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Articles

THE INFLUENCE OF EXILE

SARA K. RANKIN*

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

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INTRODUCTION

*True compassion is more than flinging a coin to a beggar. It comes to see that an edifice which produces beggars needs restructuring.*¹

Concepts of inclusion and exile—that is, whether one earns permission to participate as a recognized part of society or should be distanced from it—are at the core of human thought and motivation.² The exclusive side of this pervasive phenomenon, which this Article calls “the influence of exile,” often drives the regulation and restriction of the rights of the most vulnerable members of society.³ However, legal discourse and decisionmaking do not

1. Martin Luther King, Jr., Address at Manhattan’s Riverside Church: Beyond Vietnam—A Time to Break Silence (Apr. 4, 1967) (a year to the day before he was assassinated).

2. See Naomi I. Eisenberger et al., *Does Rejection Hurt? An fMRI Study of Social Exclusion*, 302 SCI. 290 (2003) (examining the painfulness of ostracism); Lisa Zadro et al., *How Low Can You Go? Ostracism by a Computer is Sufficient to Lower Self-Reported Levels of Belonging, Control, Self-Esteem, and Meaningful Existence*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 560, 567 (2004) (concluding people are negatively impacted by rejection even if they know their exclusion comes from a random computerized algorithm); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497–529 (1995) (observing that a sense of belonging is a fundamental human need).

3. Public opinion has been shown to influence both legislative policymaking and judicial decisionmaking. See Paul Burnstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29 (2003) (discussing the relationship between public opinion and policymaking); Hans Kelsen, *On the Basis of Legal Validity*, 26 AM. J. JURIS. 178 (1981) (observing that criminal laws are primarily a codification of social norms and are thus justified by reference to common social beliefs); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996)

sufficiently account for it. The human drive to exile is perhaps most clearly expressed when empowered groups restrict access to public space through legal⁴ or extra-legal⁵ means. American history shows a persistent commitment to exiling “undesirable” people from public space: Jim Crow, Anti-Okie, and Sundown Town laws are among many notorious examples.⁶

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

(establishing the influence of public opinion on Supreme Court jurisprudence). Public opinion also influences the enactment of laws that impact commonly marginalized and stigmatized groups such as racial minorities, immigrants, members of the LGBTQ community, and homeless individuals. See David Leonhardt & Alicia Parlapiano, *Why Gun Control and Abortion Are Different from Gay Marriage*, N.Y. TIMES: THE UPSHOT (June 30, 2015), http://www.nytimes.com/2015/06/30/upshot/why-gun-control-and-abortion-are-different-from-gay-marriage.html?_r=0 (synthesizing Pew Research Center and Gallup poll data on changes over time regarding social views of equality relating to various marginalized groups and concluding “public opinion and legal changes fed on each other”); Javier Ortiz & Matthew Dick, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *The Wrong Side of History: A Comparison of Modern and Historical Criminalization Laws* (Sara K. Rankin ed., 2015), <http://ssrn.com/abstract=2602533> (reviewing historical and contemporary efforts to purge marginalized groups from public space, including correlations between legal developments and public opinion); see also Marie-Eve Sylvestre & Céline Bellot, *Challenging Discriminatory and Punitive Responses to Homelessness in Canada*, in *ADVANCING SOCIAL RIGHTS IN CANADA* (Martha Jackman & Bruce Porter eds., 2014) (observing that “punitive responses to homelessness were largely based on negative stereotyping, prejudices, and discrimination”). The relationship between popular societal attitudes and perceptions, and the development of laws and policies is also implicated in discussions of institutional discrimination. See, e.g., EDWARD ROYCE, *POVERTY & POWER: THE PROBLEM OF STRUCTURAL INEQUALITY* 17 (2009) (discussing how discrimination is largely a structural problem since “these obstacles . . . originate from the combined workings of the economic, political, cultural, and social systems”).

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

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

6. Ortiz & Dick, *supra* note 3.

7. See *infra* note 17.

8. See, e.g., Joel Blau, *The Visible Poor: Homelessness in the United States* (1993).

9. See generally *id.*

10. See Part I.A–C; Part IV.

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

Despite America's disturbing heritage of exiling marginalized groups from public space, contemporary legal discourse largely ignores such analogies when laws and policies similarly marginalize poor or homeless people. This Article contends that discrimination, stereotypes, and bias fuel the enactment and enforcement of laws and policies that regulate and restrict visibly poor people from public space; however, these laws are not commonly understood as discriminatory. Instead, legal and popular discourse often legitimates these laws through narratives that blame poor people for their poverty, associate them with criminality, or accept as unassailable the purported interests of public safety or public health. A better understanding of the influence of exile should prompt a re-examination of such laws and policies that not only push poor people to the literal fringes of society, but also condemn them to stay there.

This Article is organized in four parts. Part I introduces the influence of exile in the context of societal perceptions of the visibly poor. This Section surveys sociological and psychological studies that clearly establish the human instincts to organize, include, and exclude each other, especially around perceived status and class lines.¹² This Section suggests that common stereotypes and prejudices can influence societal judgments regarding one's worthiness¹³ and, in turn, these perceptions not only affect the restrictions of rights and resources of poor people in general but visibly poor people in particular.¹⁴

Part II examines interdisciplinary definitions and perceptions of public space as a stage for the influence of exile. This Section examines questions

11. Joel Blau explains:

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

BLAU, *supra* note 8, at 4.

12. See generally SUSAN T. FISKE, *ENVY UP, SCORN DOWN: HOW STATUS DIVIDES US* (2011) (discussing a wide range of scholarship and studies).

13. See generally *id.*; see also Mina Cikara et al., *On the Wrong Side of the Trolley Track: Neural Correlates of Relative Social Valuation*, 5 *SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE* 404 (2010) (discussing the types of harm that come from economically well-off people who determine that a homeless person's life is not worth as much as a higher class person's life).

14. Burnstein, *supra* note 3; Carolyn J. Tompsett et al., *Homelessness in the United States: Assessing Changes in Prevalence and Public Opinion, 1993–2001*, 37 *AM. J. COMMUNITY PSYCHOL.* 47 (2006) (explaining that the views of domiciled individuals influence social and legal policy).

such as what is public space? Who should have access? Who gets to decide the scope and terms of access? What do these inquiries mean for democratic principles, diversity, tolerance, and social justice? These inquiries reveal disquieting tensions in American constructions and valuations of public space.

Part III connects our societal attitudes toward the poor with contests over public space, surveying the increasing prevalence and popularity of laws that regulate the presence of poor people in public space. These spatial-hierarchical responses to visible poverty not only raise legal and policy concerns,¹⁵ but they have been shown to be ineffective and more expensive than the provision of non-punitive alternatives, such as social services and affordable housing.¹⁶ Still, many jurisdictions continue to favor laws and policies of exclusion to mitigate visible evidence of poverty, such as the removal of homeless people from public space through the use of “move along” warnings, civil infractions, or incarceration.¹⁷

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

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

Status is everywhere This process is so basic that we automatically judge the dominance of another individual in a fraction of a second, using certain cues, such as physical strength. . . . All

15. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2014), http://nlchp.org/documents/No_Safe_Place [hereinafter NAT'L LAW CTR.]; Justin Olson & Scott MacDonald, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *Washington's War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement* (Sara K. Rankin ed., 2015), <http://ssrn.com/abstract=2602318>; *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that a state cannot punish a person for his or her status). Following *Robinson*, the Court invalidated a Texas law criminalizing homosexual acts through anti-sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003).

16. NAT'L LAW CTR., *supra* note 15; Josh Howard & David Tran, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle & Spokane* (Sara K. Rankin ed. 2015), <http://ssrn.com/abstract=2602530>.

17. See, e.g., NAT'L LAW CTR., *supra* note 15; Olson & MacDonald, *supra* note 15; MARINA FISHER ET AL., UNIV. CAL. BERKELEY SCHOOL OF LAW POLICY ADVOCACY CLINIC, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE (2015), <http://ssrn.com/abstract=2558944>.

*known organizations gravitate toward status and power hierarchies because this structure makes them run more smoothly. At the macro level, human societies stratify social groups by dominance hierarchies, especially social class.*¹⁸

Common perceptions of poor people can fuel their marginalization. Poverty is relative; in America, income inequality shapes American society in significant ways. Different measures of wealth or poverty correlate to different outcomes concerning health,¹⁹ housing,²⁰ transportation,²¹ education,²² water,²³ and of course, the law.²⁴ Differential allocations of rights and resources are no accident. Empowered groups, which control access to political and financial resources, also control decisions about the allocation of

18. FISKE, *supra* note 12, at 26.

19. See, e.g., Annie Lowery, *Income Gap, Meet the Longevity Gap*, N.Y. TIMES (Mar. 15, 2014), <http://www.nytimes.com/2014/03/16/business/income-gap-meet-the-longevity-gap.html> (discussing the relationship between income disparity and health); Brenda Major & Laurie O'Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCHOL. 393 (2005) (observing the relationship between social belonging and health); Neil Schneiderman et al., *Stress and Health: Psychological, Behavioral, and Biological Determinants*, 1 ANN. REV. CLINICAL PSYCHOL. 607 (2005) (observing the relationship between social belonging, psychosocial stressors, and health).

20. See, e.g., Rajini Vaidyanathan, *Why Don't Black and White Americans Live Together?*, BBC NEWS (Jan. 8, 2016), <http://www.bbc.com/news/world-us-canada-35255835> (discussing trends in housing segregation and noting that across the nation, "people of other races simply don't mix, not through choice but circumstance. And if there's no interaction between races, it's harder for conversations on how to solve race problems to even begin."); William H. Frey, *Census Shows Modest Declines in Black-White Segregation*, BROOKINGS INSTITUTION (Dec. 8, 2015, 11:00 AM), <http://www.brookings.edu/blogs/the-avenue/posts/2015/12/08-census-black-white-segregation-frey> (observing that even modest declines in segregation "are still high measures—more than half of blacks would need to move to achieve complete integration").

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

22. See, e.g., NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA (Harriet Newburger et al. eds., 2011) (examining the impact of poverty and neighborhood on a variety of measures, including educational attainment and equal opportunity).

23. Stephanie Pincetl & Terri S. Hogue, *California's New Normal? Recurring Drought: Addressing Winners and Losers*, 20 LOC. ENV'T 850 (2015), <http://dx.doi.org/10.1080/13549839.2015.1042778> (highlighting the widening gap of inequality between the wealthy and the poor of California, specifically in relation to the State's current drought).

24. For example, poor people struggle with access to justice issues. See, e.g., Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001) (examining the access to justice crisis). Poverty is also likely to result in unequal treatment under the law when compared to legal outcomes for more affluent defendants. See, e.g., GLENN GREENWALD, WITH LIBERTY AND JUSTICE FOR SOME: HOW THE LAW IS USED TO DESTROY EQUALITY AND PROTECT THE POWERFUL 269 (2011) ("The greater the disparities in wealth and power become, the more unequal the law becomes—and the more unequal the law is, the more opportunities it creates for the wealthy and powerful to reinforce their advantages."); MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP (2014) (exploring how "basic rights are now determined by our wealth or poverty").

rights and resources—even though these decisions clearly impact disempowered groups as well.²⁵ Naturally, empowered groups cannot be assumed to be disinterested in such decisions.²⁶ Moreover, empowered groups' perceptions of the social worth of disempowered groups influence these decisions.²⁷ The relationship between power and rights informs many socio-political theories, which maintain that empowered groups consciously or unconsciously use such power to reproduce class relations and hierarchies.²⁸ Simply put,

25. See, e.g., Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 581 (1994) (discussing the danger of a tyrannical majority); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506, 1513–31 (1990) (discussing the popular belief that direct democracy is an authoritative expression of majority will and identifying significant problems associated with this conception); Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, 18–20 (1997) (discussing the ways the views and interests of the visible poor are discounted in societal calculations of maximizing "public welfare").

26. See generally JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* (1992) (examining how institutional rules reflect the self-interested motivations of individuals, who perpetuate institutional structures that best serve their strategic interests). Many economic theories paint a stark portrait of self-interest, suggesting that people make decisions in order to maximize their wealth and other material goals. See, e.g., Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q. J. ECON. 817, 817 (1999); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 247 (1980) ("Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically."); see also Sanford Schram & Joe Soss, *Demonizing the Poor*, JACOBIN (Sept. 3, 2015), <https://www.jacobinmag.com/2015/09/welfare-republicans-sam-brownback-race-corporations/> ("Harsh restrictions on welfare don't limit fraud and abuse. They advance the interests of the rich and powerful."). Of course, these assumptions are often contradicted by examples where people prioritize social goals over economic self-interest. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 842–44, 854–56 (2009) (discussing examples in the context of property law). Because disempowered people are, by definition, not an actively engaged political majority, their preferences—whether driven by self-interest or not—do not control the allocation of rights and resources. Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 AM. POL. RES. 29, 29 (2012) (concluding that lower income individuals "receive little substantive political representation (compared to more affluent citizens)").

27. The allocation of resources based on social worth is often studied and critiqued in the context of economics and ethics. See, e.g., *Advanced Application of Ethics: Types of Resource Allocation*, UNIV. OF ILL. AT URBANA-CHAMPAIGN: ENGINEERING ETHICS, <http://www.scs.illinois.edu/~eseebauer/ethics/Advanced/Allocation.html> (last visited Oct. 7, 2016); see also CRIME, DISORDER AND COMMUNITY SAFETY: A NEW AGENDA? (Roger Matthews & John Pitts eds., 2001). Relatedly, social worth is also frequently examined under the rubric of distributive justice in philosophy and social sciences. See Linda J. Skitka & Faye J. Crosby, *Trends in the Social Psychological Study of Justice*, 7 PERSONALITY & SOC. PSYCHOL. REV., 282, 282–85 (2003). Distributive justice may occur when individuals "get what they deserve," a calculation based in part on norms and an individual's perceived worthiness according to those norms. See, e.g., Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137 (1975). As discussed *infra*, Part II, legal interpretations of social worth—especially the allocations of rights relating to social worth—often manifest in doctrines of property and constitutional law.

28. For more on the systemic reproduction of hierarchies, see, for example, PAULA S. ROTHENBERG, *RACE, CLASS, AND GENDER IN THE UNITED STATES* 593 (2007) (noting "the stere-

the powerful generally stay powerful, the rich stay rich, and the poor stay poor.²⁹

A. Social Worthiness & Socio-Spatial Distance

The engine of this hierarchical system may be human psychology, plain and simple. People perceive and organize each other through the formation of powerful “in-groups” and marginalized “out-groups.” Powerful in-group members may exclude people as “others” having undesirable attributes, thus warranting their rejection from the accepted core of the in-group and their placement on the margins.³⁰ Commonly recognized out-groups include racial or ethnic minorities,³¹ LGBTQ individuals,³² people with physical or mental disabilities,³³ as well as homeless and visibly poor people.³⁴

These sorts of judgments demonstrate “social distancing,” a phenomenon well explained in social psychology. Social distancing examines “the ways in which individual preferences, based in a person’s membership of specific social in-groups, influence social relations with people from other out-groups. These judgments are often measured along a continuum with

otypes and values transmitted through education and the media have played a critical role in perpetuating racism, sexism, hetero-sexism, and class privilege even at those times when the law has been used as a vehicle to fight discrimination rather than maintain it”). Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 138 (2013) (arguing that “racial wealth and housing disparities are dramatic and are probably best explained as a result of systemic racial discrimination and related preferences”). For more on unconscious aspects of structural discrimination, see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (examining “organizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent”).

29. Income inequality is particularly pronounced along racial lines. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> (documenting significant disparities in median household net worth by race). Such structural inequalities relentlessly persist. See Ezra Rosser, *supra* note 28, at 134 (discussing the work of Professor Daria Roithmayr and others as “show[ing] how racial advantage and disadvantage need not be tied to intentional discrimination; instead such advantages and disadvantages can remain stable because the effects of prior discrimination and related early advantages get locked into place”).

30. See, e.g., FISKE, *supra* note 12, at 26; Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363 (2001).

31. See, e.g., SUSAN WELCH ET AL., RACE AND PLACE: RACE RELATIONS IN AN AMERICAN CITY (2001).

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

33. Elaine Makas, *Getting in Touch: The Relationship Between Contact with and Attitudes Toward People with Disabilities*, in PERSPECTIVES ON DISABILITY 121 (Mark Nagler ed., 1993).

34. See, e.g., Barrett A. Lee et al., *Revisiting the Contact Hypothesis: The Case of Public Exposure to Homelessness*, 69 AM. SOC. REV. 40 (2004).

nearness, intimacy, or familiarity at one end and farness, difference, and unfamiliarity at the other end.”³⁵ Sociologist Georg Simmel famously advanced the concept of a “stranger” as an archetype of social distancing: the stranger often is perceived to transgress social norms and thus lives at the fringes of society, wavering in and out of visibility at the periphery.³⁶ Even when strangers are physically near, they are perceived as “far.”³⁷ In this respect, social distancing is both a psychological and hierarchical act of organization, reinforcing one’s perceptions of in-group and out-group membership. But social distancing also reinforces the likelihood that one might form basic emotional and moral associations, such as empathy, anger, disgust, or pity for another based on perceived group membership.³⁸ Higher degrees of social distance facilitate negative associations.³⁹

Social distancing is not only a psychological phenomenon; it can also manifest as a physical one. Social distancing is associated with increased

35. Darrin Hodgetts et al., ‘Near and Far:’ *Social Distancing in Domiciled Characterisations of Homeless People*, 48 URB. STUD. 1739, 1740 (2011). Professor Paul Gorski translates years of considerable research about stereotyping people in poverty:

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

PAUL GORSKI, REACHING AND TEACHING STUDENTS IN POVERTY: STRATEGIES FOR ERASING THE OPPORTUNITY GAP 57 (2013).

36. Georg Simmel, *The Sociological Significance of the “Stranger”*, in INTRODUCTION TO THE SCIENCE OF SOCIOLOGY 322, 322–26 (R. Park & E. Burgess eds., 1921). For more on Simmel’s theories of social distancing, see GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL (Kurt H. Wolff ed., trans., 1950).

37. See, e.g., Donald Levine et al., *Simmel’s Influence on American Sociology I*, 81 AM. J. SOC. 813 (1976) (explaining the tension between the near and far embodied in strangers).

38. FISKE, *supra* note 12, at 26 (discussing the association of these reactions based on perceptions of social worth). Stigma literature closely examines how in-groups assign stigma, a sort of “spoiled identity that encourages their devaluation and rejection by ‘normal’ others.” Lee et al., *supra* note 34, at 42.

39. As Princeton psychologist Susan Fiske explains: “Distance has the effect of belittling people, making them appear smaller. Hence, keeping our distance should make it easier for us to look down on other people. Indeed, it is easier to dehumanize someone at a distance. Scorn looks down and distances.” FISKE, *supra* note 12, at 51 (footnote omitted).

spatial distancing,⁴⁰ such as the evolution of racially segregated neighborhoods and schools.⁴¹ Naturally, spatial distance depresses opportunities for interaction among groups. Indeed, physical segregation may be either an unintended consequence or an explicit motivation associated with social distancing.⁴²

Although social distancing may be a hard-wired human phenomenon, it not only invites discrimination and compromise of the rights of perceived

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

41. History is replete with examples of exclusionary laws that minimize the presence of “undesirable people” in public space. See, e.g., Ortiz & Dick, *supra* note 3. For more on the relationship between discrimination and current trends in racial segregation, see, for example, PAUL JARGOWSKY, *ARCHITECTURE OF SEGREGATION: CIVIL UNREST, THE CONCENTRATION OF POVERTY, AND PUBLIC POLICY* (2015) (noting that discriminatory housing, zoning, and other policy choices are driving a dramatic increase in racialized poverty and segregation across the U.S.); DAVID SANCHEZ ET AL., *AN OPPORTUNITY AGENDA FOR RENTERS: THE CASE FOR SIMULTANEOUS INVESTMENTS IN RESIDENTIAL MOBILITY AND LOW-INCOME COMMUNITIES* (2015) (finding the “lack of available affordable housing and deeply rooted patterns of residential segregation have created a situation in which where people live depends in large part on their income, race, and ethnicity”); Matthew Hall et al., *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 *AM. SOC. REV.* 526, 527 (2015) (observing that racialized segregation “fueled” the foreclosure crisis, which in turn, “may have significantly disrupted trajectories toward residential integration”); Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, *THE CIVIL RIGHTS PROJECT* (Sept. 2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus-separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_complete_2012.pdf (finding segregation has “increased dramatically” for Latino students and is a persistent problem of “double segregation” by race and poverty for African-American students).

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

out-groups, but it also comes at a significant cost to the personal growth and understanding of in-group members. Socio-spatial distancing decreases interaction and integration among groups. However, contact theory shows that contact between in-group and out-group members generally improves “the attitudes of the former toward the latter by replacing in-group ignorance with first-hand knowledge that disconfirms stereotypes.”⁴³ In other words, social-spatial segregation further entrenches stereotyping, misunderstanding, and the stigmatization of marginalized groups.⁴⁴ Such self-perpetuating consequences of socio-spatial distancing are troubling.

B. The Special Stigma of Poverty

Socio-spatial instincts have particular significance when applied to societal perceptions of poor people. Of all commonly identified out-groups, visibly poor and homeless people may be at the bottom of the chain. Social neuroscientists confirm that today, society tends to regard homeless and visibly poor people with disgust and rejection at higher rates than people of any other perceived status.⁴⁵ Other studies consistently suggest that of all marginalized groups, homeless and visibly poor people are the most severely and persistently stigmatized.⁴⁶

43. Lee et al., *supra* note 34, at 40; see also Vaidyanathan, *supra* note 20 (discussing trends in racial segregation).

44. For more on the process of stigmatization, see Link & Phelan, *supra* note 30; see also Major & O'Brien, *supra* note 19.

45. See FISKE, *supra* note 12, at 131 (noting that “in the United States, by far the most extreme out-group is homeless people, but drug addicts, welfare recipients, and immigrants, especially undocumented ones, are also among society’s default bad guys”); see also SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND 124 (Alexander Todorov et al. eds., 2011) (describing how study participants “dehumanized [homeless people] as ill-intentioned, inept, unfamiliar, dissimilar, strange, and not uniquely human or quite typically human”); Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847, 848 (2006) (describing study results placing homeless people in the “lowest” category lacking warmth and competence, which “elicit the worst kind of prejudice—disgust and contempt—based on perceived moral violations and subsequent negative outcomes that these groups allegedly caused themselves”); Lasana T. Harris & Susan T. Fiske, *Social Groups That Elicit Disgust Are Differentially Processed in mPFC*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 45 (2007) (finding study participants dehumanize homeless people as stimuli that elicit “disgust”). Some scholars attribute these perceptions to negative stereotyping, prejudices, and discrimination, often associated with moral judgments and assumptions that visibly poor people are to blame for their condition. See, e.g., BLAU, *supra* note 8; see also Sylvestre & Bellot, *supra* note 3. Sylvestre and Bellot describe common views of homeless people as “inferior, lazy, and dishonest individuals (the ‘moral deprivation’ discourse), blamed for their own misfortunes (the ‘choice’ discourse), and are treated as criminals or potential serious offenders needing to be repressed and confined rather than as equal citizens worthy of respect and consideration (the ‘criminality discourse’).” Sylvestre & Bellot, *supra* note 3, at 2.

46. See, e.g., FISKE, *supra* note 12 (reviewing various studies and concluding that societal disdain for the homeless and visibly poor is the most severe); see also Leon Anderson, David A. Snow & Daniel Cress, *Negotiating the Public Realm: Stigma Management and Collective Action Among the Homeless*, in RESEARCH IN COMMUNITY SOCIOLOGY: THE COMMUNITY OF THE STREETS 121 (Dan A. Chekki et al. eds., 1994) (documenting that homeless or visibly poor people are commonly

But don't just take the word of social scientists. America's deep disdain for poor people is commonly acknowledged in popular media as well. Celebrated Rolling Stone journalist and best-selling author of *The Divide: American Injustice in the Age of the Wealth Gap*, Matt Taibbi, recently declared that Americans have "a profound hatred of the weak and the poor."⁴⁷ Linguist and philosopher Noam Chomsky apparently agrees, describing a "class war" in a recent article, partly titled, *America Hates Its Poor*.⁴⁸ Television commentators frequently suggest that shaming and stigmatizing poverty is vital to the national economy.⁴⁹ Television producers commonly gamble on

not perceived as human beings); Jo Phelan et al., *The Stigma of Homelessness: The Impact of the Label "Homeless" on Attitudes Toward Poor Persons*, 60 SOC. PSYCHOL. Q. 323, 334 (1997) (concluding that "homelessness is stigmatized more severely than poverty and, generally, more severely than mental illness"). Of course, the intersectionality between homelessness and other marginalized groups complicates the question of which perceived traits or out-group membership might trigger negative associations of in-group members. For more on the intersectionality of homelessness and other commonly stigmatized groups, see Kaya Lurie & Breanne Schuster, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *Discrimination at the Margins: The Intersectionality of Homelessness & Other Marginalized Groups* (Sara K. Rankin ed., 2015), <http://ssrn.com/abstract=2602532>.

47. Emily Tess Katz, *Matt Taibbi: America Has a 'Profound Hatred of the Weak and the Poor'*, HUFFINGTON POST (Apr. 16, 2014, 2:48 PM), http://www.huffingtonpost.com/2014/04/16/matt-taibbi-the-divide_n_5159626.html.

48. Chris Steele, *Noam Chomsky: America Hates Its Poor*, SALON MEDIA GRP. (Dec. 1, 2013, 7:00 AM), http://www.salon.com/2013/12/01/noam_chomsky_america_hates_its_poor_partner/.

49. Examples abound, but Fox News provides a prolific showcase. On a recent edition of Fox Business's *Varney & Co. at Night*, Stuart Varney reflected on his earlier statement that "99.6% of [poor people] have a refrigerator." Varney opined, "[t]he image we have of poor people as starving and living in squalor really is not accurate. Many of them have things, what they lack is the richness of spirit." Media Matters Staff, *Fox's Stuart Varney on the Poor: "Many of Them Have Things—What They Lack Is the Richness of Spirit"*, MEDIA MATTERS FOR AM. (Aug. 25, 2011, 9:56 PM), <http://mediamatters.org/video/2011/08/25/foxs-stuart-varney-on-the-poor-many-of-them-hav/138530>. On America's Newsroom, Fox Business host Charles Payne alleged that federal benefit programs trap people in poverty and complained that there wasn't enough "stigma" directed at poor Americans for using food assistance programs: "I know there's a big thing trying to de-stigmatize food stamps, but the good part about the stigma is it actually does serve as an impetus to get people off of it. . . . They're trying to take that stigma away." Media Matters Staff, *Fox's Charles Payne Laments Lack of "Stigma" Surrounding Food Stamps*, MEDIA MATTERS FOR AM. (Mar. 28, 2013, 10:29 AM), <http://mediamatters.org/video/2013/03/28/foxs-charles-payne-laments-lack-of-stigma-surro/193311>. Similarly, in a recent segment of Fox News' *Happening Now*, Fox Business co-contributor Charles Gasparino explained that he wished more stigma was attached to welfare. Craig Harrington, *Fox's Gasparino Calls Public Pensions "Ponzi Schemes," Wishes More "Stigma" Was Attached to Welfare*, MEDIA MATTERS FOR AM. (Aug. 21, 2014, 4:39 PM), <http://mediamatters.org/blog/2014/08/21/foxs-gasparino-calls-public-pensions-ponzi-sche/200506>. New York Post columnist Michael Goodwin recently lamented that "the sense of shame is gone" from enrolling in government anti-poverty programs. See Noah Rothman, *NY Post Columnist: 'Sense of Shame is Gone' for Entitlement Recipients*, MEDIATE, L.L.C. (May 21, 2012, 9:45 AM), <http://www.mediaite.com/tv/ny-post-columnist-sense-of-shame-is-gone-for-entitlement-recipients/>.

the popularity of so-called “poverty porn,” which entertains through the spectacle of poor people enduring hardships, all for the viewing pleasure of the public.⁵⁰

Contemporary politics also demonstrate an appetite for stigmatizing the poor.⁵¹ Recently, an Oklahoman political party compared food stamp recipients to wild animals.⁵² Maine placed a cap on the savings accounts of food stamp recipients, a move some criticized as discouraging poor people from saving money.⁵³ Wisconsin recently passed a so-called “food nanny” bill,⁵⁴ prohibiting food stamp recipients from buying a long list of staple food items, including beans, spaghetti sauce, and nuts.⁵⁵ Further, Wisconsin joined many other states in requiring applicants for most state benefits to submit to drug screening, despite strong evidence that welfare recipients have a lower positive test rate for illicit drug use than the general population.⁵⁶ Several states

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

51. GREENWALD, *supra* note 24, at 14 (“It is now quite common for American political discourse to include arguments expressly justifying the elites’ legal impunity and openly calling for radically different treatment under the law for various classes of people based on their power, status, and wealth.”).

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

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

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

55. Assemb. B. 117, 2015–2016 Leg., 102nd Reg. Sess. (Wis. 2015), <http://docs.legis.wisconsin.gov/2015/related/proposals/ab177>.

56. Bryce Covert, *Wisconsin Begins Drug Testing for Unemployment and Food Stamp Applicants, Which May Be Illegal*, THINKPROGRESS (Nov. 9, 2015, 10:59 AM), <http://thinkprogress.org/economy/2015/11/09/3720495/wisconsin-begin-drug-tests/>; WIS. STAT. ANN. § 49.79 (West 2015).

cap eligibility for welfare based on the number of people per family to discourage poor women from having children, despite evidence that families receiving welfare are no larger than those in the general public and that such caps actually exacerbate poverty.⁵⁷ Critics contend such regulations are expensive and ineffective and instead primarily serve to punish poor people for, well, being poor.⁵⁸ Ultimately, such punitive constructions codify and legitimize the instinct to condemn people for their poverty.

C. Poverty and the Transmutation of Discrimination

Given the disproportionate representation of other various marginalized groups within poor and homeless populations, the higher rate of negativity associated with poverty—as opposed to other commonly stigmatized traits—is curious. Studies show visible poverty elicits higher rates of disgust than nearly any other commonly marginalized trait, including racial or ethnic indicia.⁵⁹ But poverty is more likely to be associated with racial minorities, people with physical and mental disabilities, and single-female-headed families.⁶⁰ Similarly, homeless populations are disproportionately comprised of these and other commonly marginalized groups.⁶¹ The special stigma reserved for poor and homeless people, then, seems at odds with such evidence of intersectionality. Why does viewing people through the lens of poverty trigger especially negative reactions?

Perhaps this special stigma serves as a sort of release valve for the contemporary American conscience: as many forms of discrimination find less space in a normative framework, the stigmatization of poverty may present an attractive path of less resistance.⁶² National public opinion seems to accept the normative proposition that (at least overt) discrimination on the basis

57. See, e.g., CAL. WELF. & INST. CODE § 11450.04 (West 1994); see also Bryce Covert, *An 'Ugly Policy' Systematically Devalues Poor Children. One State Is Ready to Stop It.*, THINKPROGRESS (July 1, 2015, 8:00 AM), <http://thinkprogress.org/economy/2015/07/01/3675655/california-family-cap/>.

58. See, e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011) (discussing the criminalization of welfare); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (discussing laws and policies that punish and marginalize poor people); JOE SOSS ET AL., *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (2011) (cataloguing the systemic oppression and regulation of the poor).

59. See *supra* note 45. Indeed, neurological studies suggest that people demonstrate higher degrees of support or tolerance for racial minorities that show indicia of higher socioeconomic status. FISKE, *supra* note 12.

60. Lurie & Schuster, *supra* note 46 (examining the disproportionate representation of various marginalized groups in poor and homeless populations when compared to the general population).

61. *Id.* (examining the disproportionate representation of various marginalized groups, such as racial minorities, in homeless populations when compared to the general population).

62. SOSS ET AL., *supra* note 58, at 55 (noting the gradual morphing of poverty governance: “[M]arginalization itself does not have a static relationship to race, class, gender, or other axes of social division.”).

of race, ability, or sexual orientation and identity is wrong—or that it is supposed to be.⁶³ The Black Lives Matter movement; continuing battles over women’s reproductive rights; disputes over the relationship between immigration, religion, and national security; and the fight for marriage equality are just a few examples of struggles that continue to clarify the contours of America’s commitment to diversity, inclusion, and social justice. These high-visibility debates certainly do not reflect a national consensus around racism, sexism, or xenophobia; however, at least they register in the American conscience.⁶⁴

Of course, the American conscience cannot and should not be oversimplified. The passage of civil rights and anti-discrimination laws does not moot the existence of overt or implicit bias against protected groups. In fact, some persuasively contend that such laws stand as testaments to the continuing crises of discrimination.⁶⁵ However, studies suggest the American public

63. See SOSS ET AL., *supra* note 58, at 54 (noting that “[e]galitarian racial norms are now widely promoted, and explicit racism is rarely tolerated in the discourses of the market and polity”); Steve Holland, *Most Americans Side With Gays in Religious Freedom Disputes: Reuters/Ipsos Poll*, REUTERS (Apr. 9, 2015, 9:13 AM), <http://www.reuters.com/article/2015/04/09/us-usa-religion-poll-idUSKBN0N00A720150409> (discussing poll supporting marriage equality for LGBTQ individuals); Sara K. Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 RUTGERS L. REV. 563 (2014) (discussing legislative evidence of the relationship between public opinion, overtly expressed views of perceived social worth by legislators, and laws that support or protect these marginalized groups).

64. Maggie Haberman, *Poll: Anti-Discrimination Law Support*, POLITICO (Sept. 30, 2013, 5:05 AM), <http://www.politico.com/story/2013/09/poll-big-support-for-anti-discrimination-law-097540>. Hate crime protections are commonly afforded to marginalized groups, except for the visible poor. See Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383 (2015) (comparing congressional allocations of hate crime protections on the basis of race, ethnicity, national origin, gender, sexual orientation, gender identity, and homelessness). Many marginalized groups, but not the poor, are considered suspect or quasi-suspect classes worthy of heightened judicial scrutiny. See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008) (reviewing suspect classification analyses with various marginalized groups and arguing that the classification of the poor is still unsettled). Sylvestre & Bellot, *supra* note 3, at 1, 4 (arguing that homelessness should be recognized as a protected class under Canadian law because, among other reasons, “it is, like several other enumerated or analogous grounds of discrimination, a social construct attached to some individuals that is not immutable, but that is difficult to change”). Another example of legal recognition afforded commonly marginalized groups (but not the visibly poor, at least so far) is disparate impact analysis under Equal Protection theories. Most recently, the Supreme Court reiterated the availability of disparate impact analysis on the basis of race in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). In this case, the plaintiffs argued that the Texas Department of Housing and Community Affairs distributed federal tax credits for low-income housing in a way that disproportionately affected minorities. *Id.* at 2514. The Supreme Court considered whether the language of the Fair Housing Act, which makes it illegal to refuse to sell, rent, or “otherwise make unavailable or deny” a property because of race and other categories, required that the discrimination be intentional or whether it permitted plaintiffs to claim a discriminatory effect, regardless of intent. *Id.* at 2518. The Court held that the Act permitted disparate impact claims. *Id.*

65. The prevalence of unconscious bias is well-established. See, e.g., *King’s Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RESEARCH CENTER, (Aug. 22, 2013), <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many->

is growing more aware of how unconscious bias might be perceived by others, which may make people more reflective regarding overt expressions of discrimination. Still, this awareness could result in the expression of more subtle and nuanced—but still potent and damaging—forms of discrimination. In other words, reductions in overt expressions of bias might suggest that people are learning to outwardly censor their implicit biases with respect to race and gender, and perhaps increasingly, with respect to sexual orientation and identity. *Racial Attitudes in America*, an annual survey conducted since 1997, reports that “the survey data on white racial attitudes shows improvement, stagnation, or decline” in American attitudes about race.⁶⁶ The principal researchers recently observed that:

[Q]uestions of how much social distance whites prefer to keep from blacks, and the extent to which whites endorse negative stereotypes of blacks, also show clear evidence of improvement: fewer and fewer white Americans readily endorse statements that blacks are less intelligent and hardworking than whites; and fewer verbally object to interracial mixing in neighborhoods and in marriage partners. . . . [T]here is a need for some caution in interpreting the trends from these kinds of questions because they do not capture all aspects of racial attitudes and because some of the liberalizing trend may be due to changes in social norms about what kinds of answers should be reported in surveys. . . . This in itself reflects a change in the racial climate in this country even if it does not reflect changes in the hearts and minds of white Americans.⁶⁷

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

But in the context of poverty, discrimination is still largely unrecognized as discrimination.⁶⁸ Americans commonly disregard evidence that racism, able-ism, sexism, and homophobia are major contributors to poverty and

americans-see-racial-disparities/; see also Eben Harrell, *Study: Racist Attitudes Are Still Ingrained*, TIME (Jan. 8, 2009), <http://content.time.com/time/health/article/0,8599,1870408,00.html>. According to Harrell, “The authors say the results suggest attitudes so deeply ingrained that protective legislation and affirmative-action programs are required to overcome them. The results may even offer clues as to how other societies have spiraled into genocide.” *Id.*; see Kerry Kawakami et al., *Mispredicting Affective and Behavioral Responses to Racism*, 323 SCIENCE 276 (2009).

66. See Maria Krysan & Sarah Moberg, *Trends in Racial Attitudes: A Portrait of African American and White Racial Attitudes*, UNIV. OF ILL. (Sept. 9, 2016), <http://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/reports/A-Portrait-of-Racial-Attitudes.pdf>.

67. *Id.*

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

homelessness,⁶⁹ and instead, embrace the belief that poor people are to blame for their own conditions.⁷⁰ Punitive treatment of poor people on account of their poverty does not warrant the same legislative or judicial protections afforded to many other marginalized groups.⁷¹ Somehow, as further illustrated below, constructions of the poor as less worthy—as expressed in popular media, in political circles, or even in the enactment or enforcement of laws and policies that target or disproportionately impact poor people—do not generate the same level of societal introspection or caution.⁷² But given the intersectionality of poverty, homelessness, and other marginalized traits, this phenomenon may simply represent the transmutation of normatively “bad” discrimination into a normatively “more acceptable” form of discrimination against the poor.⁷³ Thus, through the special stigmatization of poverty, the American conscience may be sanitizing many forms of discrimination to appear as something less objectionable or actionable: judgments about social worthiness.⁷⁴

69. Lurie & Schuster, *supra* note 46 (reviewing a range of studies).

70. *See infra* Part I.D.

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

72. *See generally* Rankin, *supra* note 63 (discussing how homeless and visibly poor people are largely omitted from state and federal antidiscrimination legislation that often protects other commonly marginalized groups from various forms of discrimination); *id.* (reviewing various but limited legislative efforts to advance homeless rights advocacy, including anti-discrimination legislation, across various United States and Puerto Rico). Certainly, the omission of poverty from suspect classification analysis is another problematic expression of the relative social worth ranking of poor people compared to other commonly marginalized groups. *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 787 (1991) (noting that judicial distinctions between “justifiable [and] unjustifiable disadvantaging quite plainly requires a substantive value choice”); Nice, *supra* note 64, at 631–36. Other overt calculations of the low social worth of poor people are plentiful. *See, e.g.*, Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.L. L. REV. 1, 11 (2011) (describing a tension in Portland, Oregon, which “capitalizes upon its image as an exceptionally livable, an extraordinarily progressive and tolerant city, while at the same time consolidating systems of disgust, phobia, and abandonment used against certain (non)members of the urban community”). Social worth calculations as a policy decision-making guide is illustrated in a recent statement by one Florida state senator, who explained his support for cutting mental health funding: “When it comes to funding, an 85-year-old woman in a nursing home matters more to me than a 45-year-old guy with a substance abuse problem . . . It’s all about priorities.” Tia Mitchell, *Senate Plan Includes Big Cuts to Mental Health Programs*, TAMPA BAY TIMES (Feb. 14, 2012, 8:51 PM), <http://www.tampabay.com/news/health/senate-plan-includes-big-cuts-to-mental-health-programs/1215489>.

73. *See, e.g.*, Kaaryn Gustafson, *supra* note 58, at 648 (“The criminalization of welfare recipients entails a long historical process of public discourse and welfare policies infused with race, class, and gender bias.”).

74. Societal recognition of and response to evidence of discrimination against common outgroups—such as racial minorities, physically or mentally disabled individuals, LGBTQ individuals, and women, for example—is so well established that a review of this extensive body of literature is not necessary here. For a starting point, consider Rankin, *supra* note 64.

D. *The Blameworthy Poor*

Judgments about social worthiness are closely tied to the construction of blame. Public support or tolerance for certain groups may turn on the degree to which society believes individuals are responsible for a particular trait.⁷⁵ This relationship between perceptions of causal responsibility and perceptions of social worthiness resonates with traditional suspect classification analyses, which afford higher degrees of judicial scrutiny when a law discriminates against a member of a suspect group who is marked by an involuntary trait that cannot be changed.⁷⁶ In other words, the judiciary extends such enhanced protection only to those who are not to blame for who they are.⁷⁷

Blame plays a significant role in Americans' constructions of poverty.⁷⁸ Compared to other countries, the United States is particularly enamored with the "bootstrap" work ethic: the belief that, if you just work hard enough, you can avoid poverty.⁷⁹ Approximately a quarter of Americans believe the most significant cause of income inequality is the failure of the poor to work as hard as the more affluent.⁸⁰ Accordingly, American sentiment might "urge

75. See Gail Sahar, *On the Importance of Attribution Theory in Political Psychology*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 229, 229–49 (2014) (discussing how "[j]udgments of causal responsibility . . . pervade our understanding of the social world," poverty, and homelessness and explaining that "perceptions of responsibility are linked to ideology and . . . influence policy attitudes"). Sahar calls for "increased communication among fields and a more systematic application of attributional models to the study of political judgments." *Id.* at 229; see also FISKE, *supra* note 12. The relationship between causal responsibility and social or legal judgments about worthiness resonate with traditional suspect classification analyses, which afford higher degrees of judicial scrutiny when a law has a discriminatory impact or intent on a "suspect" group that cannot change a trait. Neurological studies suggest that people inherently have higher degrees of support or tolerance for certain racial minorities, especially when those racial minorities are of higher socioeconomic status. See *id.*; see also *Census Data Shows Black Women and Children Impacted by Poverty More*, ELEC. URB. REP. (Oct. 8, 2015), <http://www.eurweb.com/2015/10/census-data-shows-black-women-and-children-impacted-by-poverty-more/>.

76. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

77. See, e.g., *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (striking down a statute punishing individuals based on their status rather than conduct).

78. MICHAEL KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* (2d ed. 2013) (explaining the role of blame and other related moral judgments in Americans' constructions of poverty). The visibly poor and homeless are particularly vulnerable to this judgment. See, e.g., Sylvestre & Bellot, *supra* note 3. Homelessness is often "explained and addressed as in individual moral failure rather than in relation to its structural causes, so that the victims of economic changes leading to displacement or unemployment were blamed for their predicament, suspected of being a threat to society and likely to engage in serious criminality." *Id.* at 10.

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

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

pity for those who are worse off, and we do pity certain unfortunates, but only those who have landed at the bottom through no fault of their own. Otherwise, under meritocracy, they deserve their fate and are beneath consideration.”⁸¹

Blame also plays into theories of property—that is, whether one’s work and productivity justifies the acquisition or ownership of property. The labor-desert “principle rests on a conception of persons as agents who, by their actions in the world, are responsible for changes in it and so deserve or are entitled to something.”⁸² Placed in the context of poverty, the labor-desert principle fits neatly with American attitudes: a poor person likely did something (like make bad decisions) or failed to do something (like work hard enough) that caused his or her poverty. The labor-desert principle does not account for institutional or structural discrimination that limits meaningful opportunities, nor does it contemplate health or social conditions, such as addiction or mental illness, which undercut the labor-desert calculation. Thus, blame serves as a blunt but effective instrument, partitioning those who deserve the benefits of full membership in society from those who have not earned the privilege.⁸³

E. *The Criminal Poor*

Blame also facilitates a host of other negative associations, commonly expressed in the “broken windows theory,” a criminal justice framework that equates visible, undesirable people with criminality.⁸⁴ The broken windows theory suggests that if a community fails to swiftly and adequately respond to the first signs of disorder in a neighborhood, such as a broken window,

81. FISKE, *supra* note 12, at 27. Some scholars attribute these perceptions to negative stereotyping, prejudices, and discrimination, often associated with moral judgments and assumptions that visibly poor people are to blame for their condition. See, e.g., BLAU, *supra* note 8; see also Sylvestre & Bellot, *supra* note 3. Amy Wax has also examined America’s belief that welfare recipients should earn, owe something in return, or otherwise be deserving of public aid. See generally Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 L. & CONTEMP. PROBS. 257 (2000).

82. Munzer, *supra* note 25, at 4.

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

84. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

those signs then serve as a beacon, signaling to hungry lawbreakers that the neighborhood does not attend to public order.⁸⁵ These signals attract new potential offenders, result in more disorder and crime, and drive away any remaining law-abiding citizens.⁸⁶ Due to inadequate social and legal responses to the first broken window, the neighborhood steps onto a greased slope, facing downhill, sliding into urban decay.⁸⁷

Even in its earliest iterations, the broken windows theory had special application to “street people,”⁸⁸ who are commonly associated with disorderly acts such as being “disreputable or obstreperous or unpredictable.”⁸⁹ In this way, homeless and visibly poor people themselves actually become “broken windows,” threatening to undermine the order and safety of public space. Thus, the broken windows theory supports a normative judgment that such people should be removed from view because “their choice to live on the streets is disruptive to others.”⁹⁰ Although the broken windows theory has been widely discredited as fundamentally flawed,⁹¹ anti-democratic,⁹² and discriminatory,⁹³ it continues to play a potent and persistent role in criminal justice and policymaking circles—especially in application to marginalized groups, including homeless and visibly poor people.⁹⁴

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; see also GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 8 (1996).

89. Kelling & Wilson, *supra* note 85.

90. KELLING & COLES, *supra* note 88, at 66. Studies belie suggestions that homelessness and poverty are voluntary conditions. See Lurie & Schuster, *supra* note 46 (finding that certain marginalized groups are disproportionately impacted by homelessness because of systemic discrimination); Suzanne Skinner, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *Shut Out: How Barriers Often Prevent Meaningful Access to Emergency Shelter* (Sara K. Rankin ed., 2016), <http://ssrn.com/abstract=2776421>.

91. See GARY BLASI, UCLA SCH. OF LAW, POLICING OUR WAY OUT OF HOMELESSNESS? THE FIRST YEAR OF THE SAFER CITIES INITIATIVE ON SKID ROW (2007), http://www.ced.berkeley.edu/downloads/pubs/faculty/wolch_2007_report-card-policing-homelessness.pdf; John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207 (Alfred Blumstein & Joel Wallman, eds., 2000); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

92. See, e.g., STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY (2006).

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

94. Olson & MacDonald, *supra* note 15; Ortiz & Dick, *supra* note 3; see also Marie-Eve Sylvestre, *Narratives of Punishment: Neoliberalism, Class Interests and the Politics of Social Exclusion*, 7 EUR. J. HOMELESSNESS 363, 364 (2013) (agreeing with others that the repression of poor and homeless people cannot be totally attributed to broken windows policing, but maintaining that

Thus, complex dynamics—economic, psychological, sociological, and spatial—feed American perceptions of poor people. Indeed, perceptions of poverty may be the most salient factor in American determinations of social worthiness; perceived poverty generally depresses judgments of social worth.⁹⁵ This moral calculation may be even more pronounced for homeless and visibly poor people, even when compared to the generic poor.⁹⁶ Yet, before we can understand how this special stigma influences the increasing exile of visibly poor people from public space, it helps to next investigate concepts of public space itself.

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

*Place can be a powerful weapon of social and political control.*⁹⁷

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

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

broken windows theories have “been widely and conveniently used as *legitimizing discourses* to justify existing repressive practices” in the United States and elsewhere).

95. For example, neurological studies suggest that people show higher degrees of support or tolerance for certain racial minorities when those individuals are associated with indicia of higher socioeconomic status. See FISKE, *supra* note 12.

96. Many sociological theories suggest that stigma and inequality-legitimizing ideologies result in higher degrees of stigma for homeless people versus poor people generally. See, e.g., Phelan et al., *supra* note 46 (reviewing such theories and related studies).

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

98. See generally Judit Bodnar, *Reclaiming Public Space*, 52 URB. STUD. 2090 (2015) (reviewing decades of cross-disciplinary obsessions with the topic of public space); see also Zachary Neal, *Seeking Common Ground: Three Perspectives on Public Space*, 163 URB. DESIGN & PLAN. 59 (2010) (reviewing various disciplinary perspectives on public space).

99. See MATTHEW CARMONA ET AL., PUBLIC PLACES-URBAN SPACES: THE DIMENSIONS OF URBAN DESIGN 111 (2003); STEPHEN CARR ET AL., PUBLIC SPACE (1992); see also *Public*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *public* as “[o]pen or available for all to use, share, or enjoy”).

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

A. Socio-Political Constructions of Public Space

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

Moreover, the difference and diversity values of public space are unique and irreplaceable: “Public streets and sidewalks are the only remaining sites of public expression and ‘unscripted political activity,’ and their main function is making poverty and inequality visible.”¹⁰⁵ Many critics reject a monolithic, normative construction “of the public sphere, suggesting that it should

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

101. See, e.g., JOHN R. PARKINSON, DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE 24 (2012).

102. Some scholars frame a democratic ideal of public space as “the commons.” See DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH 2–3 (2003) (describing public, or common, space as the “valuable resources that the American people collectively own”). Similarly, Professor Lawrence Lessig describes the commons as a resource for “joint use or possession; to be held or enjoyed equally by a number of persons.” LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 19 (2002) (quoting *Commons*, OXFORD ENGLISH DICTIONARY); PARKINSON, *supra* note 101.

103. As one scholar observes: “It is easy to forget that public space thrives on diversity and the lack thereof can kill it.” Bodnar, *supra* note 98, at 2095.

104. PARKINSON, *supra* note 101, at 4.

105. Bodnar, *supra* note 98, at 2097 (quoting KOHN, *supra* note 83).

include . . . a variety of subaltern or counter-publics.”¹⁰⁶ Even frictions with others is of significant value; “in the presence of difference people have at least the possibility to step outside themselves,” creating opportunities for personal growth.¹⁰⁷ The price of this opportunity is engagement with strangers and their associated differences, which can produce feelings of anxiety or fear.¹⁰⁸

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

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

But such ideals conflict with America’s commitment to disorder-suppression or broken windows-type policies. Robert Ellickson starkly animates the spatialization of social order in his influential article, *Controlling Chronic Misconduct in City Spaces*.¹¹³ He argues that certain behaviors associated with visibly poor people, such as begging, violate community norms of civility and appropriateness. Accordingly, cities should confine certain non-conforming people to specific zones where undesirable people can be more effectively policed.¹¹⁴ Ellickson proposes a color-coded zoning system to allocate downtown space, a system “modeled on traffic lights with red signaling caution to the ordinary pedestrian, yellow, some caution, and green, a

106. Neal, *supra* note 98, at 63 (citing to and discussing many of these theories).

107. Bodnar, *supra* note 98, at 2093.

108. *Id.* at 2092 (describing how interactions with strangers or other evidence of difference can be “unpleasant and sometime even frightening Unknown and unassimilated otherness can produce cognitive and emotional shocks”).

109. *See, e.g.,* Lee et al., *supra* note 34, at 40 (concluding that “multiple types of ingroup exposure” to homeless people can have a positive influence on in-groups’ opinions and beliefs about people experiencing homelessness).

110. Bodnar, *supra* note 98, at 2091.

111. Richard Boyd, ‘*The Value of Civility?*’, 43 URB. STUD. 863, 871 (2006).

112. *Id.* at 875.

113. *See* Ellickson, *supra* note 83.

114. *Id.* at 1208–09.

promise of safety.”¹¹⁵ Red zones would allow noise, public drunkenness, prostitution, and other forms of “disorderly conduct.”¹¹⁶ Yellow zones would prohibit “offensive” activities such as panhandling and other “public nuisances,” but some “flamboyant and eccentric conduct” would be permitted.¹¹⁷ Green zones would serve as a refuge for the “unusually sensitive” members of society, such as children and elderly people.¹¹⁸ Strict social controls in green zone sanctuaries would prohibit any potentially “disruptive” activities which are currently legal, such as dog walking or playing a radio.¹¹⁹ According to Ellickson’s logic, segregating people based on their compliance with community norms would ensure that downtown space is most efficiently enjoyed.

Such “zoning by behavior” proposals have been both embraced¹²⁰ and vigorously critiqued as discriminatory or Orwellian,¹²¹ and yet, as further explained below, they are also fairly characterized as the “prevailing logic” behind contemporary regulations of public space.¹²² Clear tensions exist between the ideals of creating and maintaining inclusive and diverse public space that encourages difference and discomfort when compared to ideals that segregate people based on their perceived compliance with in-group norms. Marginalized groups—by the very nature of their marginalization—have little power in the negotiation of this tension or its manifestation in the American conscience, laws, and policies.

B. Legal Constructions of Public Space

The law has long been fascinated with the regulation of public space. Part of this fascination concerns the thorny exercise of distinguishing between public and private property and the constitutional rights or obligations attendant to a property’s categorization. In the property context, government-owned property is frequently construed as “public” property in contrast to “everything else.”¹²³ But, “in the modern world of quasi-public entities and governmental privatization, attempts to categorize entities, properties, and

115. KOHN, *supra* note 83, at 168 (discussing Ellickson, *supra* note 83, at 1120).

116. Ellickson, *supra* note 83, at 1221.

117. *Id.*

118. *Id.* at 1221–22.

119. *Id.* at 1222.

120. See, e.g., Sheila Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 70–73 (2011) (discussing Ellickson’s zoning proposal and describing the presence of “transient homeless populations[s]” in public space as undesirable and requiring heightened governmental or private management to “enforce social norms”).

121. Munzer, *supra* note 25, at 40.

122. KOHN, *supra* note 83; see also Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 2–4 (2004) (describing the persistence of broken windows theory in public zoning regulations).

123. See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 29 (2002).

activities as strictly public or private have led to frustration and uncertainty.”¹²⁴

Legal narratives commonly center on the right to exclude. Legal scholarship frequently reflects on the “tragedy of the commons,” an economically-oriented belief that public space ultimately degrades when governmental or private managers fail to exclude potential users who lack incentives to conserve or sustain the space as a shared resource.¹²⁵ As further explained below, some narratives challenge the law’s obsession with exclusion, arguing for a construct more consistent with inclusion and diversity. But these critiques are themselves outliers because, in most respects, they do not represent the current state of the law.

1. *Exile in Property Law*

Property law is a fundamental node in American hierarchical constructions of space. Indeed, the right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹²⁶ Through exclusion, property expresses its meaning in terms of the acquisition, access, occupation, use, and ownership of resources, including physical space.

a. *Property Zoning and Regulations*

Broken windows policies—which, as previously discussed, suppress evidence of normatively defined disorder and feed the stigmatization of visibly poor people—not only permeate the American approaches to criminal justice and community policing, but they also influence American property regulations. Nicole Garnett investigates the relationship between “order-maintenance efforts” and property regulation in her article, *Ordering (and Order in) the City*.¹²⁷ She acknowledges that “disorder suppression” is the

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

125. The “tragedy of the commons” was coined by Garrett Hardin in *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). Illustrative commentary includes Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (reviewing the history of legal doctrine concerning public access to private property), and Foster, *supra* note 120, at 57 (contending that the tragedy of the commons occurs “during periods of ‘regulatory slippage’—when the level of local government oversight . . . significantly declines”).

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

127. Garnett, *supra* note 122, at 3.

“first function of property regulation.”¹²⁸ Efforts such as the authorization of private property inspections¹²⁹ and public nuisance lawsuits¹³⁰ codify the priority of suppressing disorder. Indeed, Garnett goes further, suggesting that “our dominant form of property regulation—Euclidean zoning—has addressed the spatial separation of different land uses rather than property conditions. That is, the point of ubiquitous zoning laws is to put ‘everything in its place,’ to segregate economic from noneconomic activities, rich from poor, etc.”¹³¹

Garnett challenges the codification of disorder-suppression ideologies, which erroneously “equate ordered land uses with the absence of disorder.”¹³² She shows that collectively, such pervasive property regulations devastate “the social and economic prospects of poor people.”¹³³ Such over-regulation or “misregulation” of property actually “impede[s] efforts to restore a vibrant, healthy, and organic public order.”¹³⁴ Having laid bare some of the potentially negative impacts of property regulations on marginalized communities, Garnett stops short of examining why property law might operate this way. Instead, she endeavors to reconcile her critique of property regulation rules with “the social norms justifications for the order-maintenance agenda.”¹³⁵ Accordingly, her recommendations fall in line with the economic compass that predictably guides so much of property law.¹³⁶ This approach, like that of the law generally, leaves the influence of exile undisturbed.

b. Progressive Property Critiques

A collection of “progressive property” scholars have perhaps come closest to exposing the influence of exile on property law. These scholars critique American law and policy as not only generally obsessed with exclusion, but as specifically bent on the exclusion of marginalized groups.¹³⁷ Professor

128. *Id.* at 7.

129. *Id.* at 13–19.

130. *Id.* at 20–21.

131. *Id.* at 21.

132. *Id.* at 5.

133. *Id.* at 26.

134. *Id.* at 5.

135. *Id.* at 42.

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

137. Indeed, Professor Rosser describes progressive property theory as the contemporary “site of intervention to challenge the extent to which property rights trump the interests of the property-less.” Rosser, *supra* note 28, at 114.

Ezra Rosser describes this developing field as comprised of two linked propositions: “(1) that conventional law and economics and the related assumption of a single metric—efficiency—should not be the sole means of evaluating laws and establishing property norms, and (2) that alternative, progressive frameworks should be used.”¹³⁸ Rosser further explains that progressive property scholars represent “both a reaction against the particularly strong influence of economic approaches to the law and an assertion that property lawmaking must be more nuanced, more expressly political, and less preoccupied with the owner’s right to exclude.”¹³⁹

Progressive property theorists argue that American property law should be reconstructed to reflect owners’ social¹⁴⁰ and moral¹⁴¹ obligations, including the call to better support civility¹⁴² and democratic principles.¹⁴³ Property expresses and reproduces power,¹⁴⁴ so progressive property theorists argue that the law “should promote the ability of each person to obtain the material resources necessary for full social and political participation.”¹⁴⁵

By pushing such radical reconstructions of the law and legal discourse, progressive property norms challenge deep American conceptions of property. Still, some think progressive property theories are not radical enough. For example, Rosser claims that progressive property theories still fail to adequately emphasize “the troubling origins of ownership in the United States,”¹⁴⁶ which limits progressive property scholars’ analysis and advocacy, especially around the redistribution of property rights to atone for “prior wrongful acquisition” and to correct “related, currently experienced inequality.”¹⁴⁷ Rosser offers examples of “the racialized nature of acquisition and distribution”¹⁴⁸ in American history, including the forced dispossession of

138. *Id.* at 110.

139. *Id.*

140. *See id.* (discussing Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009)).

141. Peñalver, *supra* note 26.

142. Professor Alexander calls this “human flourishing.” Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 770 (2009).

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

144. Rosser, *supra* note 28, at 126; *see also* Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 757 (2009) (noting “perhaps the most ubiquitous and important messages that property communicates have to do with relative status, with the material world defining and reinforcing a variety of economic, social, and cultural hierarchies”).

145. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009).

146. Rosser, *supra* note 28, at 127.

147. *Id.* at 111.

148. *Id.*

Native American lands and “the systematic exploitation of African Americans, first as slaves and later as second-class citizens.”¹⁴⁹ According to Rosser, American property law not only fails to appreciate this tainted history, but also perpetuates such oppression and exploitation through doctrines and practices of inheritance.¹⁵⁰

Despite progressive property theorists’ common focus on private property, these critiques translate to laws and policies concerning public space. Integrating Rosser’s critique, progressive property scholars not only challenge property law’s codifications of the instinct to exclude, but they also suggest how dominant groups may express unconscious biases and discrimination against marginalized groups through the rules of property. Indeed, many of these scholars’ concerns about the role of discrimination in the context of private property arguably become more pointed and urgent when they are extended to public space.

2. *Exile Under the First Amendment*

First Amendment jurisprudence ostensibly implicates values of diversity and difference in public space; however, as explained herein, it also fails to adequately address the influence of exile.¹⁵¹ At first blush, things seem promising for marginalized groups. Governmental decisions about how to regulate public space are generally presumed to be constitutional,¹⁵² but when First Amendment rights are implicated, the burden shifts to the state to justify any restriction on speech.¹⁵³ In reviewing a free speech challenge to a governmental regulation of public space, courts will modify the level of judicial scrutiny depending on just how “public” the property is deemed to be.¹⁵⁴ This

149. *Id.* at 128–33 (examining the role of colonialism and the dispossession of Indian land); *id.* at 133–40 (examining the role of slavery and racism).

150. *Id.* at 128 (“Society . . . treats property acquisition as a given, disconnected from past wrongs, even as new generations inherit the benefits and harms of property’s racial legacy.”).

151. *See* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). The First Amendment provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.” U.S. CONST. amend. I. Generally, First Amendment rights only extend to the expression of speech on public but not private property. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). Of course, the constitutionality of governmental regulation of public spaces is challenged under many other theories than free speech. *See infra* Part III.C (surveying various legal challenges to criminalization laws).

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

153. *E.g.* *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183 (1999); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1209 (E.D. Cal. 2015).

154. *See, e.g.*, *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

inquiry—commonly referred to as public forum analysis—turns on the value of the public space as a site of expression and communication of ideas.¹⁵⁵

Quintessential public fora include places like streets, sidewalks, and parks, which “have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁵⁶ Indeed, the First Amendment protects the expression of offensive and disagreeable speech in public fora on the grounds that it is essential to American democracy.¹⁵⁷ Accordingly, a governmental regulation of speech in a public forum is subject to stricter scrutiny¹⁵⁸ if it is content-based,¹⁵⁹ rather than if it is content-neutral with respect to time, place, or manner. This restriction is warranted because the former “raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing.”¹⁶⁰ In this sense, First Amendment concerns appear consistent with socio-political values of diversity and difference in public space, even when the protection of those values might result in confrontation, tension, and discomfort.¹⁶¹ Such protection is particularly vital to the rights of marginalized groups, political outsiders whose views and interests fall outside of, or conflict with, the priorities of governing in-groups.¹⁶² Accordingly, marginalized groups frequently rely

155. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992). Critiques of the public forum doctrine abound. See, e.g., Zick, *supra* note 97, at 586 n.26 & 27 (citing several such critiques).

156. *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting *Hague*, 307 U.S. at 515).

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

158. Content-based restrictions “must satisfy strict scrutiny—that is, [they] must be the least restrictive means of achieving a compelling state interest.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014); *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2231 (2015) (requiring “the Government to prove that [a content-based] restriction furthers a compelling interest and is narrowly tailored to achieve that interest” (quoting *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011))).

159. *Reed* also distinguished between “viewpoint discrimination” and “content discrimination.” Viewpoint discrimination regulates speech based on “the specific motivating ideology or the opinion or perspective of the speaker.” *Reed*, 135 S. Ct. at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)). By contrast, content discrimination prohibits a broad topic from discussion. *Id.* A law “targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” *Id.*

160. *Cutting v. City of Portland*, 802 F.3d 79, 84 (1st Cir. 2015).

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

162. See *supra* Part I about systemic discrimination and power hierarchies. See also Zick, *supra* note 97, at 584–85 (“Social and political movements often require disruption and a degree of confrontation with authority in order to be even marginally effective.”). Zick contends that the problem is particularly acute in America, noting that First Amendment jurisprudence routinely allows for the

on public space as a venue to effectively communicate their needs to wide audiences.¹⁶³

But the First Amendment may not adequately protect marginalized groups who represent dissent from social norms or who offend common sensibilities—the very sort of speech the First Amendment is supposed to protect.¹⁶⁴ Courts often construe speech restrictions as content-neutral¹⁶⁵; accordingly, courts often defer to governmental proffers that such restrictions are necessary to maintain order or security.¹⁶⁶ Through a functionally “weak strain of rationality review,”¹⁶⁷ city and state governments “have learned to manipulate geography in a manner that now seriously threatens basic First Amendment principles.”¹⁶⁸ In other words, spatial regulations are evolving and adapting in order to effectively mitigate speech critical of the status quo, yet still avoid potential constitutional liability.

Although, visibly poor people engage in various forms of protest that cities increasingly prohibit or restrict despite the First Amendment.¹⁶⁹ Consider a threshold example: visibly poor people who speak in public by asking for help. City-wide bans against begging are on the rise,¹⁷⁰ despite the fact that begging is a well-established form of constitutionally protected

“neutering [of] political dissent, [while] protesters in countries deemed far less friendly to dissent are discovering the power that comes with the ability to access, even commandeer, public spaces.” *Id.* at 587.

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

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

165. Zick, *supra* note 97, at 583.

166. *Id.*

167. *Id.*

168. *Id.* at 584, 589–90 (“Political dissent has become spatial tactics’ principal casualty.”).

169. See *id.* For example, anti-camping bans have been challenged under the First Amendment. Tents and other temporary structures have been found to be viable instruments of political speech. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *ACORN v. City of Tulsa*, 835 F.2d 735, 742 (10th Cir. 1987); *Occupy Minneapolis v. Cty. of Hennepin*, 866 F. Supp. 2d 1062, 1069, 1071 (D. Minn. 2011) (sleeping and overnight occupation of tents in a park was expressive conduct protected by First Amendment, although it could be regulated by a permit scheme that functions as a valid time, place, or manner restriction); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (same); *Students Against Apartheid Coal. v. O’Neill*, 660 F. Supp. 333 (W.D. Va. 1987); *Univ. of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1204–05 (D. Utah 1986). Other potential First Amendment applications to visibly poor people, such as the right to assemble and protest, are further discussed *infra*, Part III.

170. NAT’L LAW CTR., *supra* note 15.

speech.¹⁷¹ Although the judiciary offers some protection from violations of this First Amendment right, it has not been a consistently reliable refuge.¹⁷²

Moreover, cities often attempt to avoid heightened judicial scrutiny by drafting their anti-begging laws “broadly, under the counterintuitive rationale that they can mitigate First Amendment problems . . . by restricting *more* speech.”¹⁷³ For example, Everett, Washington’s city council recently amended its “aggressive” panhandling law to be more expansive than the prior version, which had specifically provided that the defendant cause or attempt to cause “another person reasonably to fear imminent bodily harm or the commission of a criminal act upon their person, or upon property in their immediate possession.”¹⁷⁴ But in January of 2015, Everett’s city council inserted the word “charities” to suggest the aggressive panhandling law might apply to charitable organizations as well as individuals,¹⁷⁵ a move fairly criticized as pretext.¹⁷⁶ Indeed, Everett went further, removing any concrete examples of when or how a defendant’s conduct might trigger reasonable fear, requiring simply that the defendant undertake “conduct that would make a reasonable person fearful or feel compelled.”¹⁷⁷ As explained earlier in this Article, social science and popular sentiment suggest that people increasingly find it reasonable to be fearful or feel compelled when confronted with visible poverty—even in the form of peaceable panhandling.¹⁷⁸ Accordingly, such a broad intent-to-intimidate standard is circular and problematic: panhandlers intend to ask people for money, and merely doing so often makes people feel

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

172. See Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991); Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 266 (1994); see also NAT’L LAW CTR., *supra* note 15.

173. Joseph Mead, *The First Amendment Protection of Charitable Speech*, 76 OHIO ST. L.J. FURTHERMORE 57, 59 (2015).

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

175. EVERETT, WASH., MUN. CODE ch. 9.52, § 010 (2015).

176. Letter from the Homeless Rights Advocacy Project et al. to Ray Stephanson, Mayor, City of Everett (Oct. 27, 2015) (on file with author) [hereinafter Letter]; Mead, *supra* note 173, at 60 (noting that “the very use of the word ‘panhandling’ lays bare the legislative purpose”).

177. EVERETT, WASH., MUN. CODE ch. 9.52, § 010 (2015).

178. See *supra* Part I.B–D. See also Letter, *supra* note 176, at 3 (“Moreover, people often respond because they feel compelled—and compelled for many reasons, including sympathy—but feeling compulsion without threatened or actual aggression is not a threat to public safety.”)

compelled or fearful. Thus, such anti-begging laws fail to distinguish between truly dangerous or aggressive behavior and merely perceived danger, a common consequence of witnessing someone who appears to be in desperate circumstances. Accordingly, increasingly popular laws like Everett's functionally conflate even peaceable begging—constitutionally protected speech—with criminality.¹⁷⁹

Cities commonly invoke phrases like “public safety” to insulate themselves from First Amendment challenges, and courts frequently defer to such rationales.¹⁸⁰ Of course, public safety is a compelling interest because it is “the heart of the government’s function”¹⁸¹; however, the definition of “public safety” must also be understood in the context of the instinct to construct poor people as blameworthy or criminal.¹⁸² The potential for unconscious bias, especially in the context of judicial discretion,¹⁸³ means that courts may accept governmental rationalizations for reducing visible evidence of poverty—such as homeless encampments or panhandling. These rationalizations include public safety (because visible poverty is perceived as dangerous) or the stimulation of tourism (because visible poverty is inconsistent with consumerism).¹⁸⁴ In other words, courts have upheld laws that effectively push visibly poor people out of public space merely because visible evidence of human desperation tends to undermine feelings of safety or the desire to shop.¹⁸⁵

179. NAT'L LAW CTR., *supra* note 15, at 20 (noting seventy-six percent of surveyed cities prohibit begging in particular public places and a twenty-five percent overall increase of city-wide bans on begging in public). Cities are not only broadening their anti-begging laws; they often share model ordinance language with each other, allowing such restrictive laws to proliferate nationwide. *See, e.g.*, Mead, *supra* note 173, at 59 n.3; Nick Licata, *Inside the Conservative Plan to Take Over City Politics*, CROSSCUT (Jan. 6, 2016), <http://crosscut.com/2016/01/a-seattle-liberal-ventures-into-a-den-of-conservative-activism/>.

180. *See, e.g.*, Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014) (accepting city's justification of public safety as basis for holding the anti-begging law was content-neutral), *vacated*, 135 S. Ct. 2887 (2015); Norton v. City of Springfield, 768 F.3d 713, 717 (7th Cir. 2014), *rev'd on reh'g*, 806 F.3d 411, 413 (7th Cir. 2015); *see also* Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 440 (2006) (critiquing First Amendment jurisprudence and arguing that “[c]ourts routinely conclude that the government’s (unsubstantiated) interests outweigh the rights of speakers”).

181. *Houston Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. 2007).

182. *See supra* Part I (discussing views of poor people as blameworthy or criminal).

183. The judiciary is not immune to unconscious bias. *See, e.g.*, Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 154 (2013); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

184. NAT'L LAW CTR., *supra* note 15, at 12 (surveying these laws and noting they are “designed to move visibly homeless people out of commercial and tourist districts or, increasingly, out of entire cities, [and] are often justified as necessary public health and public safety measures”).

185. BECKETT & HERBERT, *supra* note 40, at 21 (“[M]any simply do not wish to see those who appear disorderly or otherwise inspire trepidation. Nor is it pleasant to be reminded of the deprivations associated with homelessness, severe poverty, addiction, or mental illness.”).

Things may be looking up for visibly poor people who ask for charity in public.¹⁸⁶ For some time, circuits have been split about whether such broad restrictions on charitable speech, including begging, are content-based restrictions subject to strict scrutiny.¹⁸⁷ However, in *Reed v. Town of Gilbert*,¹⁸⁸ the United States Supreme Court clarified the definition of a content-based restriction in a way that should encourage courts to determine that anti-begging laws are content-based restrictions subject to strict scrutiny.¹⁸⁹ Thus, in the wake of *Reed*, courts should no longer defer to the government's "benign motive[s],"¹⁹⁰ such as the invocation of public health or safety. Instead, courts should more aggressively scrutinize such rationales for evidence of pretext for discrimination against visibly poor people.¹⁹¹

The increasing prevalence of anti-begging laws is a helpful example of how unconscious biases against poor people and deep-rooted associations between visible poverty and danger can become manifest in the law. Post-*Reed*, we shall see if First Amendment jurisprudence—with its expressed interest in protecting diversity and difference—adequately addresses one indicium of the influence of exile, at least in the limited context of anti-begging laws.¹⁹²

But even if the judiciary were to adequately protect certain First Amendment rights of visibly poor people, city governments appear unrelenting in their efforts to abridge such rights.¹⁹³ As these laws multiply at a viral rate, access to justice issues—which are particularly pronounced for homeless and visibly poor people—compound the problem.¹⁹⁴ Without adequate means to challenge these popular restrictions in court, visibly poor people are likely to remain First Amendment "constitutional castaways."¹⁹⁵

186. NAT'L LAW CTR., *supra* note 15, at 21 (noting that "[i]n the absence of employment opportunities or when homeless people are unable to access needed public benefits, panhandling may be a person's only option for obtaining money").

187. *See* Mead, *supra* note 173, at 57–59.

188. 135 S. Ct. 2218 (2015).

189. *Id.* at 2227, 2230; *see* Mead, *supra* note 173, at 61 (discussing and quoting *Reed*).

190. *See* Mead, *supra* note 173, at 61.

191. Courts most clearly scrutinize for pretext in the context of Title VII employment discrimination cases. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). But at least the Seventh Circuit has already responded to *Reed*, applying strict scrutiny and reversing an anti-begging law previously upheld as constitutional.); *Norton v. City of Springfield*, 768 F.3d 713, 717 (7th Cir. 2014).

192. For a sanguine perspective on *Reed's* potential impact on begging restrictions, see Anthony Lauriello, Note, *Panhandling Regulation After Reed v. Town of Gilbert*, 16 COLUM. L. REV. 1105 (2016).

193. *See* NAT'L LAW CTR., *supra* note 15.

194. *See supra* note 24.

195. Millich, *supra* note 172.

C. *The “Death of Public Space”*

Political and legal theories aside, public space—and its appetite for diversity, difference, and social growth—is a quickly shrinking resource.¹⁹⁶ Economic theories commonly frame public space as a type of public good, “a resource that individuals cannot be prevented from consuming (i.e. non-excludable) and for which one individual’s consumption does not diminish its potential consumption by others (i.e. non-rivalrous).”¹⁹⁷ But when the resource of public space becomes overcrowded or in high demand, it becomes less “public” and more “privatized”:

To manage the congestion, an organisation charged with maintaining the space introduces regulations to restrict its use, thereby reducing consumption rivalries but also making the space more exclusive. As these regulations are incrementally expanded, assigning control over specific parts to certain individuals or groups, the public space takes on the character of a partly or completely private space.¹⁹⁸

Thus, public space can also be understood in contrast to privatized space, which is distinguished by more exclusive degrees of access. In this context, access refers not only to physical access or entry into the space, but also to social accessibility—the accessibility of activities, information, and resources in the space.¹⁹⁹

Government actors are not the only, or even the most influential, regulators of public space. Over the last century, the financing of public space has shifted from state and public expenditures to private developers.²⁰⁰ Business improvement districts and other “public-private partnerships” continue to assume increasingly important roles in the financing and governance of public space.²⁰¹ As a result, public space is increasingly privatized.²⁰²

By the 1990s, the increasing privatization of public space prompted teams of interdisciplinary scholars to sound alarms predicting the “death of public space.” Such critics contended that the traditional purpose of public space as a center for social and political diversity was giving way to more

196. See generally KOHN, *supra* note 83; Alex Glyman, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, *Blurred Lines: Homelessness and The Increasing Privatization of Public Space* (Sara K. Rankin ed., 2016), <http://ssrn.com/abstract=2776876>.

197. See Neal, *supra* note 98, at 60 (citing Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954)).

198. Neal, *supra* note 98, at 60.

199. See PUBLIC AND PRIVATE IN SOCIAL LIFE (Stanley Benn & Gerald Gaus eds., 1983); see also KOHN, *supra* note 83, at 1–14.

200. Neal, *supra* note 98, at 61, 63 (citing studies and noting the influence of zoning laws on the privatization of public space).

201. *Id.* at 60; Glyman, *supra* note 196, at i.

202. See generally Glyman, *supra* note 196; KOHN, *supra* note 83.

contemporary promotions of consumerism.²⁰³ This focus on consumerism seeks to purge indicia of diversity from urban centers, in favor of a new, sanitized, and commercialized space that caters to middle and upper-classes.²⁰⁴ The economic concept of competing for slices of the “fixed pie” of public space is particularly acute in the context of gentrification, which is “an essentially economic process of increasing land values but with wide-ranging social consequences.”²⁰⁵

Contemporary conceptions of public space focus on leisure and fostering fraternity with like-minded individuals, but such expectations trend toward homogeneity and the exclusion of indicia of difference in order to create a relaxed, social atmosphere.²⁰⁶ Public space then serves as a vehicle for socioeconomic and class conformity,²⁰⁷ referring to expectations about and enforcement of identities, actions, and appearances that are “normal” and acceptable.²⁰⁸ In this sense, public space should uphold a mirror of sameness, or at least, similarity. Deeming public space as a normative space not only contradicts the traditional hallmarks of “diversity and grittiness that the public entails,” but also inevitably moves toward the expulsion of such diversity and grittiness—visibly poor people and associated evidence of human suffering—as sources of tension that contradict the desired public stage of sociability, consumerism, and relaxed entertainment.²⁰⁹

Today’s sprawling shopping malls exemplify the hybridization of private and public space. The U.S. Supreme Court confronted the issue in *Pruneyard Shopping Center v. Robbins*,²¹⁰ where the Court found that a shop-

203. Many urban studies scholars refer to this process of the privatization of public space as “festivalization.” See, e.g., Andrew Smith, *‘Borrowing’ Public Space to Stage Major Events: The Greenwich Park Controversy*, 51 URB. STUD. 247, 247 (2014); Sally Weller, *Consuming the City: Public Fashion Festivals and the Participatory Economies of Urban Spaces in Melbourne, Australia*, 50 URB. STUD. 2853 (2013). One particularly well-known critique of the privatization of public space is from Michael Sorkin’s edited collection, *Introduction: Variations on a Theme Park*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE xi (Sorkin ed., 1992) (concluding that urban centers were converting to theme parks).

204. BECKETT & HERBERT, *supra* note 40, at 21. “[M]any simply do not wish to see those who appear disorderly or who otherwise inspire trepidation. Nor is it pleasant to be reminded of the deprivations associated with homelessness, severe poverty, addiction, or mental illness.” *Id.*

205. Neal, *supra* note 98, at 63; see also KOHN, *supra* note 83, at 8 (noting “[t]he privatization of public space exacerbates the effects of racial and class segregation that already exists in housing patterns”).

206. See Bodnar, *supra* note 98, at 2097 (“The dialectics of community building is such that accepting members comes at the cost of excluding others.”).

207. Sylvestre, *supra* note 94, at 365 (noting “marginality corresponds, both historically and in the present, to certain empowered groups’ interests related to the preservation of a certain social and economic order”).

208. Gabrielle Pollini, *Elements of a Theory of Place Attachment and Socio-Territorial Belonging*, 15 INT’L REV. SOC. 497–502 (2005).

209. Bodnar, *supra* note 98, at 2097.

210. 447 U.S. 74 (1980).

ping mall, unlike a conventional private space, issues an invitation to the general public and, therefore, opens itself up to certain regulations. Many subsequent decisions seized on this notion of shopping malls as the new, quintessential quasi-public space, reasoning that the traditional town centers—historically public sites for socializing and democratization—no longer exist in most contemporary areas. Accordingly, the shopping mall was emerging as the new, contemporary heart of public space.²¹¹

But, shopping malls are not ideals of public space: they remain fundamentally private spaces with commercial interests, corporate governance, and private security guards.²¹² Private businesses exist for one primary purpose: to spur and feed consumerism. A key component of this process is to offer a controlled, sanitized, comfortable space that purges “troubled urbanity of its stinging, of the presence of the poor, of crime, of dirt, of work.”²¹³

The macrocosm of the shopping mall is the downtown area. Thus, a popular belief among private businesses, particularly coordinated businesses such as downtown business improvement districts (“BIDs”), is that in order to maximize profits, they must remove any physical evidence that undercuts the desire to spend money. BIDs demonstrate the blurring of government and private action: First, BIDs heavily influence the lawmaking process, including the enactment of laws regulating public space.²¹⁴ Second, BIDs often assume quasi-governmental roles, such as “deputizing private citizens to police downtown areas.”²¹⁵ When private business interests reign over the governance of public space, visibly poor people are often negatively impacted.²¹⁶ The increasing visibility of poor and homeless people in urban centers provokes significant backlash, especially from businesses.²¹⁷ City officials and

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

212. Bodnar, *supra* note 98, at 2097.

213. Sorkin, *supra* note 203, at xv.

214. Glyman, *supra* note 196 at i; Memorandum from the Berkeley Policy Advocacy Clinic on BIDs Enabling Legislation to Paul Boden, Western Regional Advocacy Project (Oct. 29, 2015) (on file with the author) [hereinafter Berkeley Policy Advocacy Clinic]. Some may agree that the “death” or privatization of public space coincides with the “death” or privatization of democracy. Martin Gilens and Benjamin Page drew data from over 1,800 different policy initiatives from 1981 to 2002 and concluded that rich, well-connected individuals steer American politics, regardless of or even contrary to the will of the majority of voters. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014) (noting that “economic elites and organized groups representing business interests have substantial, independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence”).

215. Glyman, *supra* note 196, at i.

216. *Id.*; Berkeley Policy Advocacy Clinic, *supra* note 214.

217. DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003); see also Schweik, *supra* note 72, at 5 (noting “[m]ost of the current spatial policies and practices that do the work of old unsightly beggar ordinances route primarily through the mechanisms of rampant privatization and private control of ‘securescapes’ in the city” (citing BECKETT

businesses face pressure to create cosmetically attractive downtown areas that will attract shoppers and tourists.²¹⁸ Indeed, surveys consistently show that visibly poor people report more frequent harassment from private security or BID ambassador-type authority figures than from police officers.²¹⁹

Thus, the increasing privatization of public space frustrates socio-political ideals of democracy and difference.²²⁰ It reinforces the power to exclude and control marginalized groups as fundamental to property laws and policies.²²¹ As further explained below, over the past twenty years, the combination of economic conditions, broken window ideologies, and the human drive to exile created a perfect storm for the increasing enactment of laws that purge signs of visible poverty from public space.²²²

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

*The wealthy working people have earned their right to live in the city. They went out, got an education, work hard, and earned it I shouldn't have to see the pain, struggle, and despair of homeless people to and from my way to work every day.*²²³

Is being visibly poor a crime? Should it be? Consider, for a moment, how you would live your life—perform the daily activities you must every day, such as sleeping, eating, drinking, sitting, resting, or even going to the bathroom—if you were forced to live each moment in public. Without resort to shelter, could you perform any of these necessary, life-sustaining activities

& HERBERT, *supra* note 40 (discussing privatization)); Lawrence Vale, *Securing Public Space [Awards Jury Commentaries]*, 17 PLACES 33 (2005) (discussing securescapes).

218. MITCHELL, *supra* note 217.

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

220. KOHN, *supra* note 83; *see also*, Garnett, *supra* note 122, at 1–14 (describing the persistence of broken windows theory in public zoning regulations).

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

222. FISHER ET AL, *supra* note 17; NAT'L COAL. FOR THE HOMELESS, *supra* note 219; Olson & MacDonald, *supra* note 15.

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

for hours, days, weeks, or years without offending or upsetting another person who observes you doing these things in public? In fact, a significant number of jurisdictions nationwide criminalize such conduct,²²⁴ even if (and, as this Article suggests, especially because) you have no reasonable alternative due to lack of shelter.

For hundreds of years, the United States and other countries have used laws and policies—purporting to protect public order—to move undesirable people from sight and control access to public space.²²⁵ These laws are often called “criminalization laws” because they prohibit or severely restrict the ability of certain marginalized groups to exist in public space.²²⁶ Jim Crow, Ugly laws, and Sundown Town laws are a few notorious examples of historical laws that criminalized the presence of people of color, disabled people, and immigrants in public space.²²⁷ Criminalization laws thus function as a form of banishment.²²⁸ Americans have since repealed these historical laws as discriminatory, but many contemporary ordinances—similar in form and function—are new hosts for the persistent influence of exile.²²⁹

A. *The Contemporary Rise of Visible Poverty*

The steady growth in the popularity of these laws correlates with the steady increase in the number of visibly poor people throughout the country. A 2016 report shows that, compared with peer countries, the United States has the worst overall ranking on key poverty and inequality indicators.²³⁰

224. NAT’L LAW CTR., *supra* note 15.

225. Ortiz & Dick, *supra* note 3. For more on the history of regulating the presence of the poor, see, for example, William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111 (1997); William P. Quigley, *Five Hundred Years of English Poor Laws, 1349–1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73 (1996); William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35 (1996).

226. See, e.g., BECKETT & HERBERT, *supra* note 40; NAT’L LAW CTR., *supra* note 15, at 18 (defining the criminalization of homelessness as prohibitions on “life-sustaining activities” that are performed in public); Farida Ali, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL’Y 197 (2004); Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV. 1 (1996); John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIM. L. REV. 465 (2012); Olson & MacDonald, *supra* note 15; Sylvestre & Bellot, *supra* note 3; Waldron, *supra* note 83; Paul Ades, Note, *The Unconstitutionality of “AntiHomeless” Law: Ordinances Prohibiting Sleeping in Outdoor Areas as a Violation of the Right to Travel*, 77 CALIF. L. REV. 595 (1989); Antonia Fasanelli, Note, *In re Eichorn: The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323 (2000).

227. Ortiz & Dick, *supra* note 3.

228. BECKETT & HERBERT, *supra* note 40.

229. Ortiz & Dick, *supra* note 3.

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

Homelessness is a significant crisis nationwide. At least 600,000 people experience homelessness on any given night, including over 200,000 people in families.²³¹ Nearly 3.5 million Americans will experience homelessness this year alone.²³² In 2013, “an estimated 2.5 million children lived in run-down motels, cars and shelters, on friends’ and relatives’ couches and on the streets.”²³³ According to the latest U.S. Conference of Mayor’s report, the number of homeless people in nineteen major cities increased over the last year by an average of 1.6%, with 58% of surveyed cities reporting increases.²³⁴ Major cities such as Los Angeles, Portland, and Seattle have recently declared homelessness as a state of emergency.²³⁵

But the problem has not always been this bad. Many agree that free market theories, supply side economics, and anti-welfare ideologies in the 1980s fueled the swell of contemporary homelessness.²³⁶ The 1980s ushered

231. MEGHAN HENRY ET. AL, THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS (Nov. 2015), <https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf>. These “point in time” numbers are roundly criticized as underestimations. See, e.g., Paul Boden, *Homeless Head Counts Help No One*, S.F. GATE (Feb. 5, 2013, 7:26 PM), <http://www.sfgate.com/opinion/openforum/article/Homeless-head-counts-help-no-one-4254191.php> (“Point-in-time counts are a minimum number, always. They undercount hidden homeless populations because homeless persons are doubling up with the housed or cannot be identified by sight as homeless.”).

232. NAT’L COAL. FOR THE HOMELESS, HOW MANY PEOPLE EXPERIENCE HOMELESSNESS? 3 (Aug. 2007), http://www.nationalhomeless.org/publications/facts/How_Many.pdf; NAT’L ALL. TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA (Apr. 1, 2015), <http://www.endhomelessness.org/library/entry/the-state-of-homelessness-in-america-2015>.

233. Joe Mozingo, *No Room at the Inn for Innocence*, L.A. TIMES (July 22, 2015), graphics.latimes.com/san-bernardino-motel (discussing Jon Queally, *Study: More Homeless Children Now Than Any Point in U.S. History*, COMMON DREAMS (Nov. 17, 2014)). The number of homeless students in the United States recently reached a record national total of 1.36 million in the 2013–14 school year. Lyndsey Layton & Emma Brown, *Number of Homeless Students in U.S. Has Doubled Since Before the Recession*, WASH. POST (Sept. 14, 2015), <https://goo.gl/8BDTZC> (noting “student homelessness has risen steadily since 2009, continuing to rise even after the U.S. unemployment rate began falling and much of the country began recovering from the recession and the housing crash that helped cause it”). City officials commonly identify the leading cause of homelessness among families as the lack of affordable housing, followed by poverty, unemployment, and low-paying jobs. THE UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES 2 (Dec. 2015).

234. THE UNITED STATES CONFERENCE OF MAYORS, *supra* note 233, at 2. Although approximately 42% of cities reported decreases over last year, during the same time period, emergency food assistance requests rose by an average of 2.8% in more than half of surveyed cities. Fifty percent of surveyed cities expected homelessness to rise “moderately” next year and 65% of cities expected emergency food requests to “moderately” increase over the same time period. *Id.* at 1–2. Twenty-three percent of requests for emergency food assistance in the cities surveyed went unmet. *Id.* at 1.

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

236. VINCENT LYON-CALLO, INEQUALITY, POVERTY, AND NEOLIBERAL GOVERNANCE: ACTIVIST ETHNOGRAPHY IN THE HOMELESS SHELTERING INDUSTRY (2004); W. REG’L ADVOCACY PROJECT, THE SYSTEMIC INADEQUACY OF BUSH’S HOMELESSNESS POLICY (2011).

in a devastating trifecta: First, Congress decimated funding for public housing construction and subsidization programs and they have never regained their prior strength.²³⁷ Second, Congress severely undercut important mental health programs, such as community mental health centers that were supposed to replace mental hospitals after deinstitutionalization.²³⁸ Third, social welfare cuts blazed an unprecedented path to deeper poverty and homelessness for hundreds of thousands of people.²³⁹

Today, the majority of homeless people are forced to live in public. Virtually every major city lacks sufficient shelter to accommodate local homeless men, women, and children.²⁴⁰ This lack of shelter, combined with a dearth of affordable housing,²⁴¹ especially in aftershocks of the most recent recession, means that several hundreds of thousands of Americans have no reasonable alternative but to live in public spaces.²⁴²

237. CUSHING DOLBEARE, IRENE SARAF & SHEILA CROWLEY, CHANGING PRIORITIES: THE FEDERAL BUDGET AND HOUSING ASSISTANCE 1976–2005 (2004).

238. Deinstitutionalization refers to the release of large populations of mentally-disabled individuals who lacked stable residency upon discharge from mental institutions. See MICHAEL J. DEAR & JENNIFER R. WOLCH, LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS (1987); David Cutler et al., *Four Decades of Community Mental Health: A Symphony in Four Movements*, 39 COMMUNITY MENTAL HEALTH J. 381 (2003); E.K. Sherl & A.D. Schmetzer, *Community Mental Health Centers Emergency Services in the 1980's: Effects of Funding Changes*, 25 COMMUNITY MENTAL HEALTH J. 267 (1989).

239. DEAR & WOLCH, *supra* note 238.

240. THE UNITED STATES CONFERENCE OF MAYORS, *supra* note 233, at 2 (“Because no beds were available for them, emergency shelters in 76 percent of the survey cities had to turn away homeless families with children experiencing homelessness. Shelters in 61 percent of the cities had to turn away unaccompanied individuals.”); NAT’L COAL. FOR THE HOMELESS, *supra* note 232, at 2 (noting that “a study of homelessness in 50 cities found that in virtually every city, the city’s official estimated number of homeless people greatly exceeded the number of emergency shelter and transitional housing spaces”).

241. The number of households in America who must devote more than fifty percent of their income to rent will rise eleven percent by 2025. ANDREW JAKABOVICS ET. AL., PROJECTING TRENDS IN SEVERELY COST-BURDENED RENTERS: 2015–2025, at 4 (2015). Housing cost-burdened renters will rise from 11.8 million to 13.1 million. *Id.* “The nationwide lack of sufficient affordable housing for poor households is well documented.” JOSH LEOPOLD ET AL., THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2013, at 2 (2015) (reviewing available data and further examining “the affordability crisis” for extremely-low income renters); see also NAT’L LOW INCOME HOUS. COAL. STUDY, OUT OF REACH (2015) (concluding there is no place in the U.S. where “an individual working a typical 40-hour workweek at the federal minimum wage [can] afford a one- or two-bedroom apartment for his or her family”).

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

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

As the gap between the rich and the poor continues to widen,²⁴³ laws that prohibit or severely restrict the presence of visibly poor people also continue to increase and intensify across the nation.²⁴⁴ Several studies detail the extensive scope of the criminalization of homeless and visibly poor people, so a detailed examination is not necessary here.²⁴⁵ But generally, the criminalization of visible poverty refers to measures that restrict life-sustaining activities such as sleeping, camping, eating, sitting, seeking income, asking for help, urinating, defecating, receiving food, storing belongings, or protecting oneself from the elements in public spaces—even when a person has no reasonable alternative due to a lack of shelter or private space.²⁴⁶ Citywide bans on such life-sustaining activities, combined with the increasing privatization of public space, means that the spaces in which visibly poor people are permitted to legally exist are becoming smaller and smaller. Consequently, visibly poor people are increasingly forced out of entire communities or they face the threat of fines, arrest, or criminal penalties for engaging in acts necessary to survive.²⁴⁷

The defining feature of criminalization is the use of policing and the criminal justice system as a first resort for responding to the public presence

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

244. See FISHER ET AL., *supra* note 17; NAT’L LAW CTR., *supra* note 15; Olson & MacDonald, *supra* note 15.

245. See BECKETT & HERBERT, *supra* note 40; FISHER ET AL., *supra* note 17; RACHEL A. ADCOCK ET AL., *TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO* (2016), <http://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf>; NAT’L LAW CTR., *supra* note 15; Ali, *supra* note 226; Foscarinis, *supra* note 226; Mitchell, *supra* note 226; Olson & MacDonald, *supra* note 15; Sylvestre & Bellot, *supra* note 3, at 1; Waldron, *supra* note 83; Ades, *supra* note 226; Fasanelli, *supra* note 226.

246. See, e.g., NAT’L LAW CTR., *supra* note 15; Olson & MacDonald, *supra* note 15; BECKETT & HERBERT, *supra* note 40.

247. See, e.g., NAT’L LAW CTR., *supra* note 15; Olson & MacDonald, *supra* note 15; BECKETT & HERBERT, *supra* note 40. Violations can result in criminal charges or steep fines that poor people inevitably are unable to pay. Unpaid fines often evolve into misdemeanor failure to pay or respond to charges. See generally KATHERINE BECKETT ET AL., *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* (2008); AM. CIVIL LIBERTIES UNION OF WASHINGTON & COLUMBIA LEGAL SERVICES, *MODERN-DAY DEBTORS’ PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR* (2014), [https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%20Prison%20Final%20\(3\).pdf](https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%20Prison%20Final%20(3).pdf).

of visibly poor and homeless people.²⁴⁸ Because homeless people exist in public space, the experience of homelessness itself makes interactions with law enforcement more likely, especially the likelihood of being ticketed or arrested.²⁴⁹ Enforcement-based approaches present risks to the well-being and safety of homeless people by excluding them from safe spaces, fracturing existing relationships with other people or services, or pushing them towards more dangerous activities.²⁵⁰ Enforcement-based responses are also an expensive, resource-intensive use of police resources,²⁵¹ and police officers are not always equipped to deal with the complex health and social problems bound up in the experience of homelessness.²⁵²

Dragging visibly poor people through the criminal justice system for engaging in necessary, life-sustaining conduct does nothing to address the underlying conditions that encourage homelessness and poverty. Instead, criminalization exacerbates poverty and homelessness. The imposition of a criminal history or insurmountable legal financial obligations severely diminishes a person's chances of accessing employment, housing, and public benefits.²⁵³ Accordingly, laws criminalizing homelessness create an expensive revolving door, continually worsening conditions for poor people and draining cities' fiscal resources.²⁵⁴ Indeed, studies consistently show that enforcement of criminalization laws is more expensive and less effective than non-punitive alternatives, such as the provision of affordable housing, mental health services, or substance abuse treatment.²⁵⁵

Cities frequently invoke public safety and health concerns—much of the same justifications for historical laws such as Jim Crow—in defense of criminalizing visibly poor people.²⁵⁶ But studies do not support the proposition that the criminalization of visible poverty does anything to advance public

248. See, e.g., BILL O'GRADY ET AL., CAN I SEE YOUR ID?: THE POLICING OF YOUTH HOMELESSNESS IN TORONTO (2011), http://homelesshub.ca/sites/default/files/CanI-SeeYourID_nov9.pdf.

249. Sylvestre & Bellot, *supra* note 3, at 1, 16 (discussing Canadian studies).

250. HERRING & YARBOUGH, *supra* note 219; FISHER ET AL., *supra* note 17.

251. Howard & Tran, *supra* note 16, at 6; Jeffrey Selbin et al., BERKELEY LAW POLICY ADVOCACY CLINIC, DOES SIT-LIE WORK: WILL BERKELEY'S "MEASURE S" INCREASE ECONOMIC ACTIVITY AND IMPROVE SERVICES TO HOMELESS PEOPLE? (2012); Adcock et al., *supra* note 245, at 2.

252. See, e.g., Charles Gary, *How to Police the Homeless*, POLICE MAG. (June 1, 2004), <http://www.policemag.com/channel/patrol/articles/2004/06/how-to-police-the-homeless.aspx>; Liza Lucas, *Changing the Way Police Respond to Mental Illness*, CNN (July 6, 2015, 3:51 PM), <http://www.cnn.com/2015/07/06/health/police-mental-health-training/>.

253. NAT'L LAW CTR., *supra* note 15, at 32–33.

254. *Id.* at 30.

255. Howard & Tran, *supra* note 16, at 24 (surveying national and statewide studies showing the enforcement of criminalization laws is more expensive than the provision of non-punitive alternatives that better address the problems of homelessness).

256. NAT'L LAW CTR., *supra* note 15, at 12; Ortiz & Dick, *supra* note 3, at 27.

health and safety.²⁵⁷ Another frequent justification is economic stimulation, however, no study shows a correlation between purging visible poverty and an increase in the bottom line of area businesses; indeed, at least one study proves there is no such relationship.²⁵⁸ Studies also disprove the argument that criminalization actually helps poor people by engaging them with services.²⁵⁹ To the contrary, people experiencing homelessness often report extreme psychological and emotional trauma from constant societal rejection and criminalization.²⁶⁰

C. *The Persistence of Criminalizing Visible Poverty*

Given such overwhelming evidence that criminalization is bad law and policy, why are these measures increasingly enacted and aggressively enforced? The simple answer is the influence of exile. Society's negative views of poverty appear to drive some of these differences, both in terms of the pronounced stigmatization of visibly poor people and in terms of the law's lack of responsiveness.²⁶¹

In addition to social science suggesting that visibly poor people bear the brunt of stigma against poor people generally,²⁶² "popular culture abounds with examples of glorified violence against the homeless and anti-homeless sentiment."²⁶³ Visibly poor people are frequent victims of hate crimes²⁶⁴ and common victims of police harassment and brutality.²⁶⁵

257. See BLASI, *supra* note 91; HARCOURT, *supra* note 91; HERBERT, *supra* note 92; Fagan & Davies, *supra* note 93.

258. Selbin et al., *supra* note 251, at 3.

259. *Id.*; see also Herring & Yarbough, *supra* note 219, at 47; RAM SUBRAMANIAN ET AL., THE VERA INSTITUTE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (2015), <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

260. TAI DUNSON-STRANE & SARAH SOAKAI, DEP'T OF URBAN AND REG'L PLANNING UNIV. OF HAWAII AT MANOA, THE EFFECTS OF CITY SWEEPS AND SIT-LIE POLICIES ON HONOLULU'S HOMELESS (2015), http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf; NAT'L COAL. FOR THE HOMELESS, *supra* note 232, at 25.

261. See *supra* Part I (explaining negative views of poverty).

262. See *supra* Part I.

263. Rankin, *supra* note 64, at 391 (reviewing examples).

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

265. See, e.g., Elliot Spagat, *Video Released of San Diego Officer's Shooting of Transient*, MSN NEWS (Dec. 23, 2015), <http://www.msn.com/en-us/news/us/video-released-of-san-diego-officers-shooting-of-transient/ar-BBnQNYC>; Alan Pyke, *Phoenix Cops Could Face Felony Charges For Pepper Spraying a Homeless Woman and Lying About It*, THINKPROGRESS (Dec. 14, 2015, 3:07 PM), <http://thinkprogress.org/justice/2015/12/14/3731777/phoenix-police-charged-lying/>; Fernanda Santos, *New Mexico: Officers to be Tried for Man's Killing*, N.Y. TIMES (Aug. 18, 2015), http://www.nytimes.com/2015/08/19/us/new-mexico-officers-to-be-tried-for-mans-killing.html?_r=0; Tobias Salinger, *Florida Cop Shown Tossing Peanuts at Homeless Man, Laughing with Deputies as Man Eats them Off Floor in Booking Video*, N.Y. DAILY NEWS (July 27, 2015,

Of course, evidence of societal hostility toward visible poverty does not always manifest in violent ways. Many extra-legal efforts seek displacement of visible poverty. Some urban design techniques have been described as “weapons” that are used by “architects, planners, policy-makers, developers, real estate brokers, community activists, neighborhood associations, and individuals to wage the ongoing war between integration and segregation.”²⁶⁶ Such techniques are commonly dubbed as the practice of “hostile” or “disciplinary” architecture, which uses design as a mechanism to reduce the presence of homeless people in urban centers.²⁶⁷ Recent examples include the installation of spikes on ledges or behind doorways,²⁶⁸ sprinklers triggered by evening movement on the steps of church entryways,²⁶⁹ multiple armrests to divide sidewalk benches,²⁷⁰ and enormous jagged boulders on grassy medians.²⁷¹ The use of hostile architecture often generates controversy, not just because of its transparency, but sometimes because of its economic cost. Opponents point out, for example, that the finances spent to support hostile architecture could be redirected to support those in need instead of exclude them.²⁷² Similarly, some cities heavily invest in “one way” transportation

9:43 PM), <http://a.msn.com/01/en-us/AAdzIOe?ocid=se>; Robert Gebelhoff, *A New York Police Union Asks Members to Take Photos of City's Homeless*, WASH. POST (Aug. 11, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/11/a-new-york-police-union-asks-members-to-take-photos-of-citys-homeless/>.

266. Daniel D'Oca et al., *The Arsenal of Inclusion and Exclusion*, 17 MAS CONTEXT 54 (2013), <http://www.mascontext.com/issues/17-boundary-spring-13/the-arsenal-of-inclusion-and-exclusion/>; see also Eric Jaffee, *The Hidden Ways Urban Design Segregates the Poor*, FAST CODE DESIGN COMPANY (Aug. 12, 2014, 8:00 AM), www.fastcodedesign.com/3034206/slicker-city/the-hidden-ways-urban-design-segregates-the-poor.

267. See, e.g., Eric Jaffee, *supra* note 266; see also, Sara Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934 (2015).

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

269. Doug Sovern, *Saint Mary's Cathedral Drenches Homeless with Water*, CBS S.F. (Mar. 18, 2015, 5:30 AM), <http://sanfrancisco.cbslocal.com/2015/03/18/homeless-saint-marys-cathedral-archdiocese-san-francisco-intentionally-drenched-water-sleeping/>.

270. Eric Jaffee, *supra* note 266.

271. Matt Driscoll, *Throwing Rocks at Tacoma's Homeless Problem Isn't the Answer*, NEWS TRIB. (June 9, 2015), <http://www.thenewtribune.com/news/local/news-columns-blogs/matt-driscoll/article26298283.html>.

272. Mary Vorsino, *Homeless Face New City Tactic: Bus Stop Stools*, HONOLULU ADVERTISER (Oct. 27, 2008), http://the.honoluluadvertiser.com/article/2008/Oct/27/ln/ha_waii810270333.html (“So far, the city has spent about \$11,000 on the seating initiative, removing benches and installing 55 stools at 12 bus stops in urban Honolulu and Kane’ohe. . . . Michael Stoops . . . said cities should concentrate more on providing shelter and services for the homeless and less on moving them from bus stops.”); Alex Andreou, *Anti-homeless Spikes: ‘Sleeping Rough Opened My Eyes to the City’s Barbed Cruelty’*, GUARDIAN (Feb. 18, 2015), <http://www.theguardian.com/society/2015/feb/18/>

programs, designed to “solve” the problem of visible poverty by literally shipping poor people elsewhere.²⁷³

Despite clear evidence of the pervasive stigmatization and marginalization of visibly poor and homeless people, equal protection analysis holds little promise.²⁷⁴ Poverty, by itself, is not a suspect classification that triggers heightened judicial scrutiny.²⁷⁵ Other scholars have criticized the anemic quality of equal protection jurisprudence for failing to ensure meaningful protection, access, and opportunity for poor and marginalized members of society.²⁷⁶

Although advocates sometimes successfully challenge these laws as violating the human, civil, and constitutional rights of visibly poor people, they are often upheld despite evidence of their disproportionate impact on poor and homeless populations; populations that are, in turn, disproportionately comprised of other marginalized groups that are supposed to be afforded various legal protections.²⁷⁷ Courts frequently defer to governmental justifications such as public health and safety, without scrutinizing these justifications for pretext and without requiring evidence of how criminalization measures impact the health and safety of visibly poor people.²⁷⁸ In this permissive space, the influence of exile supports the proliferation of laws that criminalize people who have no reasonable alternative but to engage in necessary, life-sustaining activities somewhere in public.²⁷⁹ Consequently, criminalization laws effectively punish people for experiencing homelessness.²⁸⁰

defensive-architecture-keeps-poverty-undeen-and-makes-us-more-hostile (noting that defensive or hostile architecture “doesn’t even achieve its basic goal of making us feel safer”).

273. See, e.g., Eben Blake, *Homeless Bus Ticket Programs Across the Nation Offer Little Accountability, Poor Housing Solutions, Activists Say*, INT’L BUS. TIMES (June 24, 2015, 7:34 AM), <http://www.ibtimes.com/homeless-bus-ticket-programs-across-nation-offer-little-accountability-poor-housing-2016812>.

274. See Nice, *supra* note 64.

275. *Harris v. McRae*, for example, is commonly interpreted as Supreme Court precedent that poor people are not a suspect class. 448 U.S. 297 (1980). However, other scholars persuasively argue that the Supreme Court has not clearly addressed the suspect classification status of poor people. See Nice, *supra* note 64.

276. See Nice, *supra* note 64; Martha Albertson Fineman, *Beyond Identities: The Limits of An Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1720 (arguing for the “concept of the ‘vulnerable subject’ as a more viable and appropriate figure around which to build contemporary policy and law”).

277. NAT’L LAW CTR., *supra* note 15, at 7 (surveying various cases and outcomes); Lurie & Schuster, *supra* note 46 (establishing the disproportionate representation of other marginalized groups in homeless populations).

278. See *supra* Part II.B.

279. For more on the lack of reasonable alternatives for poor and homeless people, see Fasanelli, *supra* note 226.

280. See NAT’L LAW CTR., *supra* note 15; Olson & MacDonald, *supra* note 15; Statement of Interest of the United States at 7, *Bell v. Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014) (Civ. Action No. 1:09-cv-540-REB Hom.).

As long as cities fail to adequately address the underlying causes of homelessness, criminalization laws in those jurisdictions should be unconstitutional under the Eighth Amendment. The U.S. Supreme Court in *Robinson v. California*²⁸¹ held that laws that criminalize an individual's status, rather than specific conduct, are unconstitutional as cruel and unusual punishment under the Eighth Amendment.²⁸² Moreover, "certain acts also may not be subject to punishment under the Eighth Amendment if they are unavoidable consequences of one's status."²⁸³ Thus, if a law prohibits conduct that is unavoidable or "involuntary due to one's condition, criminalization of that conduct would be impermissible" under the constitutional prohibition against cruel and unusual punishment.²⁸⁴ For example, the Department of Justice recently clarified that conduct-versus-status analysis, which municipalities routinely rely upon to justify enforcement of ordinances that criminalize sleeping and camping in public, fails to pass Eighth Amendment muster when inadequate shelter beds leave homeless individuals with no choice but to sleep in public.²⁸⁵ This argument has found some limited success.²⁸⁶ But there is no principled basis for limiting the Eighth Amendment's application to anti-camping laws; instead, this reasoning should apply to any criminalization law that punishes conduct that is a "universal and unavoidable consequence of being human" when that person has no reasonable alternative.²⁸⁷

281. 370 U.S. 660 (1962).

282. *Id.* at 667 (holding that a state cannot punish a person for his or her status).

283. Statement of Interest of the United States, *supra* note 280, at 7. The DOJ's statement provides a cogent review and synthesis of *Robinson*, *Powell v. Texas*, 392 U.S. 514 (1968), and other relevant Eighth Amendment challenges to anti-camping ordinances that have been enforced against homeless individuals. The DOJ ultimately urged the United States District Court for the District of Idaho to adopt the reasoning of *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007), which found such ordinances unconstitutional because, in the face of insufficient shelter within the city, the laws criminalized essential, life-sustaining activities such as sitting, lying down, and sleeping even though homeless individuals had no reasonable alternative than to perform such activities in public. Statement of Interest of the United States, *supra* note 280, at 11, (noting that "punishing conduct that is a 'universal and unavoidable consequence [] of being human' violates the Eighth Amendment" (quoting *Jones*, 444 F.3d at 1136)).

284. Statement of Interest of the United States, *supra* note 280, at 7.

285. *Id.* at 11–14. In evaluating the constitutionality of anti-camping ordinances, courts may consider the sufficiency of available shelter beds. When there is an insufficient number of beds available to accommodate the local homeless population, courts may hold that a law criminalizing sleeping in public is void as applied to a homeless defendant. *See, e.g.*, *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) (upholding anti-camping ordinance because shelter beds available on the night the defendant was cited); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) (holding in part, that enforcement of an anti-sleeping ordinance was cruel and unusual punishment when insufficient shelter beds); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1155 (Cal. 1995) (upholding anti-camping ordinance in part because defendants failed to show whether shelter beds were available); *In re Eichorn*, 69 Cal. App. 4th 382, 385 (1998) (considering insufficiency of shelter beds in context of necessity defense).

286. *See supra* note 280, at 11–14.

287. *Id.* at 10 (quoting *Jones*, 444 F.3d at 1136); *see also* Fasanelli, *supra* note 226.

As explained in this Section, laws that criminalize essential life activities for individuals experiencing homelessness do not promote public safety, impose needless costs on prosecutorial, defense, and court services, and do nothing to solve the underlying problems of poverty, homelessness, and mental illness. Instead of wasting significant amounts of money on criminalizing visible poverty, governments should focus resources on non-punitive alternatives, such as providing housing and services.²⁸⁸ But, until the American conscience confronts the human instinct to exile visibly poor people from public space, criminalization laws and policies will persist and evolve.

IV. CONFRONTING THE INFLUENCE OF EXILE

*Despite Americans' insistence on egalitarianism, opportunity, and classlessness, 'there is an un-American secret at the heart of American culture: for a long time it was [and is] preoccupied by class' [W]e are acutely aware of class distinctions, and we endorse the opportunity syllogism, which suggests that people attain the class status they deserve. We deride elites as out of touch, but we do not notice that we are the elites of the world.*²⁸⁹

The influence of exile is an invisible hand, guiding the enactment and enforcement of laws that ensure and sustain inequalities to the advantage of the more powerful.²⁹⁰ Public perceptions about whether an individual “deserves” rights, in turn, affect how the law allocates or restricts rights.²⁹¹ The unparalleled stigma reserved for the visibly poor explains not only the proliferation of criminalization laws, but also the lack of urgency in legal and policy fixes.

Policymakers must confront the influence of exile. They should note consistent evidence that criminalization laws are ineffective and expensive when compared to non-punitive alternatives. They should review their laws governing the use of public spaces and repeal any that express the influence of exile. Additionally, jurisdictions that fail to adequately address the underlying causes of homelessness and visible poverty should desist from enforcing laws that criminalize conduct in which people must engage to survive.

288. Howard & Tran, *supra* note 16 (surveying national and statewide studies showing the enforcement of criminalization laws is more expensive than the provision of non-punitive alternatives that better address the problems of homelessness).

289. FISKE, *supra* note 12, at 26 (footnote omitted) (quoting Nick Krafft, *Class in American Literature*, OPEN ECONOMICS (Aug. 26, 2010), <https://openeconomicsnd.wordpress.com/2010/08/26/class-in-american-literature/>).

290. See GREENWALD, *supra* note 24, at 7.

291. See, e.g., Burnstein, *supra* note 3, at 29; Mishler & Sheehan, *supra* note 3; see also GEORGE ORWELL, *Freedom of the Park*, in THE COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL 40 (1968) (“If large numbers of people are interested in freedom of speech, there will be freedom of speech, even if the law forbids it; if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them.”).

Even if policymakers deny these points and believe they can modify laws and policies to both reduce visible poverty and avoid potential constitutional liability, they should take steps to mitigate the total waste of taxpayer dollars caused by criminalizing behaviors that many poor people have no choice but to repeat.

The judiciary must also better appreciate the influence of exile, particularly in application to visibly poor people. Courts should invalidate laws that criminalize the conduct of necessary, life-sustaining conduct in public when there is no reasonable alternative.²⁹² Governmental justifications of public health and public safety should be scrutinized and evaluated not only from the perspective of privileged individuals, but also from the perspective of poor people who are forced to live in public.²⁹³

But defending the visibility of poverty also plays a key role in confronting the influence of exile. Criminalization laws, by regulating and minimizing the visibility of poverty in public space, undermine the availability of public space as a venue to protest. Persistent counter efforts must continue to organize and challenge the influence of exile, claiming public space as a venue for acts of civil disobedience and nonviolent political protest.²⁹⁴ “Public space is inherently political and potentially subversive; it is seen as both the manifestation of reigning political power but also as that of a more inclusive power that can reclaim it temporarily by occupying it for political purposes.”²⁹⁵

Indeed, in this context, the mere existence of homeless people in public space is an act of resistance.²⁹⁶ In Martin Luther King’s Letter from Birmingham Jail, Dr. King explained why visibility is key to protest:

Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored . . . [T]he purpose of the direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation.²⁹⁷

292. See *supra* Part III (discussing criminalization laws).

293. See *supra* Part II (discussing judicial deference in First Amendment cases) & Part III (discussing the same in criminalization cases generally).

294. Bodnar, *supra* note 98, at 2100 (advocating for marginalized groups to “reclaim public space for uses that defy the dominant logic of the contemporary rearrangement of public space, and point to its countercurrents”).

295. *Id.* at 2095.

296. TALMADGE WRIGHT, *OUT OF PLACE: HOMELESS MOBILIZATIONS, SUBCITIES, AND CONTESTED LANDSCAPES* 182 (1997) (noting that, for marginalized populations, “[e]xistence is resistance”).

297. Letter from Martin Luther King Jr. to Bishop C. C. J. Carpenter et al. (Apr. 16, 1963) (generally known as the “Letter from a Birmingham Jail”).

Thus, it is only when society cannot hide evidence of poverty, inequality, underfunded mental health services, and the lack of affordable housing that society is forced to confront it. In order to effectuate a meaningful shift in American laws and policies, the crisis of poverty must be visible in public space.²⁹⁸ The presence of visible poverty forces society to confront inequality of income, education, health care, and criminal justice. Although confrontation with visible poverty may make more privileged people feel uncomfortable or even frightened, this dissonance is an essential form of protest, a crucial method to influence public opinion and provoke social change.²⁹⁹ Impact litigation and legislative advocacy are slow, unsure, and even expensive options; the visibility of people who are experiencing poverty and homelessness is a necessary and primary form of resistance.³⁰⁰ The presence of visible poverty is a persistent message that can “scratch[] the psychological armor of even those citizens who insisted that all those people on the street were still the unworthy poor.”³⁰¹

The peaceful occupation of public space then becomes its own sort of tactical control that is both “adaptive and defiant.”³⁰² Encampments and similar “strategies enabl[e] individuals to weave together survival and in some cases social transformation”³⁰³; such forms of protest and resistance amount to “an attempt by the homeless to provide themselves with the shelter, community, and dignity denied them by their social system.”³⁰⁴ Fighting displacement then creates a form of “insurgent citizenship, where those whose status as legitimate members of the public is not yet fully established, but where they nonetheless hold their ground and make claims of the legitimacy

298. Randall Amster & David Cook, *Homelessness as Nonviolent Resistance 2009–2010*, J. FOR THE STUDY OF PEACE & CONFLICT 13, 13–14 (2009–2010) (noting “[t]he issue of homelessness presents a unique moment in peace and social change praxis to unify both reactive survival aims with proactive policy shifts, since it is precisely the continued existence of homeless ‘street people’ that often seems to represent one of the greatest ‘threats’ to business as usual” (citing WRIGHT, *supra* note 296, at 182)).

299. KOHN, *supra* note 83; at 184 (“If the homeless do not have the opportunity to be visible in public space, if they cannot communicate their needs, then there is no chance that they will convince others to make the social changes necessary to meet these needs.”); Don Mitchell, *Introduction: Public Space in the City*, 17 URB. GEOGRAPHY 127, 129 (1996) (“[D]issidents of all types must continually assert their presence *into* public space, if they ever are to be seen and heard.”).

300. SUSAN RUDDICK, *YOUNG AND HOMELESS IN HOLLYWOOD: MAPPING THE SOCIAL IDENTITIES* 64 (1996) (noting that homeless people manifest a form of resistance “simply by their presence”); Don Mitchell, *Political Violence, Order, and the Legal Construction of Public Space: Power and the Public Forum Doctrine*, 17 URB. GEOGRAPHY 152, 172 (1996) (“[I]t is essential that activists continue to challenge restrictive rights-discourse not just in the courts, but also in the street, where a more positive vision of a just society can be fought for.”).

301. BLAU, *supra* note 8, at 175.

302. WRIGHT, *supra* note 296, at 199, 266.

303. Lynn M. Harter et al., *The Structuring of Invisibility Among the Hidden Homeless: The Politics of Space, Stigma, and Identity Construction*, 33 J. APPLIED COMM. RES. 305, 324 (2005).

304. RICHARD H. ROPERS, *THE INVISIBLE HOMELESS: A NEW URBAN ECOLOGY* 199 (1988).

of their presence.”³⁰⁵ Like most forms of protest, visible poverty creates discomfort because it challenges the status quo³⁰⁶; visible poverty as a form of protest challenges the American conscience to grapple with its own complicity in creating the circumstances within which homelessness and poverty can thrive.³⁰⁷

Current spatial-hierarchies not only undermine the viability of necessary protest, they also frustrate the possibility of proximity and the understanding that often comes with it. Proximity is necessary to create social change.³⁰⁸ Bryan Stevenson argues that the first thing we have to do to fight injustice is to get proximate to injustice; we must show up and see things with our own eyes.³⁰⁹ When we see injustice up close, Stevenson theorizes, we will have no choice but to act.³¹⁰ Just as importantly, Stevenson reminds us that viable solutions can only be developed when one has an up-close view of a problem. Accordingly, as long as the influence of exile shapes American laws and policies, it negatively affects the prospects of social change and justice.³¹¹

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

First, and fundamentally, we need to shift from the assumption that law enforcement and the criminal justice system are the most appropriate mechanisms for dealing with the use of public space by people experiencing homelessness. Public attitudes toward visible poverty influence policymaking, law enforcement, and juridical decisionmaking. Thus, connections between public attitudes and laws that govern the allocation of rights in public space warrant particular attention. Generally, laws, policies, and practices regulating

305. Neal, *supra* note 98, at 63 (discussing James Holston, *Spaces of Insurgent Citizenship, in CITIES AND CITIZENSHIP (A PUBLIC CULTURE BOOK) 155–73 (J. Holston ed., 1999)*).

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

307. Peter Marcuse, *Neutralizing Homelessness*, 1988 *SOCIALIST REV.* 69, 93 (1988) (“[H]omelessness is such a danger to the legitimacy of the status quo. Homelessness . . . may shock people into the realization that homelessness exists not because the system is failing to work as it should, but because the system *is* working as it must.”); Amster & Cook, *supra* note 298, at 14 (noting the poor are a consequence of a competitive capitalist economy; “[t]herefore, their presence is problematic to those who believe in the ideals of Western capitalism”).

308. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2015).

309. *Id.*

310. *Id.*

311. KOHN, *supra* note 83, at 8 (stating “the problem is that segregation itself makes it difficult for members of privileged groups to recognize the existence of injustice” (citing Iris Marion Young, *Residential Segregation and Differentiated Citizenship*, 3 *CITIZENSHIP STUD.* 242 (1999))). Kohn adds, “Public space is made up of more than parks, plazas, and sidewalks; it is a shared world where individuals can identify with one another and see themselves through the eyes of others. Seeing oneself through the other’s eyes may be a first step towards recognizing one’s own privilege, and, perhaps, criticizing structures of systematic privilege and deprivation.” *Id.* at 8–9.

public space are not consciously created to punish visibly poor people for their status or condition. However, this is often the impact.

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

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