chief>.

<sup>220</sup> NAT'L LAW CTR., *supra* note 16.

<sup>221</sup> Ortiz & Dick, *supra* note 3.

<sup>222</sup> See, e.g., NAT'L LAW CTR., *supra* note 16 (defining the criminalization of homelessness as prohibitions on “life-sustaining activities” that are performed in public); Olson & MacDonald, *supra* note 16; BECKETT & HERBERT, *supra* note 41; John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIMINAL LAW REVIEW: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 465 (Fall 2012); Sylvestre & Bellot, *supra* note 3; Antonia Fassionelli, *In re Eichorn: The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AMERICAN UNIVERSITY LAW REVIEW 232 (2000); Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. POVERTY LAW & POL'Y 197 (2004); Maria Foscarnis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1 (1996); Waldron, *supra* note 84;

laws, and Sundown Town laws are a few notorious examples of historical laws that criminalized the presence of people of color, disabled people, and immigrants in public space.<sup>223</sup> Criminalization laws thus function as a form of banishment.<sup>224</sup> Americans have since repealed these historical laws as discriminatory, but many contemporary ordinances—similar in form and function—are new hosts for the persistent influence of exile.<sup>225</sup>

#### A. The Contemporary Rise of Visible Poverty

The steady growth in the popularity of these laws correlates with the steady increase in the number of visibly poor people throughout the country. A 2016 report shows that, compared with peer countries, the United States has the worst overall ranking on key poverty and inequality indicators.<sup>226</sup> Homelessness is a significant crisis nationwide. At least 600,000 people experience homelessness on any given night, including over 200,000 people in families.<sup>227</sup> Nearly 3.5 million Americans will experience homelessness this year alone.<sup>228</sup> In 2013, “an estimated 2.5 million children lived in run-down motels, cars and shelters, on friends’ and relatives’ couches and on the streets.”<sup>229</sup> According to the

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Paul Ades, *The Unconstitutionality of ‘Anti-Homeless’ Law: Ordinances Prohibiting Sleeping in Outdoor Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989).

<sup>223</sup> Ortiz & Dick, *supra* note 3.

<sup>224</sup> BECKETT & HERBERT, *supra* note 41.

<sup>225</sup> Ortiz & Dick, *supra* note 3.

<sup>226</sup> DAVID GRUSKY ET. AL, PATHWAYS, STATE OF THE UNION REPORT ON POVERTY AND INCOME INEQUALITY (2016), *available at* <http://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016-2.pdf>.

<sup>227</sup> MEGHAN HENRY ET. AL, THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS (Nov. 2015), *available at* <https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf>.

These “point in time” numbers are roundly criticized as underestimations. *See, e.g.,* Paul Boden, *Homeless Head Counts Help No One*, SF GATE (Feb. 5, 2013), <http://www.sfgate.com/opinion/openforum/article/Homeless-head-counts-help-no-one-4254191.php> (“Point-in-time counts are a minimum number, always. They undercount hidden homeless populations because homeless persons are doubling up with the housed or cannot be identified by sight as homeless.”).

<sup>228</sup> National Alliance to End Homelessness, *The State of Homelessness in America* (Apr. 1, 2015); NAT’L COALITION FOR THE HOMELESS, *HOW MANY PEOPLE EXPERIENCE HOMELESSNESS?* 3 (Aug. 2007).

<sup>229</sup> Jon Queally, *Study: More Homeless Children Now Than Any Point in US History*, COMMON DREAMS (Mon., Nov. 17, 2014), <http://www.commondreams.org/news/2014/11/17/study-more-homeless-children-now-any-point-us-history> (citing to report from National Center on Family Homelessness). The number of homeless students in the U.S. recently reached a record national total of 1.36 million in the 2013-14 school year.

latest U.S. Conference of Mayor's report, the number of homeless people in 19 major cities increased over the last year by an average of 1.6 percent, with 58 percent of surveyed cities reporting increases.<sup>230</sup> Major cities such as Los Angeles, Portland, and Seattle have recently declared homelessness as a state of emergency.<sup>231</sup>

But the problem has not always been this bad: many agree that free market theories, supply side economics, and anti-welfare ideologies in the 1980s fueled the swell of contemporary homelessness.<sup>232</sup> The 1980s ushered a devastating trifecta: first, Congress decimated funding for public housing construction and subsidization programs, which never regained their prior strength.<sup>233</sup> Second, Congress severely undercut important mental health programs, such as community mental health centers that were supposed to replace mental hospitals after deinstitutionalization.<sup>234</sup> Third, social welfare cuts blazed an

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Lyndsey Layton & Emma Brown, *Number of Homeless Students in U.S. Has Doubled Since Before the Recession*, THE WASH. POST (Sept. 14, 2015), <https://goo.gl/8BDTZC> (noting "student homelessness has risen steadily since 2009, even after the U.S. unemployment rate began falling and much of the country began recovering from the recession and the housing crash that helped cause it"). City officials commonly identify the leading cause of homelessness among families as the lack of affordable housing, followed by poverty, unemployment, and low-paying jobs. THE U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 2 (Dec. 2015).

<sup>230</sup> THE UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 2 (Dec. 2015). Although approximately 42 percent of cities reported decreases over last year, during the same time period, emergency food assistance requests rose by an average of 2.8 percent in more than half of surveyed cities. 50 percent of surveyed cities expected homelessness to rise "moderately" next year and 65 percent of cities expect emergency food requests to "moderately" increase over the same time period. *Id.* 1–2. Twenty-three percent of requests for emergency food assistance in the cities surveyed went unmet. *Id.* at 1.

<sup>231</sup> J.B. Wogan, *Why Governments Declare a Homeless State of Emergency*, GOVERNING THE STATES AND LOCALITIES (Nov. 10, 2015), <http://www.governing.com/topics/health-human-services/gov-when-cities-declare-a-homeless-state-of-emergency.html>.

<sup>232</sup> VINCENT LYON-CALLO, *INEQUALITY, POVERTY, AND NEOLIBERAL GOVERNANCE: ACTIVIST ETHNOGRAPHY IN THE HOMELESS SHELTERING INDUSTRY* (2004); WESTERN REGIONAL ADVOCACY PROJECT, *THE SYSTEMIC INADEQUACY OF BUSH'S HOMELESSNESS POLICY* (2011).

<sup>233</sup> CUSHING DOLBEARE, IRENE SARAF, AND SHEILA CROWLEY, *CHANGING PRIORITIES THE FEDERAL BUDGET AND HOUSING ASSISTANCE 1976-2005* (Oct. 2004).

<sup>234</sup> Deinstitutionalization refers to the release of large populations of mentally-disabled individuals who lacked stable residency upon discharge from mental institutions. See MICHAEL J. DEAR & JENNIFER R. WOLCH, *LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS* (Princeton U.



unprecedented path to deeper poverty and homelessness for hundreds of thousands of people.<sup>235</sup>

Today, the majority of homeless people are forced to live in public. Virtually every major city lacks sufficient shelter to accommodate local homeless men, women, and children.<sup>236</sup> This lack of shelter, combined with a dearth of affordable housing,<sup>237</sup> especially in aftershocks of the most recent recession, means that several hundreds of thousands of Americans have no reasonable alternative but to live in public spaces.<sup>238</sup>

B. Criminalization as a Response to the Crisis of Visible Poverty

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Press 1987). David Cutler, Joseph Bevilacqua & Benson McFarland, *Four Decades of Community Mental Health: A Symphony in Four Movements*, 39 COMMUNITY MENTAL HEALTH JOURNAL 381 (Oct. 2003); EK Sheryl & AD Schmetzer, *Community Mental Health Centers Emergency Services in the 1980's: Effects of Funding Changes*, 25 COMMUNITY MENTAL HEALTH JOURNAL 267 (1989).

<sup>235</sup> DEAR & WOLCH, *supra* note 234.

<sup>236</sup> THE U.S. CONFERENCE OF MAYORS, *supra* note 229, at 2 (Dec. 2010) (“Because no beds are available for them, emergency shelters in 64 percent of the survey cities must turn away families with children experiencing homelessness; shelters in 68 percent of the cities must turn away unaccompanied individuals); NAT’L COAL. FOR THE HOMELESS, HOW MANY PEOPLE EXPERIENCE HOMELESSNESS? 2 (Aug. 2007) (noting that “a study of homelessness in 50 cities found that in virtually every city, the city’s official estimated number of homeless people greatly exceeded the number of emergency shelter and transitional housing spaces”).

<sup>237</sup> The number of households in America who must devote more than 50 percent of their income to rent will rise 11 percent by 2025. ANDREW JAKABOVICS ET. AL, PROJECTING TRENDS IN SEVERELY COST-BURDENED RENTERS: 2015-2025 (2015). Housing cost-burdened renters will rise from 11.8 million to 13.1 million. *Id.* “The nationwide lack of sufficient affordable housing for poor households is well documented.” JOSH LEOPOLD ET AL., THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2013 (June 2013) (reviewing available data and further examining “the affordability crisis” for extremely-low income renters). *See also* NAT’L LOW INCOME HOUS. COAL. STUDY, OUT OF REACH (2015) (concluding there is no place in the U.S. where “an individual working a typical 40-hour workweek at the federal minimum wage [can] afford a one- or two-bedroom apartment for his or her family”).

<sup>238</sup> NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: ADVOCACY MANUAL 14 (“Because many municipalities do not have adequate shelter space, homeless persons are often left with no alternative but to sleep and live in public spaces.”).

As the gap between the rich and the poor continues to widen,<sup>239</sup> laws that prohibit or severely restrict the presence of visibly poor people also continue to increase and intensify across the nation.<sup>240</sup> Several studies detail the extensive scope of the criminalization of homeless and visibly poor people, so a detailed examination is not necessary here.<sup>241</sup> But generally, the criminalization of visible poverty refers to measures that restrict life-sustaining activities such as sleeping, camping, eating, sitting, seeking income, asking for help, urinating or defecating, receiving food, storing belongings, or protecting oneself from the elements in public spaces—even when a person has no reasonable alternative due to a lack of shelter or private space.<sup>242</sup> Citywide bans on such life-sustaining activities, combined with the increasing privatization of public space, means that the spaces in which visibly poor people are permitted to legally exist are becoming smaller and smaller. Consequently, visibly poor people are increasingly forced out of entire communities or they face the threat of fines, arrest, or criminal penalties for engaging in acts necessary to survive.<sup>243</sup>

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<sup>239</sup> COLIN GORDON, *GROWING APART: A POLITICAL HISTORY OF AMERICAN INEQUALITY* (2014), available at <http://scalar.usc.edu/works/growing-apart-a-political-history-of-american-inequality/index> (“Inequality is greater now than it has been at any time in the last century, and the gaps in wages, income, and wealth are wider here than they are in any other democratic and developed economy.”); See also Richard Fry & Rakesh Kochnar, *America’s Wealth Gap Between Middle-Income and Upper-Income Families is Widest on Record*, PEW RESEARCH CENTER (Dec. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/12/17/wealth-gap-upper-middle-income/> (noting “[t]he wealth gap between America’s high income group and everyone else has reached record high levels since the economic recovery from the Great Recession of 2007-09”).

<sup>240</sup> See, e.g., Olson & MacDonald, *supra* note 16; Fisher, Miller, Walter & Selbin, *supra* note 18; NAT’L LAW CTR., *supra* note 16.

<sup>241</sup> See, e.g., NAT’L LAW CTR., *supra* note 16; Olson & MacDonald, *supra* note 16; Fisher, Miller, Walter & Selbin, *supra* note 18; Rachel A. Adcock et al., *TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO*; BECKETT & HERBERT, *supra* note 41; Mitchell, *supra* note 222; Sylvestre & Bellot, *supra* note 3, at 1; Fassionelli, *supra* note 222; Ali, *supra* note 222; Foscarinis, *supra* note 222; Waldron, *supra* note 84; Ades, *supra* note 222.

<sup>242</sup> See, e.g., NAT’L LAW CTR., *supra* note 16; Olson & MacDonald, *supra* note 16; BECKETT & HERBERT, *supra* note 41.

<sup>243</sup> See, e.g., NAT’L LAW CTR., *supra* note 16; Olson & MacDonald, *supra* note 16; BECKETT & HERBERT, *supra* note 41. Violations can result in criminal charges or steep fines that poor people inevitably are unable to pay; unpaid fines often evolve into misdemeanor failure to pay or respond charges. See generally KATHERINE BECKETT, ALEXES HARRIS, AND HEATHER EVANS, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* (Aug. 1, 2008); AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON & COLUMBIA LEGAL SERVICES, *MODERN-DAY DEBTORS’ PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR* (Feb. 2014).

The defining feature of criminalization is the use of policing and the criminal justice system as a first resort for responding to the public presence of visibly poor and homeless people.<sup>244</sup> Because homeless people exist in public space, the experience of homelessness itself makes interactions with law enforcement more likely, especially the likelihood of being ticketed or arrested.<sup>245</sup> Enforcement-based approaches present risks to the well-being and safety of homeless people, often by excluding them from safe spaces, fracturing existing relationships with other people or services, or pushing them into more dangerous activities.<sup>246</sup> Enforcement-based responses are also an expensive, resource-intensive use of police time,<sup>247</sup> and police officers are not always equipped to deal with the complex health and social problems bound up in the experience of homelessness.<sup>248</sup>

Dragging visibly poor people through the criminal justice system for engaging in necessary, life-sustaining conduct does nothing to address the underlying conditions that encourage homelessness and poverty. Instead, criminalization exacerbates poverty and homelessness: the imposition of a criminal history or insurmountable legal financial obligations severely diminishes a person's chances of accessing employment, housing, and public benefits.<sup>249</sup> Accordingly, criminalization laws create an expensive revolving door, continually worsening conditions for poor people

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<sup>244</sup> See, e.g., BILL O'GRADY, STEPHEN GAETZ & KRISTY BUCCIERI, CAN I SEE YOUR ID? THE POLICING OF YOUTH HOMELESSNESS IN TORONTO (2011).

<sup>245</sup> Sylvestre & Bellot, *supra* note 3, at 1, 16 (discussing Canadian studies).

<sup>246</sup> CHRIS HERRING & DILARA YARBOUGH, *supra* note 215; Fisher, Miller, Walter & Selbin, *supra* note 18.

<sup>247</sup> Howard & Tran, *supra* note 17; Jeffrey Selbin, Joseph Cooter, Ericka Meanor & Ericka Soli, Berkeley Law Policy Advocacy Clinic, DOES SIT-LIE WORK: WILL BERKELEY'S "MEASURE S" INCREASE ECONOMIC ACTIVITY AND IMPROVE SERVICES TO HOMELESS PEOPLE? (2012); Adcock et al., *supra* note 241.

<sup>248</sup> See, e.g., Charles Gary, *How to Police the Homeless*, POLICE MAGAZINE (June 1, 2004), <http://www.policemag.com/channel/patrol/articles/2004/06/how-to-police-the-homeless.aspx>; Liza Lucas, *Changing the Way Police Respond to Mental Illness*, CNN.COM (July 6, 2015), <http://www.cnn.com/2015/07/06/health/police-mental-health-training/>.

<sup>249</sup> NAT'L LAW CTR., *supra* note 16; see also *Browne v. City of Grand Junction*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 5728755, at \*32–34 (D. Colo. Sept. 30, 2015) (citing Joseph Shapiro, *As Court Fees Rise, the Poor are Paying the Price*, NPR.ORG (May 19, 2014)) (stating that "costs resulting from criminalization measures . . . are present at multiple stages of the criminal justice process," and homeless people are often unable to pay, which results in increased jail time, suspension of their driver's license, and poor credit).

and draining cities' fiscal resources.<sup>250</sup> Indeed, studies consistently show that enforcement of criminalization laws is more expensive and less effective than non-punitive alternatives, such as the provision of affordable housing, mental health services, or substance abuse treatment.<sup>251</sup>

Cities frequently invoke public safety and health concerns—much of the same justifications for historical laws such as Jim Crow—in defense of criminalizing visibly poor people.<sup>252</sup> But studies do not support the proposition that the criminalization of visible poverty does anything to advance public health and safety.<sup>253</sup> Another frequent justification is economic stimulation, however, no study shows a correlation between purging visible poverty and an increase in the bottom line of area businesses; indeed, at least one study proves there is no such relationship.<sup>254</sup> Studies also disprove the argument that criminalization actually helps poor people by engaging them with services.<sup>255</sup> To the contrary, people experiencing homelessness often report extreme psychological and emotional trauma from constant societal rejection and criminalization.<sup>256</sup>

### C. The Persistence of Criminalizing Visible Poverty

Given such overwhelming evidence that criminalization is bad law and policy, why are these measures increasingly enacted and aggressively enforced? The simple answer is the influence of exile. Society's negative views of poverty appear to drive some of

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<sup>250</sup> NAT'L LAW CTR., *supra* note 16.

<sup>251</sup> Howard & Tran, *supra* note 17 (surveying national and statewide studies showing the enforcement of criminalization laws is more expensive than the provision of non-punitive alternatives that better address the problems of homelessness).

<sup>252</sup> NAT'L LAW CTR., *supra* note 16; Ortiz & Dick, *supra* note 3.

<sup>253</sup> See Blasi, *supra* note 91; Harcourt, *supra* note 91; Herbert, *supra* note 92; Fagan, *supra* note 93.

<sup>254</sup> Selbin et al., *supra* note 247.

<sup>255</sup> *Id.* Studies also dispute the argument that police interaction or jail effectively connects people with services. See CHRIS HERRING & DILARA YARBOUGH, *supra* note 215; RAM SUBRAMANIAN ET AL., The Vera Institute, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (Feb. 2015), available at <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

<sup>256</sup> TAI DUNSON-STRANE & SARAH SOAKAI, Department of Urban and Regional Planning University of Hawaii at Manoa, THE EFFECTS OF CITY SWEEPS AND SIT-LIE POLICIES ON HONOLULU'S HOMELESS (June 2015), available at [http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small\\_.pdf](http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf); NAT'L COAL. FOR THE HOMELESS, *supra* note 215.

these differences, both in terms of the pronounced stigmatization of visibly poor people and in terms of the law's lack of responsiveness.<sup>257</sup>

In addition to social science suggesting that visibly poor people bear the brunt of stigma against poor people generally,<sup>258</sup> “popular culture abounds with examples of glorified violence against the homeless and anti-homeless sentiment.”<sup>259</sup> Visibly poor people are frequent victims of hate crimes<sup>260</sup> and common victims of police harassment and brutality.<sup>261</sup>

Of course, evidence of societal hostility toward visible poverty is not always manifest in violent ways. Many extra-legal efforts seek displacement of visible poverty. Some urban design techniques have been described as “weapons” that are used by “architects, planners, policy-makers, developers, real estate brokers, community activists, neighborhood associations, and individuals to wage the ongoing war between integration and segregation.”<sup>262</sup> Such techniques are commonly dubbed as the practice of “hostile”

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<sup>257</sup> See *supra* Part I (explaining negative views of poverty).

<sup>258</sup> See *supra* Part I.

<sup>259</sup> Rankin, *supra* note 65, at 391 (reviewing examples).

<sup>260</sup> NAT'L COAL. FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2013 (Michael Stoops ed., June 2014), available at <http://nationalhomeless.org/wp-content/uploads/2014/06/Hate-Crimes-2013-FINAL.pdf>.

<sup>261</sup> See, e.g., Elliot Spagat, *Video Released of San Diego Officer's Shooting of Transient*, MSN NEWS (Dec. 23, 2015), <http://www.msn.com/en-us/news/us/video-released-of-san-diego-officers-shooting-of-transient/ar-BBnQNYC>; Alan Pyke, *Phoenix Cops Could Face Felony Charges For Pepper Spraying A Homeless Woman And Lying About It*, THINK PROGRESS (Dec. 14, 2015), <http://thinkprogress.org/justice/2015/12/14/3731777/phoenix-police-charged-lying/>; Fernanda Santos, *New Mexico: Officers to be Tried for Man's Killing*, THE N.Y. TIMES (Aug. 18, 2015), [http://www.nytimes.com/2015/08/19/us/new-mexico-officers-to-be-tried-for-mans-killing.html?\\_r=0](http://www.nytimes.com/2015/08/19/us/new-mexico-officers-to-be-tried-for-mans-killing.html?_r=0); Tobias Salinger, *Florida Cop Shown Tossing Peanuts at Homeless Man, Laughing with Deputies as Man Eats them Off Floor in Booking Video*, N.Y. DAILY NEWS (Mon., July 27, 2015), <http://a.msn.com/01/en-us/AAdzIOe?ocid=se>; Robert Gebelhoff, *A New York Police Union Asks Members to Take Photos of City's Homeless*, THE WASH. POST (Aug. 11, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/11/a-new-york-police-union-asks-members-to-take-photos-of-citys-homeless/>.

<sup>262</sup> See Daniel D'Oca et al, Interboro Partners, *The Arsenal of Inclusion and Exclusion*, MAS CONTEXT, <http://www.mascontext.com/issues/17-boundary-spring-13/the-arsenal-of-inclusion-and-exclusion/>; Eric Jaffee, *The Hidden Ways Urban Design Segregates the Poor*, FAST COMPANY (Aug. 12, 2014), [www.fastcodesign.com/3034206/slicker-city/the-hidden-ways-urban-design-segregates-the-poor](http://www.fastcodesign.com/3034206/slicker-city/the-hidden-ways-urban-design-segregates-the-poor).

or “disciplinary” architecture, which uses design as a mechanism to reduce the presence of homeless people in urban centers.<sup>263</sup> Recent examples include the installation of spikes on ledges or behind doorways,<sup>264</sup> sprinklers triggered by evening movement on the steps of church entryways,<sup>265</sup> multiple armrests to divide sidewalk benches,<sup>266</sup> and enormous jagged boulders on grassy medians.<sup>267</sup> The use of hostile architecture often generates controversy, not just because of its transparency, but sometimes because of its economic cost; opponents point out the finances could be redirected to support those in need instead of exclude them.<sup>268</sup> Similarly, some cities heavily invest in “one way” transportation programs, designed to “solve” the problem of visible poverty by literally shipping poor people elsewhere.<sup>269</sup>

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<sup>263</sup> See, e.g., Eric Jaffee, *supra* note 262.

<sup>264</sup> Alex Andreou, *Spikes Keep the Homeless Away, Pushing them Further out of Sight*, THE GUARDIAN (Mon., June 9, 2014), <http://www.theguardian.com/commentisfree/2014/jun/09/spikes-homeless-london-metal-alcove-defensive-architecture-poverty>; Deborah Hastings, *Posh London Apartment Complex Puts up Metal Spikes to Deter Homeless*, N.Y. Daily News (Sat., June 7, 2014), <http://www.nydailynews.com/news/world/posh-london-building-puts-spikes-homeless-article-1.1820898>.

<sup>265</sup> Doug Sovern, *San Francisco Saint Mary’s Cathedral Drenches Homeless with Water to Keep them Away*, CBS LOCAL (Mar. 18, 2015), <http://sanfrancisco.cbslocal.com/2015/03/18/homeless-saint-marys-cathedral-archdiocese-san-francisco-intentionally-drenched-water-sleeping/>.

<sup>266</sup> Eric Jaffee, *supra* note 262.

<sup>267</sup> Matt Driscoll, *Throwing Rocks at Tacoma’s Homeless Problem Isn’t the Answer*, THE NEWS TRIBUNE (June 9, 2015), <http://www.thenewstribune.com/news/local/news-columns-blogs/matt-driscoll/article26298283.html>.

<sup>268</sup> Mary Vorsino, *Homeless Face New City Tactic: Bus Stop Stools*, HONOLULU ADVERTISER (Mon., Oct. 27, 2008), <http://the.honoluluadvertiser.com/article/2008/Oct/27/In/hawaii810270333.html> (“So far, the city has spent about \$11,000 on the seating initiative, removing benches and installing 55 stools at 12 bus stops in urban Honolulu and Kane’ohe. [However,] cities should concentrate more on providing shelter and services for the homeless and less on moving them from bus stops.”); Alex Andreou, *Anti-homeless Spikes: ‘Sleeping Rough Opened My Eyes to the City’s Barbed Cruelty’*, THE GUARDIAN (Wed., Feb. 18, 2015), <http://www.theguardian.com/society/2015/feb/18/defensive-architecture-keeps-poverty-undeen-and-makes-us-more-hostile> (noting that defensive or hostile architecture “doesn’t even achieve its basic goal of making us feel safer”).

<sup>269</sup> See, e.g., Eben Blake, *Homeless Bus Ticket Programs Across the Nation Offer Little Accountability, Poor Housing Solutions, Activists Say*, INTERNATIONAL BUSINESS TIMES (June 24, 2015), <http://www.ibtimes.com/homeless-bus-ticket-programs-across-nation-offer-little-accountability-poor-housing-2016812>.

Despite clear evidence of the pervasive stigmatization and marginalization of visibly poor and homeless people, equal protection analysis holds little promise.<sup>270</sup> Poverty, by itself, is not a suspect classification triggering heightened judicial scrutiny.<sup>271</sup> Other scholars have criticized the anemic quality of equal protection jurisprudence for failing to ensure meaningful protection, access, and opportunity for poor and marginalized members of society.<sup>272</sup>

Although advocates sometimes successfully challenge these laws as violating the human, civil, and constitutional rights of visibly poor people, they are often upheld despite evidence of their disproportionate impact on poor and homeless populations, which in turn are disproportionately comprised of other marginalized groups that are supposed to be afforded various legal protections.<sup>273</sup> Courts frequently defer to governmental justifications such as public health and safety, without scrutinizing these justifications for pretext and without requiring evidence of how criminalization measures impact the health and safety of visibly poor people.<sup>274</sup> In this permissive space, the influence of exile supports the proliferation of laws that criminalize people who have no reasonable alternative but to engage in necessary, life-sustaining activities somewhere in public.<sup>275</sup> Consequently, criminalization laws effectively punish people for experiencing homelessness.<sup>276</sup>

As long as cities fail to adequately address the underlying causes of homelessness, criminalization laws in those jurisdictions should

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<sup>270</sup> See Nice, *supra* note 65.

<sup>271</sup> Harris v. McRae, 448 U.S. 297 (1980), is commonly interpreted as Supreme Court precedent that poor people are not a suspect class. However, other scholars persuasively argue that the U.S. Supreme Court has not clearly addressed the suspect classification status of poor people. See *supra* note 65.

<sup>272</sup> See Nice, *supra* note 65; Martha Albertson Fineman, *Beyond Identities: The Limits of An Antidiscrimination Approach to Equality*, 92 BOSTON UNIVERSITY LAW REVIEW 1713, 1720 (arguing for the “concept of the ‘vulnerable subject’ as a more viable and appropriate figure around which to build contemporary policy and law”).

<sup>273</sup> NAT’L LAW CTR., *supra* note 16 (surveying various cases and outcomes); Lurie & Schuster, *supra* note 47 (establishing the disproportionate representation of other marginalized groups in homeless populations).

<sup>274</sup> See *supra* Part II.B.

<sup>275</sup> For more on the lack of reasonable alternatives for poor and homeless people, see Antonia Fassonelli, *supra* note 222.

<sup>276</sup> See NAT’L LAW CTR., *supra* note 16; Olson & MacDonald, *supra* note 16; Statement of Interest of the United States at 7, Bell v. Boise, 993 F. Supp. 2d 1237 (D. Idaho 2014).

be unconstitutional under the Eighth Amendment. The U.S. Supreme Court in *Robinson* held that laws that criminalize an individual's status, rather than specific conduct, are unconstitutional as cruel and unusual punishment under the Eighth Amendment.<sup>277</sup> Moreover, "certain acts also may not be subject to punishment under the Eighth Amendment if they are unavoidable consequences of one's status."<sup>278</sup> Thus, if a law prohibits conduct that is involuntary or "unavoidable due to one's condition, criminalization of that conduct would be impermissible" under the constitutional prohibition against cruel and unusual punishment.<sup>279</sup> For example, the Department of Justice recently clarified that conduct-versus-status analysis, which municipalities routinely rely upon to justify enforcement of ordinances that criminalize sleeping and camping in public, fails to pass Eighth Amendment muster when inadequate shelter beds leave homeless individuals with no choice but to sleep in public.<sup>280</sup> This argument has found some

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<sup>277</sup> *Robinson v. State of California*, 370 U.S. 660 (1962) (holding that a state cannot punish a person for his or her status).

<sup>278</sup> Statement of Interest of the United States at 7, *Bell v. Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014). The DOJ's statement provides a cogent review and synthesis of *Robinson*, *Powell v. Texas*, 394 U.S. 514 (1968), and other relevant Eighth Amendment challenges to anti-camping ordinances that have been enforced against homeless individuals. The DOJ ultimately urged the U.S. District Court of Idaho to adopt the reasoning of *Jones v. City of Los Angeles*, 444 F.3d 1118 (9<sup>th</sup> Cir. 2006), *vacated per settlement*, 505 F.3d 1006 (9<sup>th</sup> Cir. 2007), which found such ordinances unconstitutional because, in the face of insufficient shelter within the city, the laws criminalized essential, life-sustaining activities such as sitting, lying down, and sleeping even though homeless individuals had no reasonable alternative than to perform such activities in public. *Id.* at 1136 (noting that punishing conduct that is a "universal and unavoidable consequence of being human violates the Eighth Amendment").

<sup>279</sup> Statement of Interest of the United States at 7, *Bell v. Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014).

<sup>280</sup> *Id.* at 11–14 (citing *Powell*, 392 U.S. at 548–51). In evaluating the constitutionality of anti-camping ordinances, courts may consider the sufficiency of available shelter beds. When there is an insufficient number of beds available to accommodate the local homeless population, courts may hold that a law criminalizing sleeping in public are void as applied to a homeless defendant. *See, e.g., In re Eichorn*, 69 Cal. App. 4th 382, 285 (1998) (considering insufficiency of shelter beds in context of necessity defense); *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11<sup>th</sup> Cir. 2000) (upholding anti-camping ordinance because shelter beds available on the night the defendant was cited); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) (holding in part, that enforcement of an anti-sleeping ordinance was cruel and unusual punishment when insufficient shelter beds); *Tobe v. City of Santa Ana*, 9 Cal 4th 1069, 1088 (1995) (upholding anti-camping ordinance in part because defendants failed to show whether shelter beds were available).



limited success.<sup>281</sup> But there is no principled basis for limiting the Eighth Amendment’s application to anti-camping laws; instead, this reasoning should apply to any criminalization law that punishes “conduct that is a universal and unavoidable consequence of being human” when that person has no reasonable alternative.<sup>282</sup>

As explained in this section, laws that criminalize essential life activities for individuals experiencing homelessness do not promote public safety, impose needless costs on prosecutorial, defense, and court services, and do nothing to solve the underlying problems of poverty, homelessness, and mental illness. Instead of wasting significant amounts of money on criminalizing visible poverty, governments should focus resources on non-punitive alternatives, such as providing housing and services.<sup>283</sup> But until the American conscience confronts the human instinct to exile visibly poor people from public space, criminalization laws and policies will persist and evolve.

#### IV. CONFRONTING THE INFLUENCE OF EXILE

*Despite Americans’ insistence on egalitarianism, opportunity, and classlessness, “there is an un-American secret at the heart of American culture: for a long time it was [and is] preoccupied by class... [W]e are acutely aware of class distinctions, and we endorse the opportunity syllogism, which suggests that people attain the class they deserve. We deride elites as out of touch, but we do not notice that we are the elites of the world.”*<sup>284</sup>

The influence of exile is an invisible hand, guiding the enactment and enforcement of laws that ensure and sustain inequalities to the advantage of the more powerful.<sup>285</sup> Public perceptions about whether an individual “deserves” rights, in turn, affect how the law allocates or restricts rights.<sup>286</sup> The unparalleled stigma reserved for

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<sup>281</sup> Statement of Interest of the United States at 17, *Bell v. Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014).

<sup>282</sup> See Antonia Fassionelli, *supra* note 222.

<sup>283</sup> Howard & Tran, *supra* note 17 (surveying national and statewide studies showing the enforcement of criminalization laws is more expensive than the provision of non-punitive alternatives that better address the problems of homelessness).

<sup>284</sup> FISKE, *supra* note 13, at 26.

<sup>285</sup> GREENWALD, *supra* note 25, at 7.

<sup>286</sup> See, e.g., Burnstein, *supra* note 3; Mishler & Sheehan, *supra* note 3. See also George Orwell, *Freedom of the Park*, in *THE COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL* (1968) (“If large numbers of people believe in freedom of speech, there will be freedom of speech, even if the

the visible poor explains not only the proliferation of criminalization laws, but also the lack of urgency in legal and policy fixes.

Policymakers must confront the influence of exile. They should note consistent evidence that criminalization laws are ineffective and expensive when compared to non-punitive alternatives. They should review their laws governing the use of public spaces and repeal any that express the influence of exile. Additionally, jurisdictions that fail to adequately address the underlying causes of homelessness and visible poverty should desist from enforcing laws that criminalize conduct people must engage in to survive. Even if policymakers deny these points and believe they can modify laws and policies to both reduce visible poverty and avoid potential constitutional liability, they should take steps to mitigate the total waste of taxpayer dollars caused by criminalizing behaviors that many poor people have no choice but to repeat.

The judiciary must also better appreciate the influence of exile, particularly in application to visibly poor people. Courts should invalidate laws that criminalize the conduct of necessary, life-sustaining conduct in public when there is no reasonable alternative.<sup>287</sup> Governmental justifications of public health and public safety should be scrutinized and evaluated not only from the perspective of privileged individuals, but also from the perspective of poor people who are forced to live in public.<sup>288</sup>

But defending the visibility of poverty also plays a key role in confronting the influence of exile. Criminalization laws, by regulating and minimizing the visibility of poverty in public space, undermine the availability of public space as a venue to protest. Persistent counter efforts must continue to organize and challenge the influence of exile, claiming public space as a venue for acts of civil disobedience and nonviolent political protest.<sup>289</sup> “Public space is inherently political and potentially subversive; it is seen as both the manifestation of reigning political power but also as that

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law forbids it. But if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them.”);

<sup>287</sup> *Supra* Part III (discussing criminalization laws).

<sup>288</sup> *Supra* Part II (discussing judicial deference in First Amendment cases) and Part III (discussing the same in criminalization cases generally).

<sup>289</sup> Bodnar, *supra* note 98, at 11 (advocating marginalized groups “reclaim public space for uses that defy the dominant logic of the contemporary rearrangement of public space, and point to its countercurrents”).

of a more inclusive power that can reclaim it temporarily by occupying it for political purposes.”<sup>290</sup>

Indeed, in this context, the mere existence of homeless people in public space is an act of resistance.<sup>291</sup> In Martin Luther King’s Letter from Birmingham Jail, Dr. King explained why visibility is key to protest:

Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored . . . . [T]he purpose of . . . direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation.<sup>292</sup>

Thus, it only when society cannot hide evidence of poverty, inequality, underfunded mental health services, and the lack of affordable housing that society is forced to confront it. In order to effectuate a meaningful shift in American laws and policies, the crisis of poverty must be visible in public space.<sup>293</sup> The presence of visible poverty forces society to confront inequality of income, education, health care, and criminal justice. Although confrontation with visible poverty may make more privileged people feel uncomfortable or even frightened, this dissonance is an essential form of protest, a crucial method to influence public opinion and provoke social change.<sup>294</sup> Impact litigation and legislative advocacy are slow, unsure, and even expensive options;

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<sup>290</sup> *Id.* at 6.

<sup>291</sup> TALMADGE WRIGHT, *OUT OF PLACE: HOMELESS MOBILIZATIONS, SUBSIDIES, AND CONTESTED LANDSCAPES* 182 (New York: SUNY press 1997) (noting that, for marginalized populations, “existence is resistance.”).

<sup>292</sup> Letter from Martin Luther King Jr. to Bishop C. C. J. Carpenter et. al. (Apr. 16, 1963) (generally known as the Letter from Birmingham Jail).

<sup>293</sup> Randall Amster & David Cook, *Homelessness as Nonviolent Resistance*, *JOURNAL FOR THE STUDY OF PEACE AND CONFLICT* 13, 14 (2009–2010) (noting “the issue of homelessness presents a unique moment in peace and social change praxis to unify both reactive survival aims with proactive policy shifts, since it is precisely the continued existence of homeless ‘street people’ that often seems to represent one of the greatest ‘threats’ to business as usual.”).

<sup>294</sup> KOHN, *supra* note 84, at 184 (“If the homeless do not have the opportunity to be visible in public space, if they cannot communicate their needs, then there is no chance that they will convince others to make the social changes necessary to meet those needs.”); Don Mitchell, *Introduction: Public Space in the City*, 17(2) *URBAN GEOGRAPHY*, at 129 (1996) (“Dissidents of all types must continually assert their presence into public space, if they are ever to be seen and heard.”)

the visibility of people who are experiencing poverty and homelessness is a necessary and primary form of resistance.<sup>295</sup> The presence of visible poverty is a persistent message that can “scratch[] the psychological armor of even those citizens who insisted that all those people on the street were still the unworthy poor.”<sup>296</sup>

The peaceful occupation of public space then becomes its own sort of tactical control of public space that is both “adaptive and defiant.”<sup>297</sup> Encampments and similar “strategies enabl[e] individuals to weave together survival, and in some cases social transformation”;<sup>298</sup> such forms of protest and resistance amount to “an attempt by the homeless to provide themselves with the shelter, community, and dignity denied them by their social system.”<sup>299</sup> Fighting displacement then creates a form of “insurgent citizenship, where those whose status as legitimate members of the public is not yet fully established, but where they nonetheless hold their ground and make claims of the legitimacy of their presence.”<sup>300</sup> Like most forms of protest, visible poverty creates discomfort because it challenges the status quo;<sup>301</sup> visible poverty as a form of protest challenges the American conscience to grapple with its own complicity in creating the circumstances within which homelessness and poverty can thrive.<sup>302</sup>

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<sup>295</sup> Don Mitchell, *Political Violence, Order, and the Legal Construction of Public Space: Power and the Public Foreign Doctrine*, 17(2) URBAN GEOGRAPHY, at 172 (1996) (“[I]t is essential that activists continue to challenge restrictive-rights discourse not just in the courts, but also in the street, where more positive vision of a just society can be fought for.”); Susan Ruddick, *YOUNG AND HOMELESS IN HOLLYWOOD: MAPPING THE SOCIAL IMAGINARY* 64 (New York: Rutledge 1995) (noting that homeless people manifest a form of resistance “simply by their presence.”)

<sup>296</sup> BLAU, *supra* note 8, at 175.

<sup>297</sup> WRIGHT, *supra* note 293, at 199, 266.

<sup>298</sup> Lynn M. Harter et al., *The Structuring of Invisibility Among the Hidden Homeless: The Politics of Space, Stigma, and Identity Construction*, 33(4) JOURNAL OF APPLIED COMMUNICATION RESEARCH, at 324 (2007).

<sup>299</sup> RICHARD H. ROPERS, *THE INVISIBLE HOMELESS: A NEW URBAN ECOLOGY* 199 (New York: human sciences 1988).

<sup>300</sup> Neal, *supra* note 106, at 5 (discussing James Holston, *Spaces of Insurgent Citizenship*, in *CITIES AND CITIZENSHIP* (A PUBLIC CULTURE BOOK) 155-73 (Holston J., ed.) (Duke U. Press) (1999).

<sup>301</sup> “[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>302</sup> Peter Marcuse, *Neutralizing Homelessness*, 18(1) SOCIALIST REVIEW, 93 (1998) (“[H]omelessness is such a danger to the legitimacy of the status quo. Homelessness... May shock people into the realization that homelessness exists not because the system is failing to work as it should, but because the system is

Current spatial-hierarchies not only undermine the viability of necessary protest, they also frustrate the possibility of proximity and the understanding that often comes with it. Proximity is necessary to create social change.<sup>303</sup> Bryan Stephenson argues that the first thing we have to do to fight injustice is to get proximate to injustice; we must show up and see things with our own eyes.<sup>304</sup> When we see injustice up close, Stephenson theorizes, we will have no choice but to act.<sup>305</sup> Just as importantly, Stephenson reminds us that viable solutions can only be developed when one has an up-close view of a problem.<sup>306</sup> Accordingly, as long as the influence of exile shapes American laws and policies, it negatively affects the prospects of social change and justice.<sup>307</sup>

Perhaps the first step to really addressing homelessness is to examine ourselves as well as our reactions to visible poverty.

First, and fundamentally, we need to shift from the assumption that law enforcement and the criminal justice system are the most appropriate mechanisms for dealing with the use of public space by people experiencing homelessness. Public attitudes toward visible poverty influence policymaking, law enforcement, and juridical decision-making. Thus, connections between public attitudes and laws that govern the allocation of rights in public space warrant particular attention. Generally, laws, policies, practices regulating public space are not consciously created to punish visibly poor people for their status or condition. However, this is often the impact.

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working as it must.”); Amster & Cook, *supra* note 293, at 14 (noting the poor are a consequence of a competitive capitalist economy; “[t]herefore, their presence is problematic to those who believe in the ideals of Western capitalism.”).

<sup>303</sup> BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (Spiegel & Grau, Reprint ed. 2015)

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> KOHN, *supra* note 84, at 8 (stating “the problem is that segregation itself makes it difficult for members of privileged groups to recognize the existence of injustice” and citing Iris Marion Young, *Residential Segregation and Differentiated Citizenship*, 3 *CITIZENSHIP STUDIES*, no. 2, 242 (1999)). Kohn adds, “Public space is made up of more than parks, plazas, and sidewalks; it is a shared world where individuals can identify with one another and see themselves through the eyes of others. Seeing oneself through the other’s eyes may be a first step towards recognizing one’s own privilege, and, perhaps, criticizing structures of systematic privilege and deprivation.” *Id.* at 8–9.

Common reactions to visible poverty—discomfort, unease, disgust, and anxiety—fuel the urge to exile. Especially as gentrification accelerates in many urban centers, tensions over “appropriate” uses of public space also intensify. A better understanding of common stereotypes relating to visible poverty may help citizens and policymakers to more carefully distinguish between dangerous or aggressive behavior or merely perceived danger, a typical consequence of witnessing someone who seems to be in desperate circumstances. This reflection may also help us to better distinguish between social, economic, and health-related problems and criminal ones. Laws and policies governing the regulation of public space should respond to evidence about crime and its consequences, not feelings of disgust over evidence of human desperation or difference.

Currently, the law is too rigid with respect to the interpretation and understanding of popular attitudes toward visible poverty and how these perceptions influence the development of the law. For decades, various sciences have established understanding of in-groups and out-groups as a form of social control; the law needs to be more cognizant of these instincts in evaluating laws and policies that affect visibly poor and homeless people. Understanding the influence of exile should prompt us to stop resorting to the use of the criminal justice system as a first response to visible poverty. Confronting the influence of exile can allow us to consider more effective and efficient responses that respect the rights of all people to exist in public space or, more fundamentally, to exist at all.