

## ARTICLES

### THE NEW INNER CITY: CLASS TRANSFORMATION, CONCENTRATED AFFLUENCE AND THE OBLIGATIONS OF THE POLICE POWER

*Audrey G. McFarlane\**

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\* Assoc. Professor, University of Baltimore School of Law. Earlier drafts of a portion of this article were presented at a University of Southern California Faculty Workshop, the Western Teachers of Color Conference, and the Northeast Corridor Collective. Thanks to Taunya Banks, Gerald Frug, Tanya Hernandez, Desiree Kennedy, George Lefcoe and Rhonda Reaves for their helpful comments. This work was also made possible by generous research support from the University of Baltimore and able research assistance from Richard Chambers and Jennifer Scott.

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City space offers delights and surprises. Walk around the corner, or over a few blocks, and you encounter a different spatial mood, a new play of sight and sound, and new interactive movement. The erotic meaning of the city arises from its social and spatial inexhaustibility. A place of many places, the city folds over on itself in so many layers and relationships that it is incomprehensible.

—Iris Marion Young<sup>1</sup>

I'm just going to say it right plain. People is got so they want everything to shine like new money . . . So, why do people that have money try to make them that don't . . . move out and live in places that they can't afford . . . [?]

—Drusilla Hutchinson<sup>2</sup>

## INTRODUCTION

At this writing, urban real estate, worldwide, is hot.<sup>3</sup> In the most recent several years, the market for real property in centrally located neighborhoods in many U.S. cities has resurged in ways considered unimaginable just a short time ago.<sup>4</sup> Although many old central cities continue to experience overall population loss from the now decades-old middle and upper-middle class exodus to the suburbs,<sup>5</sup> the loss

<sup>1</sup> *City Life and Difference*, in *JUSTICE AND THE POLITICS OF DIFFERENCE* 240 (1990).

<sup>2</sup> A resident of a Black community eliminated by urban renewal during the early 1960s, in *URBAN RENEWAL AND THE END OF BLACK CULTURE IN CHARLOTTESVILLE, VIRGINIA: AN ORAL HISTORY OF VINEGAR HILL* 109 (James Robert Saunders & Renae Nadine Shackelford eds., 1998).

<sup>3</sup> This is not merely a U.S. trend but an international one. See, e.g., Gordon MacLeod, *From Urban Entrepreneurialism to a "Revanchist City"? On the Spatial Injustices of Glasgow's Renaissance*, 34 *ANTIPODE* 602 *passim* (2002) (describing the entrepreneurial strategies governments use to revitalize city spaces and their social justice implications); see also Jason Hackworth, *Postrecession Gentrification in New York City*, 37 *URB. AFF. REV.* 815, 818 (2002) (noting gentrification in London and Edinburgh); Daniel P. McMillen, *The Center Restored: Chicago's Residential Price Gradient Reemerges*, 26 *ECON. PERSP.* 2, 4 (2002) (documenting the restoration of Chicago's city center from 1983 to 1998 and finding that prices rose far more rapidly near the city center than at the edge of the Chicago city limits).

<sup>4</sup> See Elvin K. Wyly & Daniel J. Hammell, *Islands of Decay in Seas of Renewal: Housing Policy and the Resurgence of Gentrification*, 10 *HOUSING POL'Y DEBATE* 711, 733–34 (1999) (positing that gentrification has surrounded urban blight with areas of renewal and wealth); Karen Hill, *Decatur Taking Bite Out of Gentrification*, *ATLANTA J.-CONST.*, Mar. 4, 2002, at D1 (portraying a retired owner on a fixed income who is in danger of losing his home due to rising property taxes); Earni Young, *Housing Prices Soar Despite Population Loss, Costs Have Doubled, Tripled*, *PHILA. DAILY NEWS*, May 6, 2002, at 3 (discussing soaring prices in the downtown Philadelphia real estate market).

<sup>5</sup> See KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 213–14 (1985) (describing how the federal government facilitated and accelerated the move to the suburbs and shaped the identity of suburbia as White by denying Blacks the opportunity to obtain mortgages). What was once known as "White flight" is more properly characterized as "middle class flight" now that Black middle-income persons have increasingly been able

masks a dramatic, yet paradoxical, counter-trend.<sup>6</sup> Since the late 1960's and 1970's, the number of upper-income professionals in centrally located inner city neighborhoods, usually accessible from, if not close to, central business districts, has been slowly increasing as succeeding waves of urban middle class people are willing to breach the boundaries of the formerly taboo "inner city." The nature and pace<sup>7</sup> of such repopulation<sup>8</sup> during each period has varied, but the common characteristic has been the ongoing reconfiguration of the central city as a space for the affluent. As the single yuppie, the childless couple, and the empty nester in search of a newly valuable way of life continue to "discover" and claim new territory within the city,<sup>9</sup> they

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to move to the suburbs as well. See generally Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001) (describing modern middle class Black suburbs and the social trends that prevent integration).

<sup>6</sup> While inner city development is small in comparison to suburban growth, the gentrification is real enough to have been identified in a number of cities. See MAUREEN KENNEDY & PAUL LEONARD, THE BROOKINGS INST. CTR. ON URBAN AND METRO. POLICY, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 1 (2001), available at <http://www.brookings.edu/es/urban/gentrification/gentrification.pdf> ("The movement of new middle-class residents into U.S. cities is a small counter-trend; the dominant trend, by far, is movement away from central cities and towards the suburban periphery."). According to one report, between 1992 and 1997, conventional home loan volumes in "core and fringe urban neighborhoods" increased from \$358 million to \$763 million, an increase of 129%. Notwithstanding the substantial rate of growth, this represented only 1.6% of all conventional home purchase activity in the metropolitan areas included in the study. *Id.* at 8-9 (citing Wyly & Hammell, *supra* note 4, at 733-34).

<sup>7</sup> See Henry W. McGee, Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25, 40 (1991) (discussing Black resistance to neighborhood integration when gentrification results).

<sup>8</sup> See Wyly & Hammell, *supra* note 4, at 731 (attributing the origin of the term "gentrification" to eminent sociologist Ruth Glass, who coined the word to describe this process in London). See generally LONDON: ASPECTS OF CHANGE (Ctr. for Urban Studies ed., 1964) (discussing gentrification in the London Covent Gardens neighborhood and the importation of the term to the United States).

<sup>9</sup> See Larry Van Dyne & Deborah Hearn, *Bidding Wars*, WASHINGTONIAN, July 2000, at 51 (describing the escalation of residential real estate prices throughout the Washington, D.C. region). Van Dyne and Hearn expound on the economic factors driving the real-estate market:

The foundation of the real-estate boom is a strong economy, both at the national and local levels. The region has added thousands of jobs over the past few years, especially in the high-tech sector, which has led to growth in population, rising incomes, and a burst of consumer confidence. Real-estate agents say they are amazed at how much money Washingtonians seem to have—and at how many young high-tech employees buy first homes in the \$300,000 to \$400,000 range.

Some of this money has come from stock options, but other factors have been at work. Mortgage rates were relatively low throughout the late 1990s, though they have begun to creep up. And some baby boomers have begun to inherit lots of money from prosperous parents.

The demand for houses generated by so many buyers is coupled with a lack of supply—with the inventory of homes for sale running lower than at any time in Washington's history.

*Id.*

are part of a complex process that is causing the transformation of urban space to suit their social needs and consumption tastes. Urban places that were once racialized as Black and classified as poor, dangerous, and off-limits to anyone of affluence and with choices, have taken on new meaning today. These places are now suppliers of housing that is relatively cheap, centrally located, and often architecturally rich. They are open territories for investment speculators, redevelopment agencies, and affluent professionals who reject the suburban form of living, but demand, and can easily pay for, luxury residential, commercial retail, entertainment, and other intangible spatial amenities.

As the contrasting introductory quotations remind us, the desire to be in the city means different things and has different implications for different people. For some, the newly restructured city is the fulfillment of the post-modern American dream: a post-industrial, culturally hybrid aesthetic that covets urban life while implicitly rejecting some of its "grittier" aspects (read: diversity and certain inconveniences). For others, the restructuring signals a welcome change in community character from declining and impoverished to popular and affluent. All recognize that affluent people bring business and government attention and improved services to their neighborhoods. On the other hand, the changes are also viewed with a sense of foreboding as residents who have experienced displacement or understand that rising rents will force them out and change the complexion of the neighborhood hold their breath or worry. Worse, the changes signal ominously that the residents' departure from the community is imminent.

Notwithstanding the great changes taking place within today's cities, the public reaction to those changes is localized and subdued. In order to detect the controversy caused by the changes, you might have to attend a community meeting to hear plaintive, unanswerable complaints about rising rents. You might also ride a bus and strike up a conversation with passengers who are taking public transportation, not for convenience, but because they must; listen as they speak in resigned wonderment about the changes taking place. Better yet, cruise neighborhoods on foot in search of moving vans or cars loaded with personal belongings parked outside of dilapidated buildings about to be renovated to catch the former residents on the way out and strike up a conversation about why they are moving.<sup>10</sup>

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<sup>10</sup> See generally Hackworth, *supra* note 3, at 839 n.1 ("[T]here is frequently a substantial lag time between when the subordinate class group gives way to more affluent users. . . . [T]he displacement or replacement is often neither direct nor immediate, but the process remains 'gentrification' because the space is being transformed for more affluent users."). For a more anecdotal understanding of the unexpressed sentiment and a description of the 2004 exhibition on

Controversy, to the extent that it becomes publicly visible and covered by the media, tends to center around government-assisted redevelopment that involves exercising the power of eminent domain to facilitate particular development projects. The nature of eminent domain is such that the individual property owner (whether homeowner or small business owner) who resists moving becomes an embodiment of the status quo in the face of structural change and often an inadvertent champion of community interests.<sup>11</sup>

If we look a bit more closely at the process, however, it becomes more apparent that the affluent professional's "discovery" of the city has not been by accident or merely created by twenty-first century consumption tastes. These enormous changes are not merely the result of the invisible hand of the market rearranging city neighborhoods and driving up the price of entry for remaining property. The current market for inner city space coincides quite evenly with a decades-old policy of cities trying to attract the upper-middle class to the city. Arguably, the discovery has been partially fostered and guided by the deliberate intervention of state and local governments through an explicit and pointed policy to attract affluent residents. This intervention by state and local governments has taken many forms: incentives to urban professionals to locate in certain neighborhoods such as first-time homebuyers programs, settlement cost forgiveness programs, other incentive grants and loans for purchasing residential real estate within the city, and favorable re-zonings of industrial property to facilitate residential occupancy.<sup>12</sup> The role that local gov-

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gentrification and architectural design at the Studio Museum in Harlem, see HARLEMWORLD: METROPOLIS AS METAPHOR (Thelma Golden ed., 2004).

<sup>11</sup> Given the broadness of governmental discretion to exercise power for purposes of development, the resulting "improvement" in community economic conditions heralds other changes that may not always be greeted with open arms and is instead often a source of valid concern and sometimes heated controversy. Increasingly, raised voices argue that the use of eminent domain for economic development is improper abuse and a violation of property rights. Therefore, the champion of community interests has been the individual property owner. See, e.g., J.A. Lobbia, *Property Rights and Wrongs: East Harlem Suit Challenges Eminent Domain*, VILLAGE VOICE, Dec. 20–26, 2000, at 20 (reporting an account of several property owners fighting eminent domain implementation).

<sup>12</sup> See BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 274 (1989) (analyzing the role played by local governments to encourage upper-middle class residential occupancy in various cities); see also Baltimore Development Corporation, [http://www.baltimoredevelopment.com/busassist\\_taxcredits.html](http://www.baltimoredevelopment.com/busassist_taxcredits.html) (last visited Oct. 6, 2005) (describing real estate tax credits given by Baltimore to businesses); City of Boston, [http://www.cityofboston.gov/dnd/A\\_Historic\\_HomeWorksDND\\_intro.asp](http://www.cityofboston.gov/dnd/A_Historic_HomeWorksDND_intro.asp) (last visited Sept. 5, 2005) (discussing grants provided by Boston in order to help homeowners make historically appropriate exterior improvements); City of Boston, [http://www.cityofboston.gov/dnd/OBD/G\\_What\\_we\\_offer.asp](http://www.cityofboston.gov/dnd/OBD/G_What_we_offer.asp) (last visited Oct. 6, 2005) (describing Boston Neighborhood Development programs including "Home Buyer Assistance," which gives first-time home buyers financial and educational assistance and "Real Estate Services," which conveys foreclosed properties for private use); City of Chicago.org, <http://egov.cityofchicago.org/city/webportal/>

ernment plays in the redevelopment process is also quite significant. Cities aid in redevelopment by entering into public-private partnerships to write down land acquisition and development costs by using regulatory freezes and eminent domain power, and by providing a number of business incentives to companies willing to relocate and participate in residential and commercial (entertainment and retail) development projects. This is done with geographically targeted commercial tax incentives such as enterprise zones, creative financing techniques such as tax increment financing, favorable taxing policies such as under-assessment of commercial property values, or even the waiver of taxes through nominal payments-in-lieu-of-taxes (PILOTS).<sup>13</sup> However extensive the programs, the attendant “restructuring of urban space” through class transformation has enormous social and legal policy implications.

In Section I of this Article, I examine the process of urban spatial restructuring and its emphasis on the upper middle class or the affluent. Urban space to meet the needs of these newcomers to the city is in relatively short supply and is being created in places that are currently occupied by low-income citizens, often Black and Latino, who put up with city conditions because they have had no other choice. Thus the groups vying for space in the city have differing needs, competing, yet potentially interlocking, interests, and starkly contrasting abilities to purchase their way through the expensive process of real estate development. In Section II of this Article I argue that in light of these disparate needs and interests, there are limits, by virtue of constitutional obligations of the police power, to local government’s ability to facilitate redevelopment projects that deliberately aim to accomplish class transformation and exclusively reconfigure the inner city for the affluent.

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home/do (last visited Oct. 6, 2005) (showing various programs offered by Chicago to help residents and businesses); City of Detroit Empowerment ZonePlanning & Development Department Neighborhood Support, [http://www.detez.com/faq\\_generalci.detroit.mi.us/plandev/neighborhoodSupport/default.htm](http://www.detez.com/faq_generalci.detroit.mi.us/plandev/neighborhoodSupport/default.htm) (last visited Oct. 6, 2005) (describing programs offered by Detroit to improve the quality of life for local neighborhoods); Metro Atlanta Chamber of Commerce, <http://www.metroatlantachamber.com/macoc/business/taxes.shtml> (last visited Oct. 6, 2005) (discussing incentives offered by Atlanta to encourage business development and growth); World Business Chicago, <http://www.worldbusinesschicago.com/index.asp?> (follow “Financial Incentives” hyperlink) (last visited Sept. 2, 2005) (describing incentives provided by Chicago to help businesses expand or relocate).

<sup>13</sup> FRIEDEN & SAGALYN, *supra* note 12, at 156, 297 (describing different financing techniques employed by cities to encourage business growth and development).

## I. UNDERSTANDING THE DYNAMICS OF URBAN SPATIAL RESTRUCTURING

A. *The Quest for the Upper-Middle Class Resident*

As is well understood today, twentieth century population growth in the United States took place primarily in the suburbs, in part because the middle and upper-middle classes left the central cities or avoided living in such cities entirely.<sup>14</sup> Central cities were adversely affected, and in many cases, devastated by the decline of their key economic base: manufacturing.<sup>15</sup> The decline of manufacturing strongly impacted cities because they did not have other production-oriented options for generating tax revenue.<sup>16</sup> Also, as a significant portion of their working and productive tax base continued to depart, cities were correspondingly decimated by the migration of their middle-income population to the suburbs.<sup>17</sup> This migration took place on a massive scale for a number of reasons: the rise of the automobile, which made living close to work unnecessary; changes in housing tastes; the federal government's significant role in facilitating these preferences through policies like federal highway development, which provided access to mass produced housing on cheap suburban land; and federal mortgage insurance, which made cheap financing available.<sup>18</sup> The migration was called "White flight" because a number of policies and practices converged to prevent Black Americans

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<sup>14</sup> See generally JOE R. FEAGIN & ROBERT PARKER, *BUILDING AMERICAN CITIES: THE URBAN REAL ESTATE GAME* (2d ed. 1990) (examining various factors contributing to suburban population growth); ROBERT HALPERN, *REBUILDING THE INNER CITY* (1995) (discussing the historical use of segregation and distancing as a way to deal with poverty); STEPHAN NATHAN HAYMES, *RACE, CULTURE, AND THE CITY: A PEDAGOGY FOR BLACK URBAN STRUGGLE* (1995) (arguing that urban space was used to segregate low-income Blacks from the White suburban middle class); MICHAEL H. SCHILL & RICHARD P. NATHAN, *REVITALIZING AMERICA'S CITIES: NEIGHBORHOOD REINVESTMENT AND DISPLACEMENT* (1983) (examining the effects of gentrification and whether it offsets the flight of the middle class to the suburbs); NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* (1996) (portraying gentrification in light of the dearth of affluent city residents in the 1980's); GREGORY D. SQUIRES, *CAPITAL AND COMMUNITIES IN BLACK AND WHITE* (1994) (exploring the role of race in urban and suburban housing development); SEAN ZIELENBACH, *THE ART OF REVITALIZATION: IMPROVING CONDITIONS IN DISTRESSED INNER-CITY NEIGHBORHOODS* (2000) (discussing the causes of decline and revitalization in low-income neighborhoods).

<sup>15</sup> See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1996) (discussing the impact of the decline of manufacturing on cities and Black male unemployment).

<sup>16</sup> See generally Don Sherman Grant II & Michael Wallace, *The Political Economy of Manufacturing Growth and Decline Across the American States, 1970-1985*, 73 *SOCIAL FORCES* 33 (Sept. 1994) (tracing decline of manufacturing and impact on state economic development practices).

<sup>17</sup> See generally DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993) (discussing the role of urban public policies in encouraging the growth of the middle class suburban population).

<sup>18</sup> See JACKSON, *supra* note 5 *passim* (analyzing various factors that contributed to the middle class population shift away from cities and into the suburbs).



from taking part in the suburban exodus.<sup>19</sup> As the middle class in the cities dwindled, the remaining population was increasingly poor and increasingly Black and Brown, along with an affluent segment able to purchase its way out of a number of inner city problems with private security; doormen guarded buildings; and other exclusive work, home, and recreational enclaves.<sup>20</sup>

The result is a “Catch-22.” Fiscally, the loss of middle and upper-income households affected central cities negatively by decreasing the demand for urban land, reducing land values, and diminishing central cities’ tax bases.<sup>21</sup> Ironically, the decrease in land values in cities has been accompanied by higher local taxes which are sharply contrasted by neighboring suburban localities that have higher property values, lower social service needs, and lower tax rates that generate higher revenues.<sup>22</sup> The loss of a middle class population is believed to have had both a fiscal impact and a social one as well.<sup>23</sup> The

<sup>19</sup> See generally Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2002) (reviewing STEPHEN GRANT MAYER, *AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* (2000) (discussing housing discrimination practices against minorities which included lack of availability of mortgage financing to Blacks because of federal policies using racial criteria in appraisal standards, housing discrimination by Whites against Blacks, and overtly hostile and threatening behavior towards Blacks that sought to move into White suburban neighborhoods)). But see Robert A. Beauregard, *Federal Policy and Postwar Urban Decline: A Case of Government Complicity?*, 12 HOUSING POL’Y DEBATE 129 *passim* (2001) (challenging the federal policy blame analysis).

<sup>20</sup> See generally GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999) (discussing privatization in both society and public services).

<sup>21</sup> The resulting woes experienced by central cities are well-known and amply documented. See generally DAVID RUSK, *CITIES WITHOUT SUBURBS* (2d ed. 1995) (discussing the problems faced by cities where the population of the affluent middle class has dwindled). For a current example, see Jodi Wilgoren, *Shrinking, Detroit Faces Fiscal Nightmare*, N.Y. TIMES, Feb. 2, 2005, at A12 (describing the effects of the dwindling middle class in Detroit).

<sup>22</sup> See, e.g., *Md. State Bd. of Educ. v. Bradford*, 875 A.2d 703, 709–10 (Md. 2005) (discussing consent decree on the constitutional inadequacy of state educational funding for Baltimore school children); *Hull v. Albrecht*, 960 P.2d 634, 637–38 (Ariz. 1998) (rejecting a school financing system as unconstitutional because it would cause substantial disparities between high property value and low property value school districts); *Brigham v. State*, 692 A.2d 384, 396 (Vt. 1997) (rejecting a state education aid program as unconstitutional because it would require property-poor districts to tax at higher rates to achieve minimum standards); *Sheff v. O’Neill*, 678 A.2d 1267, 1289 (Conn. 1995) (finding that the state has a constitutional obligation to alleviate the severe racial and ethnic disparities among school districts and to provide equal educational opportunity); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989) (holding an educational funding system unconstitutional because children from poorer school districts are being under-funded).

<sup>23</sup> See Roberto G. Quercia & George C. Galster, *Threshold Effects and the Expected Benefits of Attracting Middle-Income Households to the Central City*, 8 HOUSING POL’Y DEBATE 409, 409 (1997) (“[I]t is likely that the number of middle-income households in a given area must exceed a certain threshold for significant benefits to accrue.”). The term “middle income” or “middle class” is a catch-all term that means only those who are not impoverished. See *id.* at 410 n.2 (defining “middle income” as a “generic term” that encompasses “non-poverty-level households, especially those that are nonelderly and have one or more members employed”).

belief is that the middle class provides a stable social group that can be observed by the poor as a model of hard work, property maintenance, and social cohesion.<sup>24</sup> With this middle layer gone, it is believed that there is no stable class for the poor to aspire to or upon which to model themselves.<sup>25</sup> The flip side of this view has been to characterize and stereotype the poor as being pathological, morally deficient, and generally unable to aspire to mainstream values.<sup>26</sup>

In light of these facts, cities have come to a common conclusion that they need residents with financial resources. Accordingly, urban development policies have sought to draw educated, preferably affluent professionals back to the city. Beginning in the late 1960's, cities endeavored to do so by providing a range of housing and educational benefits, as well as social and cultural amenities.<sup>27</sup> This upper-middle class attraction strategy is mainly based on practical logic, although its success as social policy is largely untested or unproven. One would imagine that if such a social policy was researched and tested, one of the articulated goals would be to restore a financially able, law-abiding, and socially stable population to the city. James Buchanan, an economist, attempted to explicate a more analytical basis for this position and argued that it was actually in the best interest of all city residents to retain the high income resident.<sup>28</sup> He advocates that cities openly engage in strategic fiscal decision-making and deliberately adjust fiscal policy to induce "potentially-mobile central-city taxpayers who contribute to net fiscal surplus" to remain in the sharing community.<sup>29</sup> In other words, cities should pay attention to supplying "goods and services that potential suburbanites might find difficult or very costly to secure independently. . . . [such as] art museums, symphony orchestras, theaters, and parks."<sup>30</sup> In addition, he also recommends making "differential adjustments on the consumption services side,"<sup>31</sup> occurring in "special police details in high-income areas of cities, in better parks in some areas than in others, in better-equipped and better-staffed schools, etc."<sup>32</sup> Buchanan acknowledges that this affluent attraction strategy might "seem harmful to low-income consumers,"<sup>33</sup> but he argues that the issue must be seen in a larger strate-

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<sup>24</sup> *Id.* at 411.

<sup>25</sup> See MITCHELL DUNEIER, *SLIM'S TABLE: RACE, RESPECTABILITY, AND MASCULINITY* 130 (1992) (discussing the prevalence of the misconception "that without middle-class and even upper working-class respectability the [B]lack community is devoid of its moral base").

<sup>26</sup> *Id.* at 134.

<sup>27</sup> Quercia & Galster, *supra* note 23, at 409.

<sup>28</sup> James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 *PUB. CHOICE* 1, 13-16 (1971).

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 13.

gic context rather than focusing on irrelevant considerations of “the ‘deservingness’ of the high-income or the low-income groups, or with ‘justice’ or ‘equity’ as an abstract ethical norm.”<sup>34</sup> Cities are still behaving in the interests of low and middle income constituents because “these policies, by preserving the fiscal base of the community, may benefit the very groups that seem initially to be harmed.”<sup>35</sup>

Prevailing urban policies and practices of seeking to attract the upper-middle class not only reflect Buchanan’s theories but also seem to make sense. Affluence-based attraction strategies improve the central city’s fiscal condition by increasing the number of those who contribute more to the fiscal tax base and presumably drain less in services. Also, the middle and upper-middle class presence provides indirect benefits, including services that respond to their presence.<sup>36</sup> When the middle and upper-middle classes are present, retail services increase and neighborhood character changes to suit their needs, thereby creating an appealing city that is a pleasant place to live. Lastly, put simply, the more affluent resident is considered stable and the affluent attraction strategy is intended to directly reduce the socio-economic isolation of low-income inner city households.<sup>37</sup> The assumption is that middle and upper-middle class residents offer a needed social stratum within the city for low-income persons to rise to and a place within the city to relocate once their financial circumstances improve.<sup>38</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 14.

<sup>36</sup> See Quercia & Galster, *supra* note 23, at 412–17 (discussing the expected fiscal and social benefits of revitalization efforts).

<sup>37</sup> See DAVID P. VARADY & JEFFREY A. RAFFEL, *SELLING CITIES: ATTRACTING HOMEBUYERS THROUGH SCHOOLS AND HOUSING PROGRAMS* 3–13 (1995) (contending that cities need to interest the middle class to move to urban areas in order to encourage redevelopment and address the contemporary ills of the city). Ironically, the search for the upper-middle class is taking place at a time when remaining in the middle class is becoming more difficult. See NANCEY GREEN LEIGH, *STEMMING MIDDLE-CLASS DECLINE: THE CHALLENGES TO ECONOMIC DEVELOPMENT PLANNING* 14–15, 38 (1994) (attributing a declining middle class in the United States partly to the widening gap between part-time and full-time workers and the declining attainability of home ownership). Leigh notes that in the late 1960’s, a middle-income worker could afford the median single-family home price of approximately \$20,000. *Id.* at 36. By the late 1980’s, a middle-income worker could afford a home for \$70,600, but median home prices had climbed to \$85,600. *Id.* Therefore, seeking to attract a middle class may ultimately be less important than seeking to create a middle class.

<sup>38</sup> See Quercia & Galster, *supra* note 23, at 432 (summarizing the social, fiscal, and interactional reasons why middle class presence is beneficial and stating that dispersal is optimal because concentration in exclusive neighborhoods is best for retail, but does not contribute to interactional benefits for the poor). *But see* Saskia Sassen, *The Global City: Strategic Site/New Frontier*, SEMINAR (2001), <http://www.india-seminar.com/2001/503/503%20saskia%20sassen.htm> (arguing that today’s dualized economy most city residents into low wage service jobs with no hope of aspiring to the high wage, knowledge-based strata of jobs).

Therefore, the quest for the upper-middle class resident has a sensible redistributive purpose, a quality of life appeal, as well as a social aspirational logic. This article examines whether those aspirational goals can truly be met with the urban restructuring process conducted as it is today. Are these goals fulfilled when implementation of the affluent attraction policy is actualized; when the reality of urban restructuring takes place on the ground; when it leads to racialized class transformation within the neighborhood; when individuals are priced out of a neighborhood or even out of urban retail participation or urban entertainment? The allocation of opportunity to maintain a decent quality of life as well as partake in city life are issues that have not received enough attention. The next section explores the urban restructuring from the demand side of the equation: why do so many people suddenly want to be in the city?

### B. Professional Attraction to the City

Quite fortuitously, city living has become attractive to affluent professionals in ways not thought possible before. It used to go without saying that inner city living was shunned by all who had a choice of where to live. The notion of the inner city is more than geographical location: it is a combination of location, housing type, and racial and class makeup of the residents. The boundary between “living in the city” and living in the “inner city” was largely policed by a rigid line of demarcation crossed only by necessity or by mistake.<sup>39</sup> As the introduction described, that demarcation line has shifted dramatically. Areas once considered forbidden and to be avoided are being traversed freely as new residents, mainly White and upper-middle class (but in select areas, a good number Black) are dramatically shifting the demarcation line. When that line is pushed back, the neighborhood these newcomers enter is transformed in a number of ways, the most significant of which is that the inner city stigma morphs into chic, affordable, hot and attractive living in the city.<sup>40</sup> As a conse-

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<sup>39</sup> Tom Wolfe’s satirical novel, *The Bonfire of the Vanities*, provides a humorous illustration of the dire consequences of crossing the inner city boundary by mistake in the 1980s. The lead character is a Wall Street banker (a master of the universe) whose life was altered forever by his mistaken crossing into the forbidden territory of the South Bronx. TOM WOLFE, *THE BONFIRE OF THE VANITIES* (Farrar, Straus, and Giroux 1987). The story was an astute parody of the geography of race, poverty, and affluence in 1980’s New York City. As someone who grew up on the wrong side of that demarcation line, in the Bronx, I found the book uproariously yet painfully funny. I knew, from being ordered out of taxi cabs in Manhattan once drivers learned of my destination, that the line of demarcation was real. There was no yellow cab service to the forbidden zone of the Bronx.

<sup>40</sup> See, e.g., Jill J. McCluskey & Gordon C. Rausser, *Stigmatized Asset Value: Is it Temporary or Long-Term?*, 85(2) REV. OF ECON. & STAT. 276 (2003) (acknowledging, indirectly, the concept

quence, settled expectations of community character, the significance of cultural make-up, safety, and desirability are changing radically in many instances. For example, Harlem, New York and other historically Black neighborhoods that occupy an important and visible place in the Black psyche, are in the process of being transformed into affluent predominately White enclaves.

First, how did space that was formerly the antithesis of desirability become sought after? The dominant vision of the American middle class dream was a reaction to the city: a house in the suburbs with a two or three car garage, plenty of grass for the children to play on, a nurturing space for the family, and safety from the crime and grime of the city. Cities could not meet what the middle class resident was looking for because the middle class was actively looking not to be in the city.<sup>41</sup>

The success of the affluent attraction strategy and the recent “re-discovery” of the city by the affluent professional has come about through a confluence of social and economic factors. Globalization’s re-ordering of economies away from manufacturing and towards service industries has dualized the economy into groups of those with high salaries and those without<sup>42</sup> while also creating and indirectly financing a set of twenty-first century consumption tastes never known before on such a massive scale. A broad class of people with ample financial resources, expensive tastes, and high demands for convenient, gourmet, and high-end services and products is creating an unprecedented pressure to restructure urban space to suit their needs and desires.

Demographic shifts have also created critical masses of new social groups who find that the city meets their needs. The number of affluent adults without young children has increased, and they are often drawn to centrally-located, walkable and convenient places to live.<sup>43</sup> Richard Florida has described this group of professionals as a

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that certain properties have a stigma beyond that justified by the actual problems associated with the property).

<sup>41</sup> Some observe, however, that urban sprawl is not necessarily a reflection of individual choice or preference, but instead has shaped and limited people’s options for appropriate selection and variety of housing choices. See Lee Anne Fennell, Remarks on Urban Sprawl, Ass’n of Am. Law Sch. Real Estate Transactions Panel (Jan. 4, 2004) (remarks not transcribed) (discussing urban growth in Atlanta).

<sup>42</sup> See Sassen, *supra* note 38 (noting that the concentration of low wage and high wage jobs in certain service industries is fueled by the high incidence of part-time jobs); see also DAVID SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (Knopf 2004) (examining the “forgotten America” in which citizens live consistently close to poverty despite a willingness to work hard and where a car breakdown or a brief illness can lead to an irreversible downward financial spiral).

<sup>43</sup> See generally RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* (2002) (identifying this group

new socio-economic class, the “Creative Class.”<sup>44</sup> These are “people who are paid principally to do creative work for a living . . . the scientists, engineers, artists, musicians, designers and knowledge-based professionals.”<sup>45</sup> According to Florida, this “Creative Class” is socially dominant because they encompass nearly a third of the American workforce and because “[t]he wealth generated by the creative sector is astounding: It accounts for nearly half all wage and salary income in the United States, \$1.7 trillion dollars, as much as the manufacturing and service sectors combined.”<sup>46</sup>

Because this class tends to be affluent and delays marriage longer than any other group, there has been an increase in the number of single people who can afford to purchase residences on their own.<sup>47</sup> Also, the “Creative Class” values urban space because they need face-to-face interactions for social fulfillment.<sup>48</sup>

Therefore, the twenty-first century is witnessing a new upper-middle class urban American dream: a townhouse in the city accessible to transportation and free from long commutes by car.<sup>49</sup> A smaller yard is better, because less maintenance is required. People who strive for the new urban American dream seek out funky eclectic places to eat in order to consume, not just the cuisine, but the experience of seeing and being seen in places that demonstrate that the diner is funky and eclectic, too. For those striving for the new urban American dream, retail shopping opportunities offer, not merely bargains, but status and value through one-of-a-kind or limited edition products that bestow on the purchaser a special distinction, demonstrating one’s own good taste and privilege. Walkable, centrally located neighborhoods allow people to meet and mingle, to seek out entertainment through experience and culture by association amid the nostalgia of old architecture that conveys a sense of place and history. By contrast, life in the suburbs can mean social iso-

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of professionals as part of a new “Creative Class” that has risen to economic and social dominance in the late twentieth century).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at iii.

<sup>46</sup> *Id.* at xiv.

<sup>47</sup> See, e.g., CHESTER HARTMAN & SARAH CARNOCHAN, CITY FOR SALE: THE TRANSFORMATION OF SAN FRANCISCO 325, 328 (2002) (describing the impact of affluent professionals on the San Francisco housing market).

<sup>48</sup> See Florida, *supra* note 43, at 182–87 (discussing the importance of street-level culture to members of the “Creative Class”).

<sup>49</sup> See John D. Kasarda et al., *Central-City and Suburban Migration Patterns: Is a Turnaround on the Horizon?*, 8 HOUSING POL’Y DEBATE 307, 320 (1997) (“These amenities include a rich diversity of population groups and lifestyles, historically significant residential architecture, extensive nighttime entertainment options, ethnic restaurants, offbeat shops and services, and quick commutes to downtown work locations.”).

lation for both singles and couples seeking social connection and interaction.

This new urban dream is not only for the rising number of “Creative Classers” who do not have children. If the children arrive, there may be a new charter school forming or the children may still be young enough that today, at least, schools are not an issue. Or perhaps private school is an affordable option. If not, at that point, the urban professional parent may concede to the suburban dream and move to an area with a better school system. Alternatively, the new city residents may already be older, former suburbanites whose children are grown and who realize there is no advantage to enduring the comparative isolation and long travel distances in the suburbs. They too value the ability to walk to entertainment venues, restaurants, and cultural activities as an important means of enjoying their later years.<sup>50</sup> With this growing recognition of the value of compact urban space, where are all these new willing consumers of urban space supposed to go?

### C. *Creating the Affluent Neighborhood:*<sup>51</sup> *The Public/Private Interplay of Redevelopment*<sup>52</sup>

The answer is that space suitable to the needs of newcomers to the cities has to be created, and real estate markets and cities have rushed to facilitate that process.<sup>53</sup> Accordingly, urban redevelopment con-

<sup>50</sup> See Robert E. Lang et al., *Targeting the Suburban Urbanites: Marketing Central City Housing*, 8 HOUSING POL'Y DEBATE 437, 442 (1997) (“Changes in lifestyle and life cycle, including later marriages, fewer children per family, gay couples, childless marriages, nonmarried couples and singles, and more ‘empty-nest’ years for couples with grown children, have made so-called non-traditional childless households the norm.”); see also Dora L. Costa & Matthew E. Kahn, *Power Couples: Changes in the Locational Choice of the College Educated, 1940–1990*, 115 Q.J. OF ECON. 1287, 1294–95 (2000) (explaining that the rise of the dual career household has led to a co-location problem; college educated couples are increasingly concentrated in large metropolitan areas because skilled professionals are increasingly coupled with equally skilled spouses and tend to favor larger cities).

<sup>51</sup> See Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 773 (1993) (“The thoroughness with which urban and suburban life has been segregated along economic, social, functional, geographic, cultural, and racial lines has been partly a result of pervasive urban planning. The trend toward segregation in postwar American life took many forms. . . . During this period, income and geography became rough proxies for race.”).

<sup>52</sup> See Wylie & Hammell, *supra* note 4, at 712 n.2 (comparing the contemporary discourse in the *New York Times* which avoids the term “gentrification” for less controversial terms, such as “housing market recovery” or “commercial and retail revitalization,” with the approach in the 1980’s when open conflicts on the Lower East Side in 1988 involved “placards [which] proclaimed, ‘Gentrification is class war’”).

<sup>53</sup> See EILEEN ZEITZ, *PRIVATE URBAN RENEWAL: A DIFFERENT RESIDENTIAL TREND* 21–22 (1979) (describing gentrification as a form of privately-sponsored and executed urban renewal).

tinues to emphasize the needs and interests of the upper-income household. State and local governments have deliberately intervened in development to attract the affluent to the cities. Their strategies tend to involve a twin approach of economic development strategies and consumption strategies, which often overlap. Economic development is a major project of central cities whose quest is to attract capital through incentives to locate offices, headquarters, and to a lesser extent, plants within the inner city.<sup>54</sup> The other approach has been a consumption strategy: tailor land use and development to meet the consumption tastes of people with money to spend by building entertainment venues, convention centers, festival marketplaces, ethnic and historical festivals, sports stadiums, hotels, restaurants, shopping, and bars (both coffee and alcohol).<sup>55</sup> Companies seeking to relocate are courted and greeted with open arms by cities.<sup>56</sup> Quasi-private economic development agencies work with private businesses and investors to facilitate retail and residential development projects.<sup>57</sup> Individual incentives are often used to encourage urban professionals to relocate in certain neighborhoods.<sup>58</sup> Cities also allocate their federal Community Development Block Grant (CDBG) and Home Investments Partnership Program (HOME) funding away from neighborhood-based community development activities to support larger redevelopment projects.<sup>59</sup> The community development movement has also played a key part in urban restructuring, notwithstanding the movement's goal of affordable housing. Community devel-

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<sup>54</sup> See, e.g., Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 393 (1996) (discussing the pressure to engage in economic development through business incentive competition).

<sup>55</sup> See DAVID LEY, *THE NEW MIDDLE CLASS AND THE REMAKING OF THE CENTRAL CITY* 298–349 (1996) (describing the restructuring of Canadian and European cities for the affluent professional).

<sup>56</sup> See Bob Jessop, et al., *Retooling the Machine: Economic Crisis, State Restructuring, and Urban Politics*, in *THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES TWO DECADES LATER* 141 (Andrew Jonas & David Wilson eds., 1999) (“Nowadays most places, it seems, have their own booster committees, complex networks of public-private ‘partnerships,’ and entrepreneurial urban strategies.”).

<sup>57</sup> See Jerry Mitchell, *Policy Functions and Issues for Public Authorities*, in *PUBLIC AUTHORITIES AND PUBLIC POLICY: THE BUSINESS OF GOVERNMENT* 3–4 (Jerry Mitchell ed., 1992) (listing economic development and housing as two of the ten basic types of public authority).

<sup>58</sup> See, e.g., David P. Varady et al., *Attracting Middle-Income Families in the HOPE VI Public Housing Revitalization Program*, 27 J. URB. AFF. 149, 156 (2005) (describing Maryland’s “Live Near Your Work Program” which provides homebuyers incentive grants in certain neighborhoods targeted for revitalization).

<sup>59</sup> See Wily & Hammell, *supra* note 4, at 732 (discussing HOME and CDBG funding); William H. Simon, *The Community Economic Development Movement*, 2002 WISC. L. REV. 377, 396 (2002) (describing the HOME program as making “grants available to state and local governments [that] can be put to a broad range of uses, such as increasing home ownership and creating affordable housing options for low income people”); Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 880–81 (2000) (discussing the CDBG program).



opment corporations (CDCs) have focused on stabilizing neighborhoods by building affordable housing for both low and middle income families.<sup>60</sup> Depending on the location, contours, and dimensions of the land market, CDCs have often unwittingly contributed to the class transformation process by fixing up lower income neighborhoods only to be surprised by their unexpected success in creating a neighborhood desirable to people who threaten to price out the lower-income residents.<sup>61</sup>

### 1. *Locating Suitable Land: The Spillover Benefits of Racial and Economic Segregation*

While demographic trends have made city living more desirable, cities have continued to work to attract upper-middle class residents through promotional campaigns and general boosterism.<sup>62</sup> The most crucial mechanism to attract the middle class resident is to create spaces that appeal to affluent tastes. This is done through privately and publicly sponsored redevelopment projects, which reconfigure existing land uses to create commercial, retail, and residential amenities that are attractive to the upper-middle class.<sup>63</sup>

Real estate development requires acquisition of suitable sites for development.<sup>64</sup> The simple logic of real estate investment is to locate

<sup>60</sup> See Audrey G. McFarlane, *Race, Space and Place: The Geography of Economic Development* 36 SAN DIEGO L. REV. 295, 304–06 (1999) (distinguishing economic development from community development).

<sup>61</sup> See generally Brent C. Smith, *The Impact of Community Development Corporations on Housing Markets*, 39 URB. AFF. REV. 181 (2003) (finding a positive relationship between CDC activity and housing prices in Indianapolis neighborhood); Gordon Oliver, *Gentrification Threatens Community Development Groups*, 66 PLANNING 29, 29 (2000) (“One nonprofit housing group is on the brink of financial collapse and three others are struggling to reorganize themselves in Portland, Oregon neighborhoods where rapid gentrification has replaced blight as a housing problem for low-income people.”). But see Jeanne Goldie Gura, *Preserving Affordable Homeownership Opportunities in Rapidly Escalating Real Estate Markets*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 78, 83–85 (2001) (exploring the community land trust concept as an attempt to ameliorate this problem); Deliah D. Lawrence, *Can Communities Effectively Fight Displacement Caused by Gentrification?*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 357, 360–68 (2002) (laying out possible strategies to preserve neighborhoods).

<sup>62</sup> See, e.g., Lang et al., *supra* note 50, at 438 (“Given the right marketing approach, central-city housing can perhaps be packaged as a commodity itself.”).

<sup>63</sup> FRIEDEN & SAGALYN, *supra* note 12, at 39. By contrast, the newer suburbs do not focus as much on attraction, but merely on responding to the continued exodus outward from the central city in the continuing low density settlement pattern. See generally DENISE DIPASQUALE & WILLIAM C. WHEATON, *URBAN ECONOMICS AND REAL ESTATE MARKETS* (1995) (providing a detailed explanation of urban real estate markets).

<sup>64</sup> See, e.g., Jane Adler, *Everyone Goes . . . Downtown*, 64 J. PROP. MGMT. 76, 76–77 (1999) (examining the desirability and difficulties of infill development and recognizing that demand for such projects exceeds supply).

land with an attractive price-to-earnings ratio.<sup>65</sup> Ideally, such land should be desirably located, cheap, and able to sustain construction. Oddly enough, these goals are not as contradictory as they might seem. Because of the history of disinvestment and loss of middle class residents, cities have an abundance of desirably located residential neighborhoods and commercial districts with undervalued land. The disadvantages of concentrated poverty and declining tax revenues match up with the ironic advantage of discounting the premium that such desirably located land should command, making it irresistibly inexpensive.<sup>66</sup>

Typically this devalued land is in Black and Latino inner city neighborhoods, and to a certain extent, in working class White neighborhoods. The difference between the two is that there may be a higher percentage of owner-occupied housing in the White working class neighborhoods and more rental properties in Black and Latino neighborhoods.<sup>67</sup>

The evidence overwhelmingly shows that the land most vulnerable to upper-middle class transformation has been subject to inequitable, discriminatory, and subordinating treatment. Recall that as the White middle class left the cities in search of the suburban utopia,<sup>68</sup> Blacks were shut out by public policies that endorsed and supported private racism. For example, Levittown, the most famous middle class suburban development, was a Whites-only development.<sup>69</sup> Even with the discontinuance of federal policy sanctioning such discrimination and the outlawing of discrimination in housing transactions, private discrimination continued. Bank and mortgage red-lining had

<sup>65</sup> See, e.g., Stephane Fitch, *The Gentrification Play: Lovely Brownstone in a Rough Part of Town: Is it a Genuine Bargain? To Answer That Question, Think About P/E Ratios*, FORBES, Jan. 8, 2001, at 250 (discussing the risks of buying into an upwardly appreciating neighborhood).

<sup>66</sup> See Wyly & Hammell, *supra* note 4, at 719 (describing transformation of urban neighborhoods); Miriam Axel-Lute, *Tales of Three Cities: The Trickiest Part of Dealing with Gentrification May Be Deciding When to Start*, SHELTERFORCE ONLINE, May/June 2001, <http://www.nhi.org/online/issues/117/ThreeCities.html> (noting the dilemma of seeking investment in abandoned neighborhoods that will ultimately force the current residents out); Kalima Rose, *Beyond Gentrification: Tools for Equitable Development*, SHELTERFORCE ONLINE, May/June 2001, <http://www.nhi.org/online/issues/117/Rose.html> (detailing how the renovation of one Brooklyn neighborhood is leading to greater evictions).

<sup>67</sup> See generally WILLIAM GRIGSBY ET AL., *The Dynamics of Neighborhood Change and Decline*, in 28 PROGRESS IN PLANNING (D. DIAMOND & J.B. MCLOUGHLIN EDS., 1987) (discussing the causes of neighborhood succession); James T. Little, *The Dynamics of Neighborhood Change*, in A DECENT HOME AND ENVIRONMENT: HOUSING URBAN AMERICA 63 (Donald Phares ed., 1977) (tracing the pattern of neighborhood transformation).

<sup>68</sup> See ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA 145-48* (1987) (arguing that the American middle class identity depended on or came to be formed around the house and the lawn).

<sup>69</sup> See MIKE E. MILES ET AL., *REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS* 153 (3d ed. 2000) (noting that the suburban planned community excluded minorities from purchasing homes).

a devastating impact. Banks' refusal to lend funds for mortgages or even second mortgages to finance repairs and improvements in Black neighborhoods contributed to the decline of those neighborhoods.<sup>70</sup> Public housing projects were exclusively situated in areas considered Black.<sup>71</sup> Highways were built through Black neighborhoods and urban renewal leveled large swaths of Black communities in the name of progress.<sup>72</sup> Left behind were neighborhoods segregated by race and by income: concentrated Black poverty. As a result, the private real estate market was depressed, and the visible signifier of this depression and disinvestment was race. Notwithstanding passage of the Fair Housing Act, racial discrimination in housing kept Blacks in these neighborhoods.<sup>73</sup> The depressed real estate values have had a ripple effect and lead to a concomitant decline in city services because of the decrease in fiscal capacity, as well as the decrease in these neighborhoods' political clout and leverage.

However, rather than dwell on history to understand the structural and policy disadvantages that operated to create the place known as the "inner city," the most significant factor contributing to depressed land values may simply be race. Anecdotal and empirical evidence about the effect of race on the appraised value of real estate indicates that labeling a property as "Black" has a depressive impact.<sup>74</sup>

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<sup>70</sup> See DAVID RUSK, THE BROOKINGS INST. CTR. ON URBAN AND METRO. POLICY, THE "SEGREGATION TAX": THE COST OF RACIAL SEGREGATION TO BLACK HOMEOWNERS 2 (2001), available at <http://www.brookings.edu/es/urban/publications/rusk.pdf> (arguing that Blacks and Hispanics pay a housing discrimination or "segregation tax").

<sup>71</sup> See, e.g., NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988) (noting that a town's zoning decisions led to segregation); Arnold Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUSING POL'Y DEBATE 393, 410-11 (2000) (recounting how federal urban renewal funds were used to deliberately segregate Baltimore's public housing in the 1950's by razing a mostly Black middle-class neighborhood and designating it as White while designating other areas for public housing, which would be Black); see also Thompson v. United States Dep't of Hous. and Urban Dev., 220 F.3d 241, 249 (4th Cir. 2000) (reaffirming a 1996 consent decree that required the City of Baltimore and the Public Housing Authority to locate new public housing in areas without high concentrations of minority residents or public housing); Thompson v. United States Dep't of Hous. and Urban Dev., No. Civ.A. MJG-95-309, 2004 WL 1058100, at \*3 (D. Md. 2004) (allowing modification of the consent decree described above because the modification would "enhance enforcement" of the decree). See generally Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996) (examining the harms that result from housing discrimination).

<sup>72</sup> See generally Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Centrifcation*, 20 FORDHAM URB. L.J. 699, 768 (1993) (discussing the massive displacement caused by federally funded renewal and highway programs).

<sup>73</sup> See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (discussing the harmful effects of spatial separation); JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995) (discussing the impact of discrimination on neighborhoods).

<sup>74</sup> See RUSK, *supra* note 70, at 1 ("Equalizing for income, [B]lack homeowners received 18 percent less value for their homes than [W]hite homeowners. . . . This gap in home values, or

One could argue that this is because of the undesirable land uses that somehow seem to go along with low-income Black occupancy, but Ellis Cose has noted that even upper-middle class Blacks have to hide their family photographs in order to market their homes and get the best price.<sup>75</sup> Regarding the commercial disinvestment found in Black neighborhoods, race has also been shown to affect the locational dynamics of retail trade. In other words, the racial makeup of a neighborhood has been shown to impact neighborhood commerce.<sup>76</sup>

During the 1980's, Daniel Immergluck examined commercial investment and firm location decisions in Chicago neighborhoods. He concluded that consumer-oriented businesses chose locations, not only based on resident income and population density, but also in part based on changes in racial and ethnic demographics.<sup>77</sup> Increases in the percentage of Black or Hispanic residents resulted in decreases in commercial investment.<sup>78</sup> Moreover, recent studies have shown that even today, Whites pay more to live in Whites-only communities.<sup>79</sup>

'segregation tax' imposed on [B]lack homeowners, primarily results from a high degree of racial segregation in neighborhoods.").

<sup>75</sup> See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 43–44 (1993) (recounting one anecdotal example of such behavior). See also JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994) (delineating the daily occurrences of racism encountered by African Americans today); BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* 135 (2000) ("In the United States, one's class standing . . . is always determined by racial factors as well as economic factors. An all-[B]lack upper class neighborhood rarely has the same class standing as an all-[W]hite upper class neighborhood, nor is the property valued the same."); David R. Harris, *Property Values Drop When Blacks Move In, Because: Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AMER. SOC. REV. 461, 471 (1999) (discovering lower property values in neighborhoods with high proportions of African American residents).

<sup>76</sup> See SMITH, *supra* note 14, at 23 (discussing how, as neighborhoods begin to gentrify, banks become eager to offer financing); UNEQUAL PARTNERSHIPS: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT IN POSTWAR AMERICA (Gregory D. Squires ed., 1989) (detailing inequalities in the urban housing markets of numerous American cities after World War II). See generally JON C. TEAFORD, *THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA, 1940–1985* (1990) (chronicling urban revitalization in several cities in Post-War America).

<sup>77</sup> See Daniel Immergluck, *Neighborhoods, Race & Capital: The Effects of Residential Change on Commercial Investment Patterns*, 34 URB. AFF. REV. 397, 408 (1999) ("[C]hanges in racial and ethnic composition are roughly as important in determining commercial investment as are changes in the median income and poverty rate.").

<sup>78</sup> *Id.*

<sup>79</sup> See Katherine A. Kiel & Jeffrey E. Zabel, *Housing Price Differentials in U.S. Cities: Household and Neighborhood Racial Effects*, 5 J. HOUSING ECON. 143, 145 (1996) (citation omitted) (asserting that many Whites are willing and able to pay a premium to live in a predominantly White neighborhood, and accordingly, equivalent housing in White areas commands a higher rent); see also Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 396 (2004) ("Hedonic studies point to the importance of decenalized racism, where [W]hites outbid [B]lacks to live in all-[W]hite neighborhoods. There is new evidence to support the existence of self-segregation among [B]lacks; however, this effect appears smaller than the effect of self-segregation among [W]hites.").

A cultural benefit came out of the economic disadvantages of the real estate market and living conditions. The segregated community became a source of strength and an historic location of Black identity, not only because the Black community lived together, but also because unique aspects of Black culture were nurtured and developed.<sup>80</sup> The recent trend, however, has been that once legal and financial barriers to exit are relaxed, middle class Blacks also seek to flee the disadvantages of the ghetto.<sup>81</sup>

This paradox of detriments and benefits is paralleled in the changes being wrought by urban restructuring. The resulting deprivations caused by concentrated poverty, devaluation, and crime mean that an influx of more affluent people into the neighborhood would correct some of the symptoms of the historic disadvantage, discrimination, and subordination, but would create others. The paradox raises important, yet currently overlooked, considerations for the way redevelopment and urban restructuring should be done. At least some of the existing community should have a right to choose to be included in the positive changes taking place in these neighborhoods. Once better times (at least in terms of services, safety, and amenities for purchase) arrive, it seems a great injustice to force out those residents and merchants who had remained in the neighborhood during the worst times. The next section will discuss why urban restructuring necessarily means displacement, and not merely because the old residents are priced out of the neighborhood.

## 2. *Redevelopment's Vision: The Affluent Paradise. Concentrated Affluence Replaces Concentrated Poverty*

Redevelopment's many attractive synonyms—urban revitalization, regeneration, and economic development—obscure the fact that re-

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<sup>80</sup> See HAYMES, *supra* note 14, at 9–10 (identifying poor and working class Black communities as sites of Black cultural identity, self definition, and urban political struggle). Harlem is known as the capital of Black America. See John L. Jackson, HARLEMWORLD: DOING RACE AND CLASS IN CONTEMPORARY BLACK AMERICA 18 (2001) (discussing Harlem's position in Black America). However, places as disparate as Southwest Washington, D.C. and the Fillmore District in San Francisco had also historically developed a night life supportive of jazz and other music, not to mention other artists. Many of these neighborhoods were partially razed for highways and other redevelopment schemes, and the cultural fabric never returned to what it was. Two documentaries vividly illustrate the impact of urban renewal on these neighborhoods: SOUTHWEST REMEMBERED (Lamont Productions 1991; re-released 2002) and THE FILLMORE (KQED 1999). See also Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 37 (2004) (describing how land condemned in East Harlem during the urban renewal era is still vacant).

<sup>81</sup> See SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 135 (2004) (discussing middle class Black migration out of the ghetto).

development necessarily embodies, initiates and executes racial and class transformation.<sup>82</sup> As Neil Smith and Peter Williams observe,

[R]esidential gentrification is integrally linked to the redevelopment of urban waterfronts for recreational and other functions, the decline of remaining inner-city manufacturing facilities, the rise of hotel and convention complexes and central-city office developments, as well as the emergence of modern “trendy” retail and restaurant districts. Underlying all of these changes in the urban landscape are specific economic, social and political forces that are responsible for a major reshaping of advanced capitalist societies . . . . Gentrification is a visible spatial component of this social transformation.<sup>83</sup>

Therefore, redevelopment embodies a particular kind of change in order for the inner city to satisfy the desires of advanced capitalist societies. As discussed earlier, production-oriented policies are no longer viable for cities in today’s global economy; instead, consumption-oriented policies appear to be the only avenue for development. Accordingly, cities have been restructuring themselves as entertainment and retail destinations and venues. In order to understand the impact of these consumption-oriented strategies, one must consider that consumption has become more than a way to fulfill needs or desires. Instead, consumption has become entertainment. Neal Gabler discusses the reversal of “the traditional assumption about the relationship between consumption and entertainment.”<sup>84</sup>

The assumption was that entertainment was a form of consumption, the commodification of leisure in an industrialized capitalist society. In truth, since the act of buying and . . . displaying goods [is] often the most efficient and effective way to create a convincing role for oneself in the life movie, *consumption really seem[s] to be a form of entertainment*. It [is] a means of preparing oneself to put on a show.<sup>85</sup>

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<sup>82</sup> See generally Reynolds Farley et al., *Continued Racial Segregation in Detroit: “Chocolate City, Vanilla Suburbs” Revisited*, 4 J. HOUSING RES. 1 (1993) (discussing gentrification in urban Detroit).

<sup>83</sup> Neil Smith & Peter Williams, *Alternatives to Orthodoxy: Invitation to a Debate*, in GENTRIFICATION OF THE CITY 1, 3 (Neil Smith & Peter Williams eds., 1986) (listing phenomena we can now easily describe using the shorthand terms of globalization, transition to a service based economy, and the reconfiguration of the global city à la Saskia Sassen to meet the needs of the global elite).

<sup>84</sup> NEAL GABLER, *LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* 203–204 (1998). Gabler also notes that “[t]he purpose of acquisition . . . was exhibition.” *Id.* at 203. Gabler connects this notion of acquisition exhibition with Thorstein Veblen’s coining of the phrase “conspicuous consumption.” *Id.*; see also THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* 68–102 (Random House 1934) (1899) (describing conspicuous consumption). I think this observation is important for reinforcing the notion that the law has been influenced by property owners who are not merely trying to build homes but also acquiring in order to exhibit or project status and identity.

<sup>85</sup> GABLER, *supra* note 84, at 203–204 (emphasis added).

The act of living in the city is about more than fulfilling the practical needs of proximity and socialization opportunities. Instead, presence in the city becomes a way to define a personal identity based on class.<sup>86</sup> This class demands a certain type of amenities: the housing stock and services have to be “yuppified.” The formula has been replicated city to city and even suburb to suburb where suburbs are developing pseudo-downtowns at the highway interchanges to simulate urban streetscapes complete with storefronts on walkable and social sidewalks; parking lots are banished to the outskirts of the development.<sup>87</sup> Moreover, retail developments in both cities and suburbs are strikingly similar; the primary development has been oriented towards luxury.

Enjoyment of luxury amenities, however, also depends on who is allowed to enjoy them and who is excluded. The resulting exclusionary effect seen in affluent-oriented urban restructuring is not merely an unforeseeable consequence. Instead, the exclusionary effect is deliberate and central to the effort to reconfigure space to be aesthetically appealing and pleasing to the upper classes.<sup>88</sup> This is because part of the effort of redevelopment is not only to provide physical creature comforts in the form of luxury goods and services, but also to create an environment that denotes (and constitutes) status and privilege. In other words, you display your status through your environment.<sup>89</sup> This requires that you exclude those who contradict that status because they detract from the reputation that the environment must provide.<sup>90</sup>

<sup>86</sup> This concept is borrowed from Gabler, who observes: “there was more social fluidity and fewer overt class distinctions in America than in Europe to betray one’s appearance. As a result, how one looked and acted could easily translate into who one was: *class by style*.” *Id.* at 194 (emphasis added).

<sup>87</sup> See generally PACO UNDERHILL, *CALL OF THE MALL* (2004) (criticizing the “disconnect in form and space” brought about by today’s poorly designed shopping malls and attributing such design to real estate developers whose only design goal is to maximize dollars per square foot).

<sup>88</sup> See MICHAEL J. WEISS, *THE CLUSTERED WORLD: HOW WE LIVE, WHAT WE BUY, AND WHAT IT ALL MEANS ABOUT WHO WE ARE* 12–13 (2000) (explaining the Claritas PRIZM marketing “cluster” classification system that categorizes people by zip code, race, class, education, occupation, and income to allow targeted consumer marketing to particular “lifestyles” with labels such as “Blue Blood Estates,” “Kids & Cul-de-Sacs,” “Hispanic Mix” and “Inner Cities”).

<sup>89</sup> See Robert A. Beauregard, *Chaos and Complexity of Gentrification, in* GENTRIFICATION OF THE CITY, *supra* note 83, at 35, 37 (explaining that the class of people who gentrify by definition consumes goods and services—including land and land uses—to acquire a particular status); see also Denise DiPasquale & Matthew E. Kahn, *Measuring Neighborhood Investments: An Examination of Community Choice*, 27 REAL ESTATE ECON. 389, 389 (1999) (“Community choice represents a household investment that can have significant effects on the quality of life of household members, particularly on the future prospects of children. There is growing empirical evidence that neighbors matter in determining outcomes that our society views as bad or good.”).

<sup>90</sup> See, e.g., Brian J.L. Berry, *Islands of Renewal in Seas of Decay, in* THE NEW URBAN REALITY 69, 78–79 (Paul E. Peterson ed., 1985) (describing the stages of gentrification’s transition and displacement); MacLeod, *supra* note 3, at 602 (“[S]ees the . . . renaissance of the . . . city [as] being

Accordingly, almost every redevelopment project is directed at satisfying the interests and needs of those whose status embodies consumption patterns consistent with the creation and maintenance of a particular identity. Projects are conceived of and shaped according to standard retail concepts utilizing “cookie cutter” schemes that are easily replicable, based on tried and true past practices of how one targets those with much disposable income. As a result, these retail developments are all remarkably similar. Mall concepts are nationally distributed and are constructed so similarly that it’s easy to become disoriented and forget for a moment which mall you are standing in.<sup>91</sup> You can enter a store in Los Angeles and find your way to your preferred brand of clothing following the same footsteps you would in Washington, D.C.

Furthermore, the urban shopping and entertainment experience (the urban playground) is privatized and segregated by affluence. Not only are malls more upscale, but publicly financed or subsidized entertainment venues like concert pavilions and stadiums now have exclusive “posh” areas (e.g., sky box levels) that are off limits to the average ticket holder. Espresso, café latte, biscotti and other gourmet specialties are available at halftime. Waiters bring refreshments right to your seat. Luxury downtown hotels cater to the upscale tourist as well as convention center visitors. The staples of city cultural entertainment—the symphony, theater or opera house—cost upwards of eighty dollars per person. The luxury formula is seen as essential for making a project economically viable and a potentially positive net contributor to city coffers through associated property and sales taxes.<sup>92</sup> Gordon MacLeod argues that “[g]ated communities, shop-

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tightly ‘disciplined’ through a range of architectural forms and institutional practices so that the enhancement of a city’s image is not compromised by the visible presence of those very marginalized groups.”)

<sup>91</sup> See generally Sandra Tsing Loh, *Shopworn: Like the Valley Girls Who Made it Famous, the Suburban Mall is Now on the Wrong Side of Forty*, 293 ATLANTIC MONTHLY 126 (reviewing PACO UNDERHILL, *CALL OF THE MALL* (2004)).

<sup>92</sup> See ANDREW MACLARAN, *MAKING SPACE: PROPERTY DEVELOPMENT AND URBAN PLANNING* 17, 42 (2003) (noting examples of redevelopment’s tendency towards luxury development). But see Michael D. Goodman & Daniel J. Monti, *Corporately Sponsored Redevelopment Campaigns and the Social Stability of Urban Neighborhoods: St. Louis Revisited*, 21 J. URB. AFF. 101, 125 (1999) (studying the aftermath of corporate and government sponsored redevelopment in five areas of St. Louis and showing that the statistics indicate a greater economic and racial variety). Goodman and Monti argue that redevelopment need not necessarily lead to gentrification, economic and racial segregation, and displacement. *Id.* This article should serve not only as a reminder of how difficult it is to generalize between cities, but also more hopefully, how redevelopment can be accomplished in a way that meets the needs of all. However, the article fails to state what policies led to this “successful” outcome. Therefore, it is hard to evaluate the claim’s accuracy because it is not clear what, if anything, was intended. Is Goodman and Monti’s argument that there need not be any present intention towards diversity—that it happens by itself? Or is the argument that, with proper attention to it, something can be done? Or do they contend that



ping malls, and publicly subsidized corporate plazas . . . represent living embodiments of . . . ‘interdictory spaces,’ designed to ‘systematically exclude those adjudged to be unsuitable and even threatening, [or] people whose class and cultural positions diverge from the builders and their target markets.’”<sup>93</sup> Therefore, although not often stated openly, the direct or immediate purpose of redevelopment is a class transformation that enhances a city’s image as being part of mainstream affluent culture, often at the expense of those with lower incomes who must live and shop somewhere else.<sup>94</sup> In particular, the low-income Black person cannot be a part of the restructured urban environment.

The implications of redevelopment’s class transformation are not merely the manifest discrimination implicit in most luxury redevelopment schemes; they are highly problematic for subordinating structural reasons because they take place through what Saskia Sassen calls new “dynamics of inequality.”<sup>95</sup> Catering to the “retail concept” or what developers desire in order to make a project viable works to reinforce and exacerbate disadvantages imposed by today’s global economy. According to Saskia Sassen:

The ascendance of the specialized services led economy, particularly the new finance and services complex, engenders what may be regarded as a new economic regime . . . . One of these pressures is towards polarization, as is the case with the possibility for superprofits in finance which contributes to devalorize manufacturing and low value added services . . . . And while the latter are essential to the operation of the urban economy and the daily needs of residents, their economic viability is threatened in a situation where finance and specialized services can earn *superprofits*. . . . Inequality in the profit making capabilities of different sectors of the economy has always existed. But what we see happening today takes place on another order of magnitude and is engendering massive distortions into the operations of various markets, from housing to labour.<sup>96</sup>

Therefore, those people who are an essential part of the global economy are priced out and, moreover, planned out of the amenities of city living.

there are enough actors with an intention towards diversity that critics need not wonder or worry about gentrification because there are people working to combat or ameliorate its effects?

<sup>93</sup> MacLeod, *supra* note 3, at 607 (quoting S. Flusty, *The Banality of Interdiction: Surveillance, Control and the Displacement of Diversity*, 25 INT’L J. URB. & REG’L RES. 658, 659 (2001)).

<sup>94</sup> See generally JOHN T. METZGER, CLUSTERED SPACES: RACIAL PROFILING IN REAL ESTATE INVESTMENT (2001), [http://www.lincolnst.edu/pubs/dl/606\\_metzger.pdf](http://www.lincolnst.edu/pubs/dl/606_metzger.pdf) (arguing that the Claritas Prizm cluster system, upon which developers base their upscale mall concepts, stereotypes people and discriminates by race and class).

<sup>95</sup> Sassen, *supra* note 38.

<sup>96</sup> *Id.* at 7–8 (emphasis added).

### 3. *Urban Spatial Restructuring and the Displacement Debate: Isn't There Room in the City for Everybody?*

The urban spatial restructuring taking place in cities is called gentrification as it applies to neighborhoods that are changing. The term restructuring keeps us focused on the fact that there is a deliberate, as well as structural, dimension to the changes taking place in the city. Gentrification is a term that focuses more on the affluent class-based nature of the restructuring. The term can evoke positive associations with restored buildings and trendy shopping and entertainment venues or negative associations with displacement of the old residents. Accordingly, there are two sets of competing narratives vying to capture the heart and soul of how we regard urban restructuring: 1) the individualized narrative of market logic, free choice, private property ownership rights, and inevitability; 2) the structural narrative of race and class subordination, reinforcing disadvantages, community ties based on residence (and not land tenure), and government responsibility for ameliorating the hard edges of the market.

The first narrative is reflected in the following quotation:

[T]he gentrification process involves the purchasing of buildings by affluent households or by intermediaries such as speculators or developers, the upgrading of the housing stock, governmental investment in the surrounding environment, the concomitant changeover in local retail facilities, the stabilization of the neighborhood and the enhancement of the tax base.<sup>97</sup>

The underlying message is inevitability, improvement, and stability. According to Andres Duany, the chief architect of the New Urbanism movement, gentrification is not municipally driven but rather spontaneous:

[E]xamples of spontaneous gentrification—improvement that takes off without municipal intervention—are legion. New York has undergone a continuous sequence of these, beginning with Greenwich Village and proceeding to SoHo and all the subsequent Hos. Elsewhere around the country, it is hard to believe today that the real estate of Georgetown, Beacon Hill, Charleston, Santa Fe, or Nob Hill was ever down; but so it was, before spontaneous gentrification. South Florida, in just 20 years, has witnessed the gentrification of Coconut Grove, Miami Beach, and the scrappy old town of Key West. Each of these transformations was driven not by planners but by individuals discovering the excellent urban qualities of the place. The government caught up later, sometimes trying to take credit, often interfering with the natural cycle.<sup>98</sup>

Duany's definition is reassuring if not exciting. Not only is there nothing to feel guilty about with respect to gentrification, but the end

<sup>97</sup> Robert A. Beauregard, *supra* note 89, at 40.

<sup>98</sup> Andres Duany, *Three Cheers for "Gentrification"*, 12 AM. ENTERPRISE 36, 37 (2001).

results are desirable and the process by which it happens reaffirms visions of initiative, self-help and the free market.<sup>99</sup> In fact, Duany argues that gentrification is not only spontaneous, but natural, organic, and unstoppable.<sup>100</sup>

Whether induced or spontaneous, once gentrification begins, the chain reaction tends to continue. The difficulty with any attempt to intervene, supposedly on behalf of low-income residents, is that urban gentrification is organic and self-fueling. Its motive force is great urbanism: well-proportioned streets, a good mix of activities in useful types of buildings, a certain architectural quality. These days the allure is all the stronger because good urban areas are rare. And this naturally boosts their market value. What spokesmen for the poor call gentrification is actually the timeless urban cycle of decay and rebirth as a free society naturally adjusts its habitat.<sup>101</sup>

This narrative is exclusively private. The urban pioneers, artists, students, and gay men target older neighborhoods with interesting and undervalued housing stock. They are followed by the speculators and investors who buy up the property and turn it over to the next wave of pioneers. This is followed by commercial developers seeking to exploit a newly created affluent market. The resulting competition and demand for land drives up prices.<sup>102</sup> Gentrification is credited with contributing to exponentially increasing property values, which is a source of wealth for homeowners with enough resources to withstand property tax increases or perhaps an elderly person whose city protects them from increased assessments. Increased property values also lead to increased tax revenues, an increased income mix (albeit often rapidly changing) within the neighborhood, and a de-concentration of poverty, as well as an upgrade in the composition and increase in the numbers of businesses located in the community.<sup>103</sup> So who can complain about all this? Crime ridden neighbor-

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<sup>99</sup> But see NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 105–38 (2004) (arguing that the logic and justifications of gentrification track the settler/pioneer logic used to take North America away from the Native Americans, or, as they identify themselves in Canada, the First Peoples).

<sup>100</sup> Duany, *supra* note 98, at 38.

<sup>101</sup> *Id.*

<sup>102</sup> See Jamie Smith Hopkins, *Homes vs. Industry on the Waterfront: Face of Shore Property May Be in for Change*, *BALT. SUN*, Dec. 14, 2003, at 1A (showing an increase in property values in a Baltimore neighborhood due to gentrification). But see Laura Vozzella, *Baltimore Protects Harbor for Industry: New Law Saves Waterfront from Curtis Bay to Canton for Maritime Use Until 2014*, *BALT. SUN*, Sept. 14, 2004, at 1A (comparing arguments about industrial and residential competition for waterfront properties, with one side decrying the economic loss from wasting a valuable port on luxury residential uses, and the other side complaining that the time and value of waterfront property has changed and the industrial era is over).

<sup>103</sup> Kennedy & Leonard, *supra* note 6, at 15, 23 (discussing the effects of increased housing and property values). This mix, however, can often be an interlude before the complete transition and displacement takes place. Preserving this mix is usually dependent on rent control or

hoods devoid of retail, services, and even ATMs, are transformed. Homeownership increases, the streets become safer. These are all positive developments.

In contrast, the second narrative used to describe this process is most clearly illustrated in the definition offered by sociologist Ruth Glass who coined the word gentrification in the early 1960's:

One by one, many of the working class quarters of London have been invaded by the middle classes—upper and lower. Shabby, modest mews and cottages—two rooms up and two down—have been taken over, when their leases have expired, and have become elegant, expensive residences. . . . Once this process of 'gentrification' starts in a district, it goes on rapidly until all or most of the original working class occupiers are displaced, and the whole social character of the district is changed.<sup>104</sup>

The underlying message is one of a progressive process of disruption and displacement caused by an invasion. The neighborhoods that tend to be most vulnerable to gentrification, class transformation, and resulting displacement are those that include “a high proportion of renters,” “ease of access to jobs centers (freeways, public transit, reverse commutes, new subway stations or ferry routes),” “location in a region with increasing levels of metropolitan congestion” and “comparatively low [property] values, particularly for housing stock with architectural merit.”<sup>105</sup>

The consequence of gentrification is the displacement of low-income renters who are unable to afford rental price increases, those evicted by landlords who want to upgrade the building for a new clientele, low-income homeowners unable to afford increased property taxes, and local small businesses with razor thin profit margins and localized personal goodwill tied to the neighborhood.

Therefore, gentrification's beauty, or lack thereof, is in the eye of the beholder. Whether you will have, or ever hope to have, the ability to consume the commodity that is the gentrified neighborhood depends on who you are. The answer to the question of “who could complain?” depends on what the neighborhood means to you in

rent stabilization laws, deliberate attempts to develop affordable housing, as well as other city programs to minimize property tax increases.

<sup>104</sup> Ruth Glass, *Aspects of Change*, in LONDON: ASPECTS OF CHANGE, at xviii–xix (Ctr. for Urban Studies ed., 1964).

<sup>105</sup> Rose, *supra* note 66. Rose also describes gentrification as a three-stage process and notes that during the final stage:

New residents have lower tolerance for social service facilities, industrial and other uses they view as undesirable. Original residents are displaced along with their industries, commercial enterprises, faith institutions[,] and cultural traditions. In the San Francisco's Latino Mission District, for example, rents have escalated so rapidly in the past few years that nonprofit health clinics, Latino cultural arts organizations[,] and the ever present auto repair shops have been forced to close—their spaces swept up by dot.coms and other office uses.

*Id.*

terms of affordability, social networks, and cultural ties, whether you are a homeowner or a renter in a stabilized apartment with limits on rent increases or a renter in a city without such protections.<sup>106</sup> Very often, original residents enthusiastically support these changes because they are able to successfully lobby for improved public services such as improved policing and better basic retail services such as access to groceries.<sup>107</sup> Others decry the involuntary displacement because of the negative impact on the poor who are driven from affordable housing or from communities to which they have a history and connection.<sup>108</sup> It is indisputable, however, that gentrification changes the essential character and flavor of a neighborhood.<sup>109</sup> Such cultural change is

felt most severely in historic communities of color. Versions of the story are playing out today in the cultural strongholds of New York's Harlem, Miami's Overton, Portland's Kern community, Washington DC's Columbia Heights, San Francisco's Mission district, Los Angeles' Figueroa Corridor, and Cincinnati's Over-the-Rhine neighborhood, as well as their counterparts in countless other urban core communities across the country.<sup>110</sup>

The most troubling aspect of gentrification is that race, and secondarily, age and class are used to distinguish the new arrivals from the old occupants. When you see scores of White professionals walking dogs, sipping coffee, or reading newspapers in neighborhoods that were once Black, the change is evident. The displacement that tends to occur, while progressive, is incremental and sometimes difficult to measure. This is because residents often initiate their own departure, encouraged by rising rents or by the discontinuance of services by landlords who wish to upgrade the building for a higher-income clientele. An eviction does not make the news.<sup>111</sup> In particu-

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<sup>106</sup> The problems associated with gentrification are also hard to prove. See Victoria Basolo, Anna Lou Dehavenon (ed.), *There's No Place Like Home: Anthropological Perspectives on Housing and Homelessness in the United States*, 21 J. URB. AFF. 367, 368 (1999) (book review) (stating that it is difficult to prove that gentrification has caused homelessness because of tracking problems).

<sup>107</sup> Kennedy & Leonard, *supra* note 6, at 21 (describing attempts by original residents to get better public services).

<sup>108</sup> Caroline Hsu, *Two Cheers for the Urban Pioneers*, U.S. NEWS & WORLD REP., Jan. 19, 2004, at 70 (quoting Bruce Katz, director of The Center on Urban and Metropolitan Policy at the Brookings Institute: "When you need to make \$150,000 to afford a home in a neighborhood with a decent school, then something is dramatically wrong with the housing market."). See generally Mindy Fullilove, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004) (exploring the emotional devastation experienced during the urban renewal era).

<sup>109</sup> Kennedy & Leonard, *supra* note 6, at 5 (defining the changed character of a neighborhood as an essential part of gentrification).

<sup>110</sup> Rose, *supra* note 66.

<sup>111</sup> Yet, what is a concerned lower income tenant to do? What rights do residents of a community have to avoid changes to their community? See *Alamo Land & Cattle Co. v. Arizona*, 424

lar, new construction or a grayfield form of redevelopment avoids open conflict between old and new residents by embedding the gentrification within “comprehensive schemes to privatize public space and exclude the city’s poor from areas now reserved for affluent residents, White-collar workers, and patrons of upscale retail and entertainment facilities.”<sup>112</sup> According to Kennedy and Leonard:

Involuntary displacement is most likely to affect the poorest, most ill-equipped residents of a community. Because in many communities these residents include significant numbers of minorities, displacement tends to hit [them] disproportionately hard. With vacancy rates at record low levels in some cities, it is likely that most of those displaced were forced to move out to other surrounding communities . . . .<sup>113</sup>

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U.S. 295, 303–04 (1976) (“[T]he holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation . . . . Ordinarily, a leasehold interest has a compensable value whenever the capitalized then fair rental value for the remaining term of the lease, plus the value of any renewal right, exceeds the capitalized value of the rental the lease specifies. . . . ‘The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant’s term, plus the value of the right to renew . . . , less the agreed rent which the tenant would pay for such use and occupancy.’” (quoting *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946))); Richard O. Duvall & David S. Black, *Dividing the Pie: Compensating Landlords and Tenants in Takings of Leased Real Property*, 69 APPRAISAL J. 1, 2–4 (2001) (describing the two-step process for determining a lessee’s entitlement to compensation when their leased property is condemned). As Duvall and Black explain:

[t]he first step is based on a fiction: the entire property taken, including land, buildings, fixtures, and any other improvements, is valued as a single property owned by one person. . . . [F]ollowing the initial determination concerning the value of the property in its entirety . . . a separate proceeding is initiated . . . regarding the allocation of the award. . . . [T]he landlord and tenant become opponents, battling each other for the greatest share of the condemnation award. . . . [T]enants are entitled to compensation for the value of their leasehold interest in the property. . . . the value of any trade fixtures or improvements they made that are included in the taking. . . . [and] expenses for relocating personal property . . . . However, in all but a few states, tenants may not recover for lost profits or good will . . . . [W]hen the condemnor takes only a portion of the leased premises, the tenant is generally entitled to severance damages for the diminution in value of the remaining portion of the leased property.

*Id.*; see also Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083, 1086–92 (1987) (explaining how the award is apportioned between landlord and tenant when the government exercises eminent domain); Annotation, *Eminent Domain: Measure and Elements of Lessee’s Compensation for Condemnor’s Taking or Damaging of Leasehold*, 17 A.L.R.4TH 337, 352–65 (1982) (describing “[t]he measure of damages for a leasehold interest taken under eminent domain . . .”).

<sup>112</sup> Wyly & Hammel, *supra* note 4, at 717. But see Peter D. Enrich, *Business Tax Incentives: A Status Report*, 34 URB. LAW. 415, 415–17 (2002) (critiquing economic development and the overuse of tax incentives to meet similar goals and positing that the expenditures often outweigh the tax benefit to the city); Audrey G. McFarlane, *Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility*, 35 URB. LAW. 305, 307–14 (2003) (examining the constraints that tie cities and states to business tax incentives).

<sup>113</sup> Kennedy & Leonard, *supra* note 6, at 17.

While affordable housing is a main concern of the displacement, another concern is its effects on the community.<sup>114</sup>

For [displaced] households, both the economic and social costs of displacement can be extremely high. . . . [W]hen a household leaves a neighborhood through displacement, it misses out on the opportunity to share in the social and economic improvements the neighborhood might enjoy in future generations. Moreover, those future generations in the neighborhood miss out on the history and grounding those residents might have provided.<sup>115</sup>

In stark contrast to the arguments about the harmful effects of gentrification, two recent studies have attempted to precisely measure displacement and challenge the conventional wisdom that the displacement of low-income households takes place at a greater rate in gentrifying neighborhoods, as compared to others.<sup>116</sup> Both studies compared mobility rates between gentrifying and non-gentrifying neighborhoods. The researchers assert that their data indicates that low-income households are more likely to remain in gentrifying neighborhoods. They conclude that such low-income houses “choose” to devote more of their income (two researchers estimated some households were spending up to sixty-one percent of income on housing costs)<sup>117</sup> to remain in gentrifying neighborhoods because living conditions and amenities are improving.<sup>118</sup> Putting aside the

<sup>114</sup> See also JOHN C. WEICHER, URBAN RENEWAL: NATIONAL PROGRAM FOR LOCAL PROBLEMS 45–46 (1972) (“The effects on the individuals and families displaced by the [urban renewal] project are likely to be severe. . . . It is possible that the quality of the housing which the displaced persons move into may be better than their original residences, especially if the project demolishes the lowest quality housing in the city. . . . A detailed study of the relocation from the West End [urban renewal] project in Boston . . . found a considerable improvement in average housing quality, with over 30 percent moving from substandard to standard housing—and some increase in dwelling size—but at the cost of a 73 percent rise in the median rent.”).

<sup>115</sup> Kennedy & Leonard, *supra* note 6, at 17.

<sup>116</sup> See Jacob Vigdor, *Does Gentrification Harm the Poor?*, in BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS: 2002 133, 141–146 (William G. Gale and Janet Rothenberg Pack eds., 2002) (arguing that gentrification may have beneficial effects on the poor because displacement does not necessarily mean harm, employment opportunities may increase as a result of the relocation of personal services, and retail jobs to the inner city and increased property tax revenues may lead to improved public services); Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS’N, 39, 51 (2004) (demonstrating that rates of residential mobility by low-income households were lower in gentrifying neighborhoods. Freeman and Braconi conclude that this and Vigdor’s studies “suggest that some degree of gentrification can occur without rapid and massive displacement of disadvantaged households.”); see also Hsu, *supra* note 108, at 69 (describing the follow-up study commissioned by Fannie Mae Foundation which shows that “government subsidies and rent-control programs were key in preventing displacements in those New York neighborhoods”). Families doubling or tripling up within one residence may help to explain the relatively low number of displacements, as well.

<sup>117</sup> Freeman & Braconi, *supra* note 116, at 50.

<sup>118</sup> See Vigdor, *supra* note 116 at 141, 172 (stating that low-income residents in gentrifying neighborhoods may decide to remain and absorb increasing housing costs); Freeman & Bra-

question of mobility rates for low-income households as compared to more affluent households (this author guesses that such rates are probably higher), the studies did not seem to control for the effect of public housing residence or for the impact of rent stabilization ordinances on the ability of such households to “choose” to remain in such neighborhoods. The other question the studies did not examine was whether a household that “chose” to leave could also exercise a similar choice to re-enter the community at a later time.

The terms of the displacement debate are misplaced. The arguments center on claiming or disclaiming whether the poor are massively and disruptively dislocated from their neighborhoods to their disadvantage. There is very little contemporary empirical evidence to support such a dramatic view of dislocation. Therefore, the studies that refute massive dislocation are not proving much. Instead, the evidence shows that, absent the exercise of eminent domain against residential tenants, the dislocation from gentrification is relatively gradual, quiet, and only observable if you know, work with (as many community organizations do), or simply ride the bus or the subway with someone from one of those neighborhoods.<sup>119</sup> The stories are of the impending change and the change is dramatic, but incremental.

As conditions in a neighborhood improve, what incentive would a poor person have to move, other than the rising cost of living? If you are poor, you have a limited amount of income. Logic dictates that as long as you can afford the rent, and rents are otherwise rising in your neighborhood, you are likely to stay put *for as long as you can*. Perhaps you cut back on purchases or move in with family members or friends. Perhaps you just work the added expense into the cycle of robbing Peter to pay Paul, the paycheck to paycheck existence that characterizes the lives of so many low and middle income Americans who shuffle additional costs in an endless juggle of past-due bills—an act that one is forced into when expenses exceed income.<sup>120</sup>

Therefore, the displacement studies cannot merely evaluate relocation rates empirically. Instead, longer-term qualitative studies must be conducted on the impact that gentrification has had on the lives of poor residents in gentrifying neighborhoods. In that way, we can perhaps arrive at an answer to a question echoed throughout cities by those that have witnessed neighborhood transitions via a hot real es-

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coni, *supra* note 116, at 48 (arguing that the greater the extent of rent inflation, the less likely that low-income residents will move out of gentrifying neighborhoods).

<sup>119</sup> See generally Monique Michelle Taylor, *Home to Harlem: Black Identity and the Gentrification of Harlem* (1991) (unpublished Ph.D. dissertation, Harvard University) (on file with the author) (illustrating the ethnographic field work that is necessary to garner the true and varied opinion about gentrification).

<sup>120</sup> See generally BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (examining the economic behavior of America's poor).



tate market: "Where do they go?" An answer to that question would make the displacement debate a bit more meaningful and helpful to the people who may be enjoying the upgraded services and amenities in their gentrifying neighborhoods, but who are aware that their days in those neighborhoods are numbered.

Truth be told, the most significant harm from gentrification may be the change in the neighborhood. The neighborhood will integrate, but that integration will not be stable. There will be a progression. You only have to look at formerly Black neighborhoods, like Georgetown in Washington, D.C. and Bolton Hill in Baltimore, to understand the likely result. Therefore, the harm of gentrification is really that a hyperactive real estate market can have devastating effects on anyone financially ill-equipped. Dozens of actions by real estate investors, new residents, and others make this an inevitable process.

As documented by this article, however, the process of class transformation has not happened naturally or in a vacuum. Rather, it takes place on territory that has suffered from devaluation, marginalization, and poverty-related social ills. To the extent that the government has had a hand on the balance of class transformation with affluent class attraction policies, as well as having explicitly facilitated a redevelopment process that is often predicated on the exclusion of the existing residents, this behavior is repugnant to fundamental notions of equity and fairness. Through the redevelopment process, the governmental body that is supposed to represent all people is judging the value of different groups of people and through the government's administration of land use and development, discriminating against and subordinating some groups, regardless of the merits of competing claims to land use.

As the previous section indicates, changes in these neighborhoods are not merely inevitable or natural. The changes are deliberately encouraged and facilitated by the city's adoption of national chain retail strategies that use exclusion as part of their retail concept, targeting a market that does not include the current occupants of gentrifying or gentrifiable neighborhoods. Oddly enough, the anti-displacement gentrification studies inadvertently provide the benefit of proving the need for government intervention to counter the effects of gentrification. They prove, indirectly, that government intervention in the gentrifying real estate market can be beneficial to low-income residents, with the most beneficial program being rent stabilization, as compared to tenant-tied market based subsidies.<sup>121</sup>

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<sup>121</sup> See generally Freeman & Braconi, *supra* note 116 (advocating government rent regulation in gentrifying neighborhoods); Vigdor, *supra* note 116 (promoting government subsidies that target the most needy during the gentrification process).

*D. Reforming the Affluent Focus: Making Room for the Black Poor and Working Class*

Can we question the city policy that benefits the affluent? The economic argument for structuring urban policy to provide extra subsidies to the affluent is that if affluent residents contribute more, they should get more. Although this position seems logical, it runs counter to the notion of the greater good of a city. Being in a city is about sharing and redistributing for the benefit of the greater good. We should be careful with any redistribution that tends to benefit those who are wealthy and leaves out those who are not. One can also argue that the affluent distribute the benefits and resources of the city to others. However, to the extent that any net secondary or tertiary benefits are not distributed to those who are less well off, the result is a net harm.

Therefore, the logic of subsidizing those people with the most resources only makes sense up to a certain point. Though the point of excess will never be precisely determinable, at the very least, a focus on individual municipal decisions relating to specific redevelopment projects would help to maintain a fair equilibrium. It is not enough to assume that municipally facilitated redevelopment decisions will somehow balance themselves out and work for the greater good. Also, if we turn our focus away from the fiscal considerations of why the redevelopment decision-making process grants benefits and resources disproportionately to the affluent, we also observe that the policy of attracting the affluent or upper-middle class is carried out by people who *are* upper-middle class. The wealthy and powerful seek to create a city's identity, in order to sell the city as a commodity, to create the city's identity for personal purposes, as well as to create the kind of place to which they would like to belong.<sup>122</sup>

This quest for the upper-middle class identity is considered vital to continued central city viability and success. As Barbara Ehrenreich observes, middle class "ideas and assumptions are everywhere, and not least in our own minds. Even those of us who come from very different social settings often find it hard to distinguish middle class views from what we think we *ought* to think."<sup>123</sup> Ehrenreich describes

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<sup>122</sup> Theoretically, the presence of the upper-middle class also leads to the creation of a city with people that have the resources and time to contribute to civic life. However, in reality, it is not clear that the middle class actually have the time, resources, or inclination to be civically involved. See generally ROBERT D. PUTNAM, *BOWLING ALONE* (2000) (contending that in contemporary society, Americans are less civically and socially involved than their historical predecessors); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003) (stating that a number of middle class families with two working parents are on the verge of bankruptcy).

<sup>123</sup> BARBARA EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 5 (1989).

the moral values that we believe all good people should have: "self-discipline, a strong super-ego, [and] an ability to plan ahead to meet self-imposed goals . . . ." <sup>124</sup>

This notion of middle class ethos is defined by its belief in merit, autonomy, and the idea that through thrift, setting goals, and hard work you can change your life and your class. These middle class virtues are in contrast to the former standards of affluence, inheritance, and privilege of the aristocratic classes. But, of course, there is no real way to differentiate this varied group into its constituent parts. This is because the middle class is broad and diverse, from both the upper-middle class, who lead a lifestyle of affluence and privilege akin to aristocracy, and the lower-middle class, whose lives are not very different from the working class or poor. Ehrenreich's observations demonstrate another dimension of why it is so difficult to critique Buchanan's rationale supporting the affluent-focused attraction strategy: the strategy is premised on autonomy and merit, based on income. The irony of the arguments presented in this article is that the arguments require us to critique that which many, if not most of us, live by.

Perhaps the most telling critique of the upper-middle class attraction policy is that the affluent attraction premise and the benefits promised for the poor are unproven. <sup>125</sup> For example, all that William Julius Wilson's widely cited thesis stands for is that the middle class left the cities and there were detrimental effects. <sup>126</sup> His thesis does not prove that the poor will experience benefits in their lives from the reentry of, and interaction with, the middle class. Anecdotal observation suggests that there is, in fact, very little interaction between the poor and middle classes. Although this disconnect between low-income and affluent people is universal, in some ways the Black community provides opportunities for examining this disconnect in detail because the different strata within the Black community have much more interaction than is the norm in White America. <sup>127</sup>

<sup>124</sup> *Id.* at 51.

<sup>125</sup> See generally William T. Dickens, *Rebuilding Urban Labor Markets: What Community Development Can Accomplish*, in *URBAN PROBLEMS AND COMMUNITY DEVELOPMENT* 381 (Ronald F. Ferguson & William T. Dickens eds., 1999) (noting that the difficulties that low-income workers experience in finding decent jobs in the city are the result of a multitude of factors including a lack of training, support, and skills; the scarcity of jobs with wages that compensate for rising living costs; prejudices and stereotyping; and the lack of opportunity for advancement in available employment). Even if the gentrification of a neighborhood results in an increase in jobs, such an increase does not necessarily benefit the lower-income residents.

<sup>126</sup> See generally WILSON, *supra* note 15 (discussing the impact of the decline of manufacturing on cities and black male unemployment).

<sup>127</sup> This is due, in part, to the relatively recent expansion of the Black middle class and the fact that family members may still be low-income or working class members. See generally MARY PATILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS*

For example, accounts of the controversy over adopting Black vernacular (“ebonics”) into the curriculum of Oakland public schools highlights typical class disconnect. A news article reported that the ebonics proposition was supported by upper-income parents, who dominated the school board discussions, while lower-income parents opposed the idea because they did not agree that the program would be beneficial to their children.<sup>128</sup> This is one small example, but it illustrates that the expectation that the upper-middle classes will automatically enhance the social lives of the less affluent is not always true. W.E.B. Dubois noted this disconnect in the early twentieth century, when he observed:

[The Black middle class] are not the leaders or the ideal-makers of their own group in thought, work, or morals. They teach the masses to a very small extent, mingle with them but little, do not largely hire their labor.<sup>129</sup> Instead then of social classes held together by strong ties of mutual interest we have in the case of the Negroes, classes who have much to keep them apart, and only community of blood and color prejudice to bind them together. . . . [T]he first impulse of the best, the wisest and richest is to segregate themselves from the mass.<sup>130</sup>

Although DuBois’s argument applies to a very different time and place, his description not only illustrates class barriers to solidarity within the Black community, but also is instructive on the class barriers to solidarity within the city in general.<sup>131</sup>

The most troubling aspect of the middle class role model rationale for the affluent attraction strategy is the way in which it reinforces the dismissal of working class people. Mitchell Duneier argues, “[t]he idea of the role model has long been a part of American sociological thought, but it has been used inappropriately in the debate

(1999) (examining the lived spatial and social realities of the Black middle class through observation of a Chicago Black middle class neighborhood).

<sup>128</sup> See generally Helen Halyard, *Ebonics and the Danger of Racial Politics: A Socialist Viewpoint*, WORLD SOCIALIST WEBSITE, Apr. 21, 1997, <http://www.wsws.org/polemics/1997/apr1997/ebonics1.shtml> (arguing that the debate over the teaching of ebonics is rooted in differences in perspective based on socio-economic group).

<sup>129</sup> But see Michael Porter, *The Competitive Advantage of the Inner City*, 73 HARV. BUS. REV. 55, 59–62 (1995) (arguing that studies show that minority entrepreneurs are most likely to hire minority urban residents).

<sup>130</sup> W.E.B. DUBOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 317 (Schocken Books 1967) (1899); see also CASHIN, *supra* note 81, at 138–140 (discussing “classism” within an affluent Black community). But see TIMOTHY M. BATES, *BANKING ON BLACK ENTERPRISE* 77 (1993) (“Black-owned firms . . . tend to utilize a work force consisting largely of minority workers . . . whether they are located in inner-city ghettos, central business districts, or outlying suburban areas.”); Reynolds Farley, *Residential Segregation of Social and Economic Groups Among Blacks, 1970–80*, in *THE URBAN UNDERCLASS* 274, 292 (Christopher Jencks & Paul E. Peterson eds., 1991) (arguing class segregation exists within ethnic groups, as well as between them).

<sup>131</sup> But see generally Patillo-McCoy, *supra* note 127 (noting that many in the Black middle class are connected to lower income Black people through family ties and by geographic proximity of Black middle class neighborhoods to poor Black neighborhoods).

over the future of the inner city.”<sup>132</sup> According to Duneier, the role model concept is too limited to capture what cities lost from the exodus of middle class and upper-working class people. He argues that the exodus “is more appropriately conceptualized as the departure of an entire constellation of values, not segmented roles”<sup>133</sup> and the more helpful conception of the way in which the middle classes may benefit the city is through serving as “reference individuals” where “multiple roles are adopted for emulation.”<sup>134</sup> Duneier makes this fine distinction in order to highlight the problem of valorizing the upper-middle classes at the expense of working class people, and particularly Black working class people, to whom society accords a significant amount of disrespect. He criticizes sociologists for “portray[ing] the [B]lack community in terms of crude distinctions between the ‘respectable’ [B]lack middle and upper-working classes, now supposedly departed from the scene, and the [B]lack lumpenproletariat, that segment of [B]lack society popularly known as the ‘underclass.’”<sup>135</sup> In particular, Duneier’s nuanced critique is important for understanding the role that a returning middle class might play—not one of role model but one of legitimizer with contact to mainstream networks of legitimacy:

Although the belief that there was significant interaction among various social classes in the old-time ghettos is usually only supported by anecdotes, it is a substantial component of the attempt to understand urban deterioration as a function of the decline of available role models. Sociologists fail to acknowledge the historical strength of the [B]lack working and lower working classes, creating the impression that without middle class and even upper-working class respectability the [B]lack community is devoid of its moral base. Thus, social theory about urban poverty fails to recognize that the working poor are moral beings that can provide their own role models, at least on moral grounds.<sup>136</sup>

But

In the face of the assault on traditional institutions [in Black neighborhoods], the ghettos cannot rely upon the simple maintainers of old structures—the working classes—to win the battle. They need the support of those who derive charisma from contact with the locus of the authority of society, those middle class and professional people who are thought to be emblematic of authoritative institutional roles.<sup>137</sup>

So Duneier would agree that a city does need a middle class and upper-middle class, but also that society should avoid denigrating the

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<sup>132</sup> DUNEIER, *supra* note 25, at 133.

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

<sup>134</sup> *Id.* (citation omitted).

<sup>135</sup> *Id.* at 134.

<sup>136</sup> *Id.* at 130.

<sup>137</sup> *Id.* at 131–32.

working poor who are already in the city. The Black working class has a dignity and moral sensibility. Although Duneier's argument leads to the conclusion that the upper-middle class attraction policy has some validity, it reinforces the notion that inner city communities are not devoid of morally worthy people with a morally worthy way of living.<sup>138</sup> If working class residents are morally worthy, then city policies that work to reinforce their economic and social structural disadvantage should be held to a standard of scrutiny that requires that the interests of all classes in the city be taken into account in city exercises of the police power that encourage class transformation.

The next sections will delineate the obligations of the police power under the Constitution as exemplified by the city's most dramatic intervention in redevelopment, through the use of eminent domain.

## II. THE ROLE OF THE POLICE POWER AND CLASS TRANSFORMATION AS A POLICY GOAL

It is essential that government facilitate redevelopment, and often such development is accomplished through a public/private partnership.<sup>139</sup> The most dramatic use of municipal power comes from the choice to use eminent domain in a particular redevelopment context, such as in a residential neighborhood. For example, in Washington D.C., the local government sought to facilitate the redevelopment of a neighborhood around a new Metrorail stop (Columbia Heights) by condemning existing rental housing and replacing it with four luxury highrise developments on each corner.<sup>140</sup>

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<sup>138</sup> Another important consideration in the upper-middle class attraction policy is whether affluent neighbors are an advantage or disadvantage to their lower-income neighbors. Susan Mayer and Christopher Jencks argue that there are two possible ways in which affluent neighbors provide advantage or disadvantage:

1) When neighbors set social standards for one another or create institutions that serve an entire neighborhood, affluent neighbors are an advantage. 2) When neighbors compete with one another for a scarce resource, such as social standing, good high school grades, or teenage jobs, affluent neighbors may be a disadvantage. Because the balance between these two kinds of influence varies from one outcome to another, there is no general rule dictating that affluent neighbors will always be an advantage or a disadvantage.

Susan E. Mayer & Christopher Jencks, *Growing Up in Poor Neighborhoods: How Much Does it Matter?*, 243 *SCIENCE* 1441, 1444 (1989); see also DUNEIER, *supra* note 25, at 181 n.7 (referring to the above quotation).

<sup>139</sup> See MILES ET AL., *supra* note 69, at 132 (discussing the historical background of the public sector's modern role).

<sup>140</sup> See DENNIS E. GALE, *WASHINGTON, D.C.: INNER-CITY REVITALIZATION AND MINORITY SUBURBANIZATION passim* (1987) (discussing the revitalization of Washington D.C. and the urbanization of its surrounding suburbs); STEPHEN J. MCGOVERN, *THE POLITICS OF DOWNTOWN DEVELOPMENT: DYNAMIC POLITICAL CULTURES IN SAN FRANCISCO AND WASHINGTON, D.C.* 189-266 (1998) (examining how people in cities shape the local political culture, which in turn

Municipal power is also used to facilitate both private commercial and city-sponsored commercial redevelopment. The city plays a role in the residential context by actively supporting rehabilitation and renovation by middle class families—this is justified by attracting people with the resources to do something positive for the community. On occasion, the local government or a redevelopment agency, endowed with the power of eminent domain, will exercise that power and forcibly acquire parcels of property (typically where market transactions would lead to hold-outs, who either do not want to sell or others who strategically position themselves to hold out for more money). Either way, the development process is a mixed public/private process. Further, whether privately or publicly initiated, government plays an integral role in private development. The private sector also plays an integral role in the publicly initiated redevelopment process. Bill Pitkin sums it up best:

[P]olitical economists contend that neighborhood decline is not an inevitable process due to a properly functioning real estate market—as do the ecologists—but rather a matter of externalities created by institutional actors, policy makers are justified under this model to correct market failings. According to this view, neighborhood decline can result from the exploitation of exchange values by the growth machine or the restructuring of economic conditions. In either case, intervention is necessary to mitigate the negative effects.<sup>141</sup>

Therefore, due to the political economy of development, there is an affirmative obligation to ameliorate the effects of development on vulnerable lower-income families and small businesses through affirmative tools and decision-making to protect the “use” value of those who are disfavored in a market economy. For the city to aid the winners, and to craft the affluent paradise that today’s wealthy professional seeks, is an improper use of police power as well as an offense to inclusivity and egalitarian principles that reject race and class discrimination. In and around all of the “private activities” described

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shapes local politics); Penelope Lemov, *Southwest: 26 Years of Renewal*, WASH. POST, Aug. 13, 1977, at D1 (discussing housing developments in Southwest Washington). *But see* Sandra Fleishman, *Bidding on Her Mission*, WASH. POST, Oct. 16, 2004, at F1 (interviewing the president of a Washington D.C. corporation regarding the development of affordable housing).

<sup>141</sup> BILL PITKIN, UCLA ADVANCED POLITY INST., *THEORIES OF NEIGHBORHOOD CHANGE: IMPLICATIONS FOR COMMUNITY DEVELOPMENT POLICY AND PRACTICE* 15 (2001); *see* JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 51 (1987) (arguing that the growth machine, a coalition between developers, city officials, and other elite members, creates a consensus for growth that “eliminate[s] any alternative vision of the purpose of local government or the meaning of community”); John R. Logan et al., *The Character and Consequences of Growth Regimes: An Assessment of Twenty Years of Research*, in *THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES TWENTY YEARS LATER* 75 (Andrew Jonas & David Wilson eds., 1999) (asserting that growth coalitions generally are able to “bend the policy priorities of localities toward developmental rather than redistributive goals”).

above are a number of governmental actions mentioned throughout this article. In addition to tax incentives, a host of discretionary police powers and land use mechanisms, including use of the eminent domain power, further make the ground fertile for development.

City, state, and federal policies may not be the direct cause of gentrification, but the consistent policy of encouraging the middle and upper income populations to move into the city through tax credits and abatements for new city home buyers, as well as other tools and techniques, is an inextricable and powerful factor in the process.<sup>142</sup> While not the cause, cities reinforce and support a preexisting trend. For example, there is some anecdotal evidence that the HOPE VI public housing program, which works to revitalize public housing through demolition of aging developments and replacing them with less dense housing which is attractive to a broader range of income groups, has resulted in gentrification. The Federal Empowerment Zone program may also have contributed to gentrification tendencies in certain cities.<sup>143</sup>

The next section will examine the government's role in terms of its use of the eminent domain power. Although cities sponsor, support, and encourage middle class or affluent development in numerous ways other than eminent domain, it is the use of this power that is the most visible, controversial, and illustrative of the choices that cit-

<sup>142</sup> See, e.g., 26 U.S.C. § 163(h)(3) (2000) (providing for mortgage interest tax deduction); 36 C.F.R. § 67.7 (2002) (setting standards for rehabilitation under federal historic preservation tax credit programs). But see Beauregard, *supra* note 19, at 52 (questioning whether local government and federal tax provisions are determinant or necessary to gentrification and, instead, arguing that the most important factors are property speculators interested in exploiting short-term investment opportunities and the financial entities that make their activities possible by lending large sums of capital). I personally think local government is culpable, since, to the extent that they do participate in gentrification, they exploit vulnerability and cause harm to their citizens, who also comprise the public and whose condition in segregated neighborhoods is due in part to ongoing racism in land settlement patterns. Furthermore, Fannie Mae and Freddie Mac's latest homeownership push is considered to have contributed to the most recent surge of gentrification. The homeownership campaign contributed to new schemes to exploit first time lower or moderate income homeowners through the fraudulent practice of "flipping." See, e.g., Erica Blount Danois, *Home Cheap Home: Predatory Developers Are Using Federal Funds and HUD Houses to Subsidize Their Schemes*, BALT. CITY PAPER, Jan. 1, 2003, available at <http://www.citypaper.com/news/story.asp?id=4720> (chronicling the misfortunes of one victim of "flipping" schemes); Gadi Dechter, *The Man Behind the Curtain: "Buffalo's Biggest Slumlord" Comes to Baltimore*, BALT. CITY PAPER, Oct. 6, 2004, at 19 (detailing the entry of a "slumlord" into Baltimore); Benny L. Kass, *Beware of Fraud in "Flipping" Schemes*, WASH. POST, Oct. 20, 2001, at H3 (interviewing the president of a company that renovates and updates affordable housing).

<sup>143</sup> See Kennedy & Leonard, *supra* note 6, at 13 (discussing unintended consequences of Empowerment Zone programs); see also Peter Marcuse, *Comment on Elvin K. Wylie and Daniel J. Hammel's "Islands of Decay in Seas of Renewal: Housing Policy and the Resurgence of Gentrification,"* 10 HOUSING POL'Y DEBATE 789, 796 (1999) (arguing that Fannie Mae and Freddie Mac programs directing mortgage capital into "underserved" areas may have contributed to gentrification); Wylie & Hammel, *supra* note 4, at 763 (arguing that the federal role in mortgage market regulation has reduced redlining but also stimulated gentrification).



ies make in favor of affluent social groups, and to the disadvantage of other groups, that requires serious policy attention and prescription.

### A. *The Lightning Rod of Eminent Domain*

The foregoing section demonstrates that the class transformation that is taking place coincides with an explicit city policy to favor the affluent in making development choices. Even though it is an overstatement to credit the city governments with the current changes taking place, they are certainly a part of the process and have worked to facilitate this market in many ways. As one developer observed following the successful completion of a downtown project: “The housing here wouldn’t have gotten built without help from the city, which assembled the sites and leased the land to us. We are pioneers, but there has to be some cheerleading for downtown developments to be successful.”<sup>144</sup>

The inevitability of the market demand and the short supply of space to meet this demand will continue, at least for the near term, to drive up prices. The fact remains that, notwithstanding the macro trends, multitudes of micro decisions have to be made in this process of change. It is on these micro decisions that this article now focuses. As the city operates within this arena, the primary question it faces involves the obligations it has to make decisions that benefit not only the recipients of the upper-middle class attraction policy but also the general population as a whole.

When the city acts on behalf of its citizens, it is exercising its police power. This faceless but omnipresent local power has been defined more so by what it is not, than by what its obligations are. Re-development involves social decisions about land use that deeply impact, reshape, or eliminate residential patterns, property ownership, or leasehold tenancies and community. Decisions to promote one type of land use, targeted at one type of consumer, often come at the expense of the local resident or merchant who does not fit the profile. As discussed above, the vision for revitalization is usually one with the upper end of the consumer market in mind. More specifically, this translates into the more desirable uses of property being White middle and upper-middle class ones.<sup>145</sup> Because residence pat-

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<sup>144</sup> Adler, *supra* note 64, at 80 (quoting developer Ann Bortz).

<sup>145</sup> See Nichole Aksamit, *Owners Sue to Save Buildings; the Suit Alleges that the City Didn't Follow Proper Procedures in Taking Property for a Performing Arts Center*, OMAHA WORLD-HERALD, Feb. 20, 2002, at 1B (discussing owners of historic buildings in downtown Omaha—one of whom had already been relocated from an earlier redevelopment—who fought the city’s declaration of blight and its inclusion of their buildings in a redevelopment district to build a new performing arts center). This challenge was mainly procedural and focused on the transfer of the property to a private property in violation of the public use clause.

terms in cities continue to heavily involve race, redevelopment as currently practiced therefore necessarily involves race. But this racial component is partially obscured by the articulation of “class transformation,” rather than racial transformation as the deliberate goal of redevelopment and gentrification. Therefore, this city influence upon gentrification and the resulting class transformation is viewed as merely raising vague policy and social justice issues rather than constitutional issues because socio-economic status is not a protected class under federal equal protection analysis.<sup>146</sup>

The most extensive discussion of police power obligations has been undertaken in redevelopment cases where the power of eminent domain has been exercised. In some ways, the eminent domain power concretely and dramatically crystallizes the role of city power in the redevelopment process. The exercise of the eminent domain power in service or redevelopment is rarely uncontroversial.<sup>147</sup> On the other hand, the social implications of redevelopment decision-making extend far beyond the question of the propriety of the exercise of the eminent domain power. Yet, the social implications are only discussed in legal thought within the context of eminent domain. Therefore, this section examines the obligations of the police power in redevelopment by looking at the most influential eminent domain case, *Berman v. Parker*.<sup>148</sup> By looking at the interplay of private property rights and the city’s eminent domain power, we can glean principles for the exercise of the police power in the margins of those decisions. As the Court identified in *Berman*, the problem is not the eminent domain exercise per se; it is the propriety of the redevelopment under the broad powers of the general welfare clause and the obligations of a city when making socially significant, if not life changing, decisions under that power.<sup>149</sup> Notwithstanding that *Berman*’s interpretation of the public use clause has been upheld in *Kelo v. New London*, the following discussion of *Berman* is relevant to show how the Court could interpret the public use clause in the context of redevelopment, if it were so inclined.

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<sup>146</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (“[W]here wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”).

<sup>147</sup> The history of urban renewal is particularly abominable. See generally *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* (James Q. Wilson ed., 1966) (providing an overview of urban renewal projects in the United States); MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949–1962* (1964) (describing and criticizing the federal urban renewal program).

<sup>148</sup> 348 U.S. 26 (1954) (holding that the legislative branch may take aesthetic considerations as well as health considerations into account when enacting redevelopment legislation).

<sup>149</sup> See *id.* at 32–33; see also *Kelo v. New London*, 843 A.2d 500 (Conn. 2004) *aff’d*, 126 S. Ct. 326 (2005) (holding that the city’s exercise of eminent domain power satisfied the constitutional “public use” requirement when done in furtherance of an economic development plan).

The first step in a government's efforts to redevelop a property from one existing land use to another is to acquire a suitable piece of property or to assemble one by combining parcels of land suitable for the proposed project. For example, a current redevelopment project in Baltimore, Maryland is designed to upgrade a dilapidated, yet active, commercial district just north of the renowned Inner Harbor.<sup>150</sup> This project seeks to redevelop the area into luxury highrise apartments and upscale retail and to renovate a historic theater, the Hippodrome, into a large entertainment and performing arts complex. In Harlem, New York a project to create a Costco/Home Depot plaza is underway on 125th Street on the east side of the neighborhood.<sup>151</sup>

One must keep in mind that there are mixed motives behind redevelopment. One view of redevelopment is that it updates existing uses of land either to eliminate blight or to convert land used for outmoded or non-useful purposes in order to suit more current needs and purposes. According to this view, the benefits are two-fold: the old outmoded use is eliminated and the new use could potentially help to fulfill an unmet need for housing or provide a positive economic contribution to a city economy by creating a more lucrative tax revenue with dollar multiplier potential. Over the past several years another view of the eminent domain power has been used in redevelopment projects: not to eliminate blight or outmoded or depressed conditions but instead to affirmatively promote economic development.<sup>152</sup> Therefore, the use of eminent domain can be for a broad range of land use goals. The question is whether there is any limit to the exercise of eminent domain and if not, should there be a limit?<sup>153</sup>

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<sup>150</sup> See, e.g., Laura Vozzella, *Plans for West Side are Unveiled: City Seeks Revitalization for Five-Square-Block Area*, BALT. SUN, Oct. 23, 2003, at 2B (describing legislation empowering the city to condemn about 3,000 properties for a development project).

<sup>151</sup> Terry Pristin, *New Match for Developer of Harlem Project*, N.Y. TIMES, June 17, 2004, at B4 (discussing the plans for a shopping complex in Harlem).

<sup>152</sup> See generally Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 HASTINGS L.J. 1245 (2002) (discussing the requirement for just compensation when taking private property for public use); Jennifer Maude Klemetsrud, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783 (1999) (critiquing the use of eminent domain for economic development); Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking"—A Proposal to Redefine "Public Use,"* 2000 L. REV. MICH. ST. U.-DETROIT C.L. 639 (arguing that the current view of what constitutes "public use" under eminent domain is too arbitrary and that clearer legislative guidelines should be enacted in order to afford greater protection to private property).

<sup>153</sup> See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 *passim* (2003) (arguing for a Nollan/Dolan means-ends analysis for the public use clause).

In most instances, there are existing land owners or tenants making use of the property.<sup>154</sup> In order to build, the city will have to terminate the current use and acquire title to the parcel through its exercise of eminent domain. This can either happen compulsorily or voluntarily. Often a property owner is quite willing to sell and is ready to negotiate for various reasons. Perhaps he or she was looking to move or the market is so depressed that an offer to purchase is welcome. Maybe the owner understands that the redevelopment is inevitable and he or she is resigned to having to sell. Frequently, however, the property owner does not want to sell. This can be for a variety of reasons as well. Perhaps the current location is quite lucrative and the owner is unwilling to risk losing the opportunity for financial gain by moving to another area. Perhaps that owner believes that the price offered is too low and would like to hold out for a better offer.<sup>155</sup>

Thus, from a project efficacy standpoint, the power of eminent domain is often crucial in allowing a redevelopment project to go forward because it allows the government to obtain the property regardless of whether or not the property owner wishes to sell.<sup>156</sup> Under the standards set by the “takings” or “eminent domain clause” of the Fifth Amendment to the U.S. Constitution (and analogous provisions in every state’s constitution or statutes), owners must be compensated for government seizure of their property.<sup>157</sup>

Since *Berman* was decided in 1954, the landowner’s primary basis for challenging the attempt to take his or her property has been limited to raising procedural due process or statutory authority claims to the extent any improprieties exist in that regard. Otherwise, the only other point of contention is litigation about the issue of “just” compensation. Typically, an owner who wishes to substantively resist the attempt to force him or her to sell must challenge the propriety of the exercise of eminent domain based on whether or not the taking is for a public use. The difficulty, or near impossibility, of challenging exercises of eminent domain stems mainly from the Supreme

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<sup>154</sup> See Tom Gutting, *Renewal Plan is Bane to Seafood Shop Owner—Worried: Mark Devine Says the City’s West-Side Project Will Force Him Out of Business*, BALT. SUN, Apr. 20, 2001, at 3B (discussing the effects of an urban renewal plan on small business); J.A. Lobbia, *A ‘Tenants Bible’ May Lead Readers Astray: The Not-So-Good Book*, VILLAGE VOICE, Aug. 10, 1999, at 24 (discussing shortcomings and errors in an informational pamphlet for tenants).

<sup>155</sup> See Scott Calvert, *City Overpaid Merchants to Relocate, Audit Reports: Businesses Displaced for West-Side Revival*, BALT. SUN, Feb. 6, 2002, at 3B (describing how the Baltimore government paid more than necessary for property).

<sup>156</sup> See Peter Hellman, *How They Assembled the Most Expensive Block in New York’s History*, NEW YORK, Feb. 25, 1974, at 31, reprinted in ROBERT C. ELLICKSON, *LAND USE CONTROLS: CASES AND MATERIALS* 1029 (2d ed. 2000).

<sup>157</sup> U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

Court's broad interpretation of the phrase "public use." Although the doctrine interpreting the Fifth Amendment establishes a threshold requirement that the exercise of eminent domain must be for a public use,<sup>158</sup> that standard is broadly defined and relatively easy to meet.

If we examine the *Berman* case in detail, the reasons for the decision are both clear and resonant with notions of local government autonomy, yet a precise rationale remains somewhat mysterious. The context for the case was the dilapidated condition of mainly illegal, yet long-standing, homes occupied by low-income Black people who lived under strained conditions in southwest Washington, D.C.<sup>159</sup> The District of Columbia Redevelopment Agency proposed redeveloping an area called "Project Area B,"<sup>160</sup> a discrete area consisting primarily of alley homes built for the poor: "64.3% of the dwellings were beyond repair . . . [only] 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, and 83.8% lacked central heating."<sup>161</sup> Clearly, there were strong health and public welfare reasons to condemn these houses and replace them with upgraded housing. Accordingly, the area was declared blighted under the Dis-

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<sup>158</sup> The 19th century approach to the public use requirement was narrow and literal. Public use meant property taken for a street or park. See, e.g., Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615 (1949) (offering a historic account of the progression of eminent domain). Beginning in the late 1940's, the concept of public use began to be interpreted more broadly. See, e.g., U.S. ex rel. Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551-52 (1946) (deferring to congressional determination of public use when demonstrated by grant of federal power).

<sup>159</sup> *Berman v. Parker*, 348 U.S. 26, 30 (1954).

<sup>160</sup> Subsequent to the decision, Area B was expanded to encompass all of southwest Washington, D.C., far beyond the scope contemplated at the time of the decision. See CONSTANCE MCLAUGHLIN GREEN, WASHINGTON, VOLUME II: CAPITAL CITY 1879-1950 504-05 (1963) ("Demolition gangs and bulldozers would wipe out every structure in southwest Washington except [a few]. In that wide expanse would rise some low-rental housing, a larger number of expensive apartments and town houses, a theatre, a shopping center, and an array of at least eight new government office buildings, all with extensive parking space. The architecture of the public buildings would abandon the neo-classical in favor of a modernized style using horizontal bands of windows interrupted by concrete grill-work to create an effect of screening, a style to be employed also for the brick apartment buildings; the lines of the town houses, flat-roofed and two-storied, would harmonize with both."); Lemov, *supra* note 140 (describing the progress and history of the urban renewal program in Southwest Washington, D.C.); SOUTHWEST REMEMBERED: A STORY OF URBAN RENEWAL (Lamont Productions, Inc. 1985) (capturing the radical transformation of southwest Washington, D.C. from urban renewal through interviews, historical photos, film footage, and original music). See generally Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (detailing the plan to clear and redevelop the southwest quadrant of the nation's capitol).

<sup>161</sup> *Berman*, 348 U.S. at 30. "The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes." *Id.* The plan for Area B provided for different types of dwelling units and required that at least one-third of them had to be "low-rent housing with a maximum rental of \$17 per room per month." *Id.* at 30-31.

trict of Columbia Redevelopment Act.<sup>162</sup> The plan for redevelopment was to raze the area and to rebuild it in a way that would “eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns.”<sup>163</sup>

The designated project area, however, included not only the alley housing but also a nearby commercial strip that included a thriving and profitable department store. The department store owner challenged the redevelopment agency’s ability to take his property, making a number of claims challenging the exercise of the eminent domain power: he argued that his property 1) was commercial, not residential property; 2) was not slum housing; 3) would “be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use;”<sup>164</sup> and 4) that “to take a man’s property merely to develop a better balanced, more attractive community” was impermissible.<sup>165</sup>

Analyzing the propriety of exercising the eminent domain power in furtherance of redevelopment, the Court first clarified that the scope of the redevelopment and the goal of using urban renewal to create a more balanced and aesthetically harmonious neighborhood were issues not of the eminent domain power per se, but of the police power.<sup>166</sup> “We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.”<sup>167</sup>

Therefore, in the Court’s eyes, the problematic exercise of governmental power being challenged by the property owner was the scope and purpose of the redevelopment plan, not the exercise of the eminent domain power. Thus *Berman*, which has come to be known as an eminent domain case, is better understood as a case mainly about the scope of judicial review of a state or local government’s exercise of the police power. Accordingly, the Court declared the necessity of judicial deference to the exercise of the police power:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is

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<sup>162</sup> District of Columbia Redevelopment Act of 1945, ch. 736, 60 Stat. 790, § 5 (granting the power to redevelop blighted territory in the District of Columbia).

<sup>163</sup> *Berman*, 348 U.S. at 34.

<sup>164</sup> *Id.* at 31.

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

<sup>166</sup> *Id.* at 32.

<sup>167</sup> *Id.*

involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.<sup>168</sup>

According to the *Berman* decision, governmental use of the eminent domain power did not change Congress's or a state's preeminence in this area of social legislation.<sup>169</sup> The Court further reasoned that the standard for the exercise of the eminent domain power was that it be undertaken for a public purpose,<sup>170</sup> although the Court did not explain why the term "public use" should now be understood as public purpose.

Two conclusions can be drawn from this use of public purpose rather than public use language: 1) public use was expanded to mean public purpose, and 2) public purpose is derived from a state's (or, in this case, Congress's) authority under the police power. The Court reserved judgment on the definition of public use. Therefore, the public use component of the Fifth Amendment guarantee of just compensation is not an independent requirement for the exercise of eminent domain; it is merely a descriptive justification for the exercise of governmental power on behalf of the public. The argument that the Fifth Amendment prohibits property from being taken for private use does not make sense in the context of redevelopment and certainly does not mirror what the eminent domain power was ever used for in the eighteenth century when the Bill of Rights was drafted.<sup>171</sup> Instead, it was probably considered a mere clarification of the ability of government to act on behalf of the public.<sup>172</sup>

This analysis is not meant to suggest that the named appellants, Samuel Berman and Solomon H. Feldman, executors of the estate of Max R. Morris, did not have a compelling complaint. Their complaint was not about the use of the eminent domain power per se, even though that was the most immediate manifestation of their resisted loss. Instead, their complaint was about the scope of the redevelopment. If the scope of the redevelopment had been narrowed or arrived at with some meaningful public participation, then perhaps their store would have been spared.

In response to the argument that the department store was being taken for conveyance to private developers, the Court made a means/ends distinction: so long as transfer to private persons was

<sup>168</sup> *Id.* (citations omitted).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 85 (1996) ("[T]he original American concept, which appeared in colonial, revolutionary, and early national days, [was] that . . . "public use" actually meant public benefit—of almost any conceivable kind.").

<sup>172</sup> *Id.*

the means and not the end of the legislation, the exercise of the eminent domain power was valid.

Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. . . . [T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.<sup>173</sup>

In effect, the Court both retained and rejected a public-private distinction. The ends of the exercise of the police power were still bound by the requirement of producing a public benefit, but the Court rejected the idea that the distinction can be used to require public or private means to achieve that end. Logically, publicly or privately sponsored redevelopment could each result in a public benefit of eliminating slums and producing an improved living environment.<sup>174</sup> Therefore, the Court's reasoning is compelling on this point. Nevertheless, even if *Berman* rather easily dismissed the public-private "means" argument, the issue remains, somewhat ironically, one of the more troubling and problematic aspects of the exercise of eminent domain power. This may be due in part to the close relationship between private developers and the city,<sup>175</sup> causing resistant property owners to believe that they have suffered as a result of more powerful actors who are favored by government. Courts, however,

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<sup>173</sup> *Berman*, 348 U.S. at 33–34 (citations omitted); see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243–45 (1984) ("Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. . . . [T]he Constitution forbids even a compensated taking of property when executed for *no reason other* than to confer a private benefit on a particular private party.") (emphasis added).

<sup>174</sup> Courts have had similar difficulties in setting standards for other binary distinctions. See, e.g., *Garcia v. San Antonio Metro. Transp. Co.*, 469 U.S. 528 (1985) (rejecting the holding of *National League of Cities v. Usery*, 426 U.S. 833 (1976), because of the difficulty in defining what is a traditional or non-traditional governmental function).

<sup>175</sup> See LOGAN & MOLOTCH, *supra* note 141, at 62 (describing economic development as an elite-dominated process controlled by a political "alliance of public officials, businessmen, and bureaucrats [who] effectively operate in most municipalities to channel expressed citizen interests into a system of land-use decisions constrained by the imperative to promote investment"); see also *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 477–80 (Mich. 1981) (Ryan, J., dissenting) (providing a detailed view of the corporate influence on the use of the eminent domain power), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). Herbert Gans supports citizen initiated development rather than city initiated redevelopment based on a "user-oriented paradigm" focused on urban residents as actors shaping their cities rather than as passive victims of "impersonal forces." HERBERT J. GANS, *PEOPLE, PLANS, AND POLICIES: ESSAYS ON POVERTY, RACISM, AND OTHER NATIONAL URBAN PROBLEMS* 94 (1991).



have resisted the invitation to second-guess these programs.<sup>176</sup> The development discourse undoubtedly plays a huge role in this interpretation, and courts are loathe to question something inevitable and ostensibly beneficial for all.<sup>177</sup>

We will never be able to determine the extent to which the reasoning in *Berman* was influenced in part by its mid-1950's context. The case arose at the very beginning of the explosion in suburban expansion. This was a particular time in our architectural and social sensibilities when not only were dilapidated alley homes and shanties seen as a problem, but older rowhomes, brownstones, or townhomes were also seen as undesirable, old-fashioned, and outdated.<sup>178</sup> Following urban renewal's discourse of scientific and rational remedying, the problem of "the old-fashioned" and obsolete buildings was one to be addressed by the experts.<sup>179</sup>

The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets and shopping centers.<sup>180</sup>

Context aside, the holding in *Kelo* affirms the guarantee implicit in *Berman* of local government autonomy, not just in matters of development, but also as in matters of property ownership in general. The thus far unsuccessful public purpose critique's focus on the dilemma of protecting the public by privileging the private avoids the real issue which is the purpose of the project: class transformation.

<sup>176</sup> See, e.g., *Kelo v. New London*, 843 A.2d 500, 542 (Conn. 2004) (rejecting a challenge to a redevelopment plan that seized private property to benefit pharmaceutical giant, Pfizer), *aff'd*, 126 S. Ct. 326 (2005).

<sup>177</sup> See David Wilson, *Metaphors, Growth Coalitions, and Black Poverty Neighborhoods in a U.S. City*, 28 ANTIPODE 72 (1996) (identifying the overly positive narrative surrounding development as a discourse).

<sup>178</sup> See Aoki, *supra* note 51, at 766–68 (outlining the history of how older, smaller buildings were razed to make way for highrises).

<sup>179</sup> See generally FRIEDEN & SAGALYN, *supra* note 12 (discussing the role of elitism in urban renewal).

<sup>180</sup> *Berman v. Parker*, 348 U.S. 26, 34–35 (1954).

*B. Unearthing Class Equity Considerations in Berman*

*Berman* stands for the urban renewal era proposition that local government may use the police power to redevelop completely, not only for health and sanitary reasons, but also for long-term reasons such as aesthetics and modern design, which at that time were believed to be necessarily connected.<sup>181</sup> Today, such comprehensive redevelopment is not viewed with such faith in terms of its ability to predictably lead to sustained and better land uses. Instead, today's justifications are broadly similar but different in an important way: they are viewed in terms of the economic benefits to be reaped from the presence and use of upper-income or affluent persons. Developers have always known this, even back in the 1950's. Back then, as now, race and class and the racialized identity of particular neighborhoods and property ownership played a significant role in the areas that were labeled redevelopable. For example, many of the parcels of property taken and assembled for development under urban renewal projects remained vacant, which precipitated or hastened blighted conditions because developers and banks were not interested in investing in those neighborhoods. Therefore, there are dimensions of redevelopment and its effect on the race and class identity of neighborhoods that went unaddressed in *Berman*.

Not only did the *Berman* decision note the racial identity of the inhabitants, but it also seemed to suggest that their class position was relevant to the Court's implicit approval of the propriety of the Southwest redevelopment plan: "[t]he population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes."<sup>182</sup> The Court's description of the urban renewal plan also noted: "[t]he plan for Area B . . . makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent housing with a maximum rental of \$17 per room per month."<sup>183</sup> Therefore, it was significant that the plan included a variety of types of housing and made ample provision for the housing of the least fortunate members of the community. The *Berman* court's approval of the exercise of police power thus implicitly rested on the plan's provision for socio-economic variety and inclusion, most importantly of the poor. Ironically, the implementation of the urban renewal program did not look anything like what was presented to the Court. In the years following the *Berman* decision, the scope of the redevelop-

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<sup>181</sup> *Id.* at 33 ("We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.") (citation omitted).

<sup>182</sup> *Id.* at 30.

<sup>183</sup> *Id.* at 30-31.

ment in Project Area B was expanded to almost the entire southwest Washington, D.C. quadrant and resulted in condemnation of homes, schools, and houses of worship.<sup>184</sup> Most significantly, the planned provision for moderate or lower-income housing was never fully implemented as originally planned. Instead, the project took on the most lucrative forms of development (middle and upper class housing) and neglected or abandoned schemes of economic integration.<sup>185</sup> Questions remain, such as, what role did the provision of housing suitable for the needs of the lower-income residents play in the Court's reasoning? Would the decision have changed if no provision had been made? Would the lack of provision of commercial amenities suitable to the needs of the lower-income residents have affected the ratification of the exercise of the police power in furtherance of redevelopment?<sup>186</sup>

Implications for the use of the police power to carry out redevelopment are significant because exercise of this power in favor of redevelopment often involves a selection of one social group above another for problematic reasons of market prejudice. It also involves a selection of one social group or class over the other, thus marginalizing or subordinating the latter group by prioritizing the land use needs of the former group. No legal doctrine currently recognizes economic class-based claims of discrimination. That means that there are a number of claims that have considerable support but no basis for articulation. The source of this discrepancy may lie in the failure to recognize that exercise of the police power by local government comes with certain implicit obligations.

### C. *Applying the Lens of Mt. Laurel to Redevelopment's Public Purpose*

The police power is an awesome power that has been defined since its origin in terms of limits. Its first early articulation arose from interstate commerce cases that acknowledged that the states have inherent powers to govern and regulate as a limit on the federal gov-

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<sup>184</sup> See SOUTHWEST REMEMBERED, *supra* note 160 (documenting the trauma of the redevelopment in Project Area B and how the various ethnic and racial groups still gather to reminisce about the neighborhood that was lost).

<sup>185</sup> *Id.*

<sup>186</sup> Another case, *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), was a further example of the outrageous use of eminent domain in the context of redevelopment; in this case, the redevelopment was strictly for economic development purposes. Therefore, just as in *Berman*, the real goal of the litigation was to have some power or the ability to resist the government determination of the land use. Again, the issue was not the transfer of land to another private party, but class domination and exploitation. The Michigan Supreme Court overruled *Poletown* in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), narrowing severely the exercise of eminent domain in furtherance of local economic development to situations of public necessity.

ernment's powers to regulate states.<sup>187</sup> Since that time, the power has been described generally as the power to regulate property and liberty in order to protect the general public's health, safety, and welfare. Since that acknowledgment, the discussion has focused exclusively on defining the scope and limits of the police power by balancing the interests of the state versus individual property rights. Although there has been some back-and-forth over the propriety of economic regulation and whether it was limited by substantive principles of due process during the *Lochner* era, the authority of the police power has been acknowledged to be relatively broad and comprehensive with respect to accepted definitions of the health, safety, morals, and general welfare.<sup>188</sup> On the other hand, the lion's share of attention to the police power has been negative, with debate over the limits that the rights of property place on the scope of exercise of the police power.<sup>189</sup> Little, if any, attention has been paid to the other dimension of the police power: what inherent affirmative obligations does the exercise of the police power impose on those who would wield its mighty sword? In particular, what are the inherent obligations that municipalities, to whom the police power has devolved, have in the exercise of the police power? In other words, what is the general welfare?

This is an important question without an immediately self-evident answer because of the context of social relations within which the police power is exercised. Those social relations are such that the interests of particular classes of people who hold more wealth are able to influence government to advance and protect their interests. In particular, the formulation of public policies naturally is weighted by prejudice of class identity, class interest, and class prejudice to the advantage of those with resources. This may seem to be the natural order of things, but gentrification and the deliberate restructuring of urban space to suit the needs of the affluent have no inherent limiting principle, unless the government intervenes to ameliorate the force of a market that has been structured to respond favorably to affluence.

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<sup>187</sup> See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (acknowledging that safety regulation "is a branch of the police power, which unquestionably remains, and ought to remain, with the states"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824) (discussing "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens"). For an extensive discussion of the police power, see D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

<sup>188</sup> See *supra* text accompanying note 173.

<sup>189</sup> See, e.g., Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 442-56 (2004) (analyzing the tension between "natural" or "inherent" property rights and "civil" rights protected by the police power under the Fourteenth Amendment).

The New Jersey Supreme Court's acknowledgment and struggle with the impact of class on land use and housing policy in the state is instructive for understanding the dimensions of the problem, as well as for formulating possible approaches to address the problems of class dominance in inner city redevelopment. The *Mount Laurel* decisions<sup>190</sup> offer guidance for how to combine the "public purpose" justifications with the exercise of eminent domain, as well as other upper-middle class attraction policies carried out by cities. The New Jersey Supreme Court explicitly acknowledges the obligations that the exercise of the police power imposes when municipalities act to promote the "general welfare."<sup>191</sup> In *Mt. Laurel I*, the New Jersey Supreme Court intervened in a settled system of land use regulation that was socio-economically (and racially) exclusive and explicated a vision of the police power and the general welfare that obligated municipalities to zone in ways that would contribute to affordable housing and also limit exclusion.<sup>192</sup> By injecting class equity and inclusion concerns into land use law, the court fundamentally altered local expectations and entitlement to impose socio-economically exclusive land use regulations. Specifically, the court decided that a municipality may not

validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby . . . exclude such people from living within its confines because of the limited extent of their income and resources.<sup>193</sup>

The court considered the widespread practice of restricting the availability of housing to be a question of state constitutional importance<sup>194</sup> because it is a basic component in the assessment of a locality's "general health and welfare,"<sup>195</sup> for substantial segments of the population. In particular, the court clarified that "a zoning regulation, like any [other] police power enactment, must promote public health, safety, morals or the general welfare."<sup>196</sup> Therefore, a municipality had a presumptive affirmative obligation "to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and

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<sup>190</sup> S. Burlington County NAACP v. Twp. of Mt. Laurel (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975); S. Burlington County NAACP v. Twp. of Mt. Laurel (*Mt. Laurel II*), 456 A.2d 390 (N.J. 1983).

<sup>191</sup> *Mt. Laurel I*, 336 A.2d at 725; *Mt. Laurel II*, 456 A.2d at 415.

<sup>192</sup> *Mt. Laurel I*, 336 A.2d 713.

<sup>193</sup> *Id.* at 724.

<sup>194</sup> *Id.* at 725.

<sup>195</sup> *Id.* at 727 (quoting *New Jersey Mortgage Finance Agency v. McCrane*, 267 A.2d 24, 27 (N.J. 1970)).

<sup>196</sup> *Id.* at 725.

moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries."<sup>197</sup> Any municipality that failed to do so would be facially in "violation of substantive due process or equal protection under the state constitution."<sup>198</sup> While the court affirmed that it was acceptable to design land uses to "seek industrial ratables to create a better economic balance for the community,"<sup>199</sup> it also added, "considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing [to benefit the local tax rate]."<sup>200</sup> Instead, a municipality has an "obligation to afford the opportunity for decent and adequate low and moderate income housing . . . to 'the municipality's fair share of the present and prospective regional need therefor.'"<sup>201</sup> Thus, "a . . . municipality . . . must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income."<sup>202</sup>

The first *Mt. Laurel* decision represents a failed attempt to define general guidelines for the exercise of the police power, because cities did not follow the guidelines. Thus, after eight more years of litigation, the New Jersey Supreme Court announced in *Mt. Laurel II* the final version of the doctrine, identifying three kinds of obligations that arise out of the exercise of the police power. The first obligation is for affordable housing: local governments have an obligation in the exercise of their police power to ensure that affordable housing exists.<sup>203</sup> Zoning in furtherance of the police power necessarily has to be exercised for the true general welfare.<sup>204</sup> Land use regulations that negatively affect something as fundamental as housing, and the ability of residents outside a particular municipality to obtain such housing, conflict with the general welfare and abuse the police power.<sup>205</sup> The court clarified that this doctrine arose not from lofty theoretical concepts but from "underlying concepts of fundamental fairness in the exercise of governmental power,"<sup>206</sup> particularly because

the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. . . . The government that controls this

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<sup>197</sup> *Id.* at 728.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 731.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 732 (citation omitted).

<sup>202</sup> *Id.* at 731-32.

<sup>203</sup> *S. Burlington County NAACP v. Twp. of Mt. Laurel (Mt. Laurel II)*, 456 A.2d 390, 415 (N.J. 1983).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

land represents everyone. While the State may not have the ability to eliminate poverty, [neither] it [nor its municipalities can] use that condition as the basis for imposing further disadvantages.<sup>207</sup>

The court then described the current situation, where “poor people [are] forced to live in urban slums,”<sup>208</sup> because they are excluded from “other [more] attractive locations,”<sup>209</sup> as being inconsistent with “all concepts of fundamental fairness and decency.”<sup>210</sup> This “fundamental fairness” rationale is the most compelling aspect of the court’s decision. It touches on one’s gut reaction of repugnance for legally sanctioned class discrimination. Perhaps fundamental fairness is about not only the harm we do to the victims by denying them the fundamental right of shelter, but also the harm to us all in allowing people to live in homogeneity without diversity. Fairness relates to the ideal vision of our society and the steps we take to make that a reality. To allow less than that to be embodied in the law is a dangerous failure of normative ends and actual means.

The fairness principle relates, therefore, not only to access to affordable housing, but also to a second obligation, arising out of the exercise of the police power: the principle of integration and diversity: a practical and important corollary logically arising from the social problems we see caused by economic and racial segregation today. In addition to expressing concerns about the unfairness of depriving people of a community and of affordable housing, forcing them into slum living, the court articulated a second obligation of the police power: a strong principle of socio-economic and racial integration. The court proclaimed that, “if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor.”<sup>211</sup> The opinion reoriented the focus of the doctrine stated in *Mt. Laurel I* to not merely the availability of an appropriate variety and choice of housing, but instead the availability of low and moderate income housing in particular. As the court observed, “[u]pper and middle income groups may search with increasing difficulty for housing within their means; for low and moderate income people, there is nothing to search for.”<sup>212</sup> All municipalities, not just developing ones, were now obligated “to provide a realistic opportunity for a fair share of the region’s present and prospective low and moderate income housing need”<sup>213</sup> through inclusive zoning devices such as “lower-income density bonuses and

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 416.

<sup>212</sup> *Id.* at 416–17.

<sup>213</sup> *Id.* at 418.

mandatory set-asides.”<sup>214</sup> The *Mount Laurel* decisions therefore establish a foundational obligation for the exercise of the police power: municipalities must design and administer their local land use regulations while taking into consideration regional needs for reasons of class equity and economic and racial integration. The requirement that municipalities take the housing needs of low and moderate income populations into account is the most controversial prong of *Mt. Laurel II* because it runs directly counter to prevailing practices of exclusive, privatized luxury residential developments. Notwithstanding the controversy in articulating this principle in connection with residential socio-economic segregation in the suburbs, the principle should also apply to urban residential and commercial retail developments that are designed and operated to be socio-economically segregated as well. To the extent that such segregation forces out existing residents in pursuit of redevelopment to suit the needs of the affluent, integrative principles should apply to ensure that a diverse population will have access to the residential and economic opportunities that the changing neighborhoods present.

The third related obligation implicit in *Mt. Laurel II* is a principle of community preservation: “[n]o one community need be concerned that it will be radically transformed by a deluge of low and moderate income developments.”<sup>215</sup> In reassuring local municipalities that they would not be required to provide more than their *fair* share of low and moderate income housing, the opinion made a discomfiting concession to the notion of the undesirability of low-income people. The reassurance was directed at suburban residents that their exclusive enclaves would not be overly disrupted by the principles announced in the case. In effect, the court recognized that existing communities had an expectation and right to their existing way of life so that, ultimately, the application of integration principles is constrained by a limited notion of inclusion, one that does not threaten the total transformation of the community.

The community preservation prong understands and acknowledges the importance of place to residents separate and apart from property ownership. The value of poor communities to their residents is underappreciated.<sup>216</sup> The importance of the sense of place may be hard for comparatively transient, upper class professionals to

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<sup>214</sup> *Id.* at 419.

<sup>215</sup> *Id.* at 420–21.

<sup>216</sup> See Mary P. Corcoran, *Place Attachment and Community Sentiment in Marginalised Neighbourhoods: A European Case Study*, 11 CAN. J. URB. RES. 47 *passim* (2002) (acknowledging that a sense of place is socially constructed and arguing that residents of both declining and changing—i.e. gentrifying—neighborhoods have been battered by the effects of de-industrialization, environmental degradation, and stigmatization, yet they draw on memories to motivate and mobilize themselves to resist the effects of these exclusions).



understand—that place has meaning based on experience, symbolic spaces, attachment, relations, and identity. In other words, there are alternatives to how we value community. Consider that there is a high value to be placed on relational wealth and personal ties. The middle class perhaps does not experience nor value personal ties in the ways that poor or working class people do. A recent study showed, for example, that low-income children are more likely to be in contact with cousins than upper income people.<sup>217</sup> How do upper-middle class decision-makers place a value on and protect what they have already lost?<sup>218</sup>

Community also plays an important symbolic role. Consider the love for community that one has even in the face of very difficult circumstances such as the condition of the housing stock, crime, drugs, and poor services. What is it like to love and value an ugly, crowded, crime-ridden space? Notwithstanding these conditions and how much someone who lives there may want to change, the identity you form is one of embeddedness and belonging, cherishing a bounded sense of time and place. These places have a historical, social (relational), and cultural meaning. Significantly, perhaps most importantly, place is not merely symbolic but a real part of coping and survival strategies. It is easy to overlook the importance of the social, relational, and cultural meaning of place, in part because of the forgotten or overlooked moral dignity of working class people.<sup>219</sup>

The importance of embeddedness was captured most aptly by Patricia Williams, who eloquently highlighted the problems raised by the rapid gentrification taking place in Harlem, noting that it was the struggles of existing residents that provided the stable territory for gentrification:

In using the word “stable” one is often understood to mean church-going, college-educated, middle-class residents with steady incomes. But by “stable” I also mean to include working-class and poor families, people with extended families, with several adults in and out of work, homes where a grandparent or aunt helps make ends meet by looking after their own and the neighbors’ children. These are the populations who suffered most from the lack of local grocery stores, for example, and who pressed for the new Fairway market in Harlem . . . . These are the families

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<sup>217</sup> Annette Lareau, *The Long-Lost Cousins of the Middle Class*, N.Y. TIMES, Dec. 20, 2003, at A19.

<sup>218</sup> See Romesh Diwan, *Relational Wealth and the Quality of Life*, 29 J. SOCIO-ECON. 305, 305 (2000) (“Material wealth, made up of commodities, provides us physical comforts and defines our standard of living. Relational wealth emanates from our interconnections with other human beings. It gives us inner strength and emotional security and defines our quality of life.”). Romesh argues that “relational wealth is as real as material wealth. . . . National policy objectives need to consider the maximization of not only the material wealth but also of relational wealth . . . .” *Id.* at 323.

<sup>219</sup> See DUNEIER, *supra* note 25, at 133–34 (describing how lower income neighborhoods are incorrectly perceived as lacking moral role models).

who suffered simultaneously from high crime rates and suspect profiling and whose protests made policing tactics a national issue. These are Manhattan's messengers, hospital workers, fast-food servers, secretaries, janitors, nannies and security guards whose tenacious political passion about issues such as education, healthcare and garbage removal have made them models of community engagement.

For all these good things, greater credit—both literally and figuratively—is most assuredly their due.<sup>220</sup>

According to Anselm Strauss, “any city—any metropolitan region—might be viewed as a complex related set of symbolized areas.”<sup>221</sup> Urban redevelopment is about reconfiguring areas to symbolize something different from before. Too often, according to Mary Corcoran, “urban re-development . . . is predicated on privacy, anonymity, and indifference to the local and vernacular quality of the neighbourhood.”<sup>222</sup> As Corcoran further observes, “the accumulation of shared history becomes truncated when living spaces that formerly shared public space become increasingly privatised both socially and symbolically.”<sup>223</sup> Community residents place a value on the quality of life, the “use” value, while development proponents value the community for its “exchange” value. Bill Pitkin explains,

Growth machines seek to maximize the exchange value of urban space, often leading to land speculation and the encouragement of population growth to drive up property values and, accordingly, their return on rent. Neighborhood residents often try to resist this by asserting their use values, based on their social networks, sense of trust, and common identity.<sup>224</sup>

The old symbols should not be ignored, because the people for whom this is a reality have an investment at stake and an ongoing need for the symbols. The integrative, community preservation obligation suggested by the *Mt. Laurel* decisions could preserve some of the old symbolism while conceding to the new, because change is natural. Resisting change is also natural, so the solution is to provide for change that happens gradually and does not obliterate the past.<sup>225</sup>

Public purpose relates to the scope of police power and the way in which local governments should exercise their power over development, according to the *Mt. Laurel* standard. In particular, the emi-

<sup>220</sup> Patricia J. Williams, *Little House in the Hood*, NATION, Jun. 19, 2000, at 9.

<sup>221</sup> Anselm L. Strauss, *Strategies for Discovering Urban Theory*, in THE AMERICAN CITY: A SOURCEBOOK OF URBAN IMAGERY 515, 521 (Anselm L. Strauss ed., 1968).

<sup>222</sup> Corcoran, *supra* note 216, at 62.

<sup>223</sup> *Id.*

<sup>224</sup> PITKIN, *supra* note 141, at 10.

<sup>225</sup> See SHARON ZUKIN, THE CULTURE OF CITIES *passim* (1995) (noting that cities have a “symbolic economy” that real estate developers use in commercial development, thereby playing a part in creating the demand for inner city living by shrewd marketing of these new cultural symbols).

ment domain power must be exercised according to a redevelopment plan that is inclusive on the bases of race and class. The approach taken by the plaintiffs in *Berman* was flawed and limited because the argument focused on the question of whether the business was properly characterized as blighted. But the real issue was the plaintiffs' exclusion because they did not fit into the vision of the proper retail mix. The two pronged basis of the argument that the plaintiffs in *Berman* should have made was: 1) excluding them based on characteristics, such as income and image is unfair; and 2) leaving this issue purely to the political process was an unsatisfactory and ineffective solution, because the development imperative is too strong.<sup>226</sup>

### CONCLUSION

We are in the midst of a widespread urban restructuring in the inner city. Redevelopment is carried out in furtherance of an affluent attraction policy, through privatized decision-making processes, in tandem with a real estate market that is targeting previously marginalized and subordinated poor and working class communities of color. A broad class of people with unprecedented levels of wealth bid prices beyond the reach of existing residents. These changes lead to safer neighborhoods that have a full complement of retail services and become more livable (in terms of material comforts). The obligations of local government are to ensure that existing communities are not obliterated and that existing residents are not forced out, but have space made for them. Redevelopment should not be based solely on the market's emphasis on luxury retail mix, but also on principles of fair share and inclusion for the residents and small business owners who have a moral right to benefit in the new inner city. *Berman's* acknowledgment that a provision had been made in the urban renewal plans for the return of the original Black residents demonstrates that race and class equity considerations are relevant in redevelopment. *Mt. Laurel's* explication of the three implied obligations of the police power: the availability of widely affordable housing; integration and diversity; and community preservation are also instructive, both for the standards that should apply when the government exercises the power of eminent domain, and also for proper exercises of the police power in connection with redevelopment, in general. Recognition of these obligations derived from principles of fundamental fairness are integral to protect the general welfare of all

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<sup>226</sup> See generally MANUEL CASTELLS, *THE CITY AND THE GRASS ROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* (1983) (discussing exceptions in cases of grassroots resistance).

the types of people that can both live and thrive in as well as benefit the new inner city.