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# Relocating Disorder

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## INTRODUCTION

MARICOPA County, home of Phoenix, Arizona, is recreating skid row. The county already has acquired several square blocks of property south of downtown Phoenix for a “human services campus” and plans to spend at least \$24 million to relocate governmental, nonprofit, and religious organizations that serve the homeless to new facilities there.<sup>1</sup> County officials hail the project as a cutting-edge, integrated approach that will enable dispersed providers to better serve the area’s large homeless population. But the county’s motives are not solely humanitarian. Currently, as many as one thousand homeless people congregate on Phoenix’s downtown streets each night. Many of these individuals suffer from serious mental illness, substance abuse, or both.<sup>2</sup> Their presence also may impede efforts to woo professionals downtown to live, work, and play. Relocating the organizations that serve the homeless may encourage their clients to spend time on the campus, rather than on the downtown streets. As the county’s promotional material asserts, “downtown Phoenix needs a campus so the current service providers can better serve the persons who need assistance while

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<sup>1</sup> Maricopa County, Human Services Campus: Capital Business Plan 8–10 (2002) [hereinafter Capital Business Plan] (on file with the Virginia Law Review Association).

<sup>2</sup> Id. at 13.

providing greater security and safety for them as well as the community.”<sup>3</sup>

Maricopa County is not the only local government seeking to use land-use policy to relocate the disorderly. Many other communities have built, or are considering, homeless campuses. Other cities have targeted inner-city neighborhoods for aggressive property inspections, hoping to address physical decay and to relocate those individuals responsible for social disorder. At least two major cities—Portland, Oregon, and Cincinnati, Ohio—and several public-housing authorities have adopted “neighborhood-exclusion zone” policies. These policies, which incorporate both zoning and trespass-law principles, empower local officials to exclude particularly disorderly individuals from struggling communities. These tactics employ different management techniques—some concentrate disorder and others disperse it—but they have same goal: Homeless campuses, exclusion zones, and regulatory sweeps all seek to relocate urban disorder from one place (where it is perceived to be harmful) to another (where policymakers hope it will be more benign).

Over the past two decades, policies seeking to curb urban disorder have become central to city renewal efforts.<sup>4</sup> While the popularity of these strategies is beyond question, their efficacy, wisdom, and justice are the subject of a rich debate. The disorder-relocation strategies outlined above contribute to that debate in an important way. The vast majority of order-maintenance scholarship treats urban disorder primarily as a policing problem. But it is also a land-management problem.<sup>5</sup> For many generations, police officers regulated the level of disorder in our cities’ public (and, to a lesser extent, private) spaces, usually informally, but also by enforcing laws

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<sup>3</sup> Id. at 17.

<sup>4</sup> These policies are often traced to James Q. Wilson and George L. Kelling. James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Monthly*, Mar. 1982, at 29; see also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551, 580 (1997) (“*Broken Windows* stimulated a flurry of scholarship on the subject of order maintenance.”).

<sup>5</sup> See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Space Zoning*, 105 *Yale L.J.* 1165, 1171 (1996) [hereinafter Ellickson, *Controlling Chronic Misconduct*] (“A specialist in property law approaches the issue of street order as a problem not of speech or of crime, but of land management.”).

criminalizing public-order offenses—such as vagrancy, loitering, and public drunkenness. The criminal procedure revolution of the 1960s and 1970s rendered many public-order offenses unenforceable,<sup>6</sup> and cases from this era now haunt officials struggling to restore order in America's cities.<sup>7</sup>

Legal challenges have sent local lawmakers scrambling to find order-maintenance policies that will survive judicial scrutiny.<sup>8</sup> In this environment, some city officials apparently have come to view land-management strategies as (legally) “safer” alternatives to order-maintenance policing. As in Phoenix, local governments are increasingly adapting the tools of property regulation to a task traditionally reserved for the police—that is, the control of disorderly people. This development is not surprising.<sup>9</sup> Not only have urban policymakers long assumed that regulations ordering land uses effectively curb disorder,<sup>10</sup> but the broad deference granted to the government-qua-regulator makes land-use policy particularly attractive. Thus, these new disorder-relocation policies may create what Dan Kahan has called a “cost of rights” problem:<sup>11</sup> In an effort to avoid constitutional challenges, local governments are turning to land-use policies that may impose costs at least as significant as their order-maintenance policing substitutes. This Article will ask what those costs might be.

This question is important because the institutional shift effected by contemporary disorder-relocation strategies—transferring authority to control the disorderly from police to planners—has profound and understudied implications. These strategies change

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<sup>6</sup> See, e.g., Livingston, *supra* note 4, at 595 (describing the fall of the public-order enforcement regime after the constitutional reforms of 1960s and 1970s).

<sup>7</sup> *Id.* at 595–627 (discussing the continued impact of these decisions).

<sup>8</sup> See George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 49–64 (1996) (discussing legislative responses to judicial limits on order-maintenance policing).

<sup>9</sup> See, e.g., Ellickson, *Controlling Chronic Misconduct*, *supra* note 5, at 1243 (arguing that “federal constitutional law is indirectly encouraging cities to bring back Skid Rows, but in a form far more official than the 1950s version”).

<sup>10</sup> But see Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 *Stan. L. Rev.* 1, 5 (2004) [hereinafter Garnett, *Ordering the City*] (asserting that “when property is over- or misregulated, property regulations may impede efforts to restore a vibrant, healthy, and organic public order”).

<sup>11</sup> Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349, 389 (1997) [hereinafter Kahan, *Social Influence*].

more than the identity of the regulator; they also change the nature of the regulation. When police informally manage disorder, officers exercise discretion to make *ex post* determinations about what behaviors, and which individuals, threaten the public order. Disorder-relocation strategies require *ex ante* determinations of who the disorderly are and where disorder is most harmful. City officials then rely upon these decisions to determine whether the individuals responsible for disorder should be concentrated or dispersed. A number of legal scholars have criticized American land-use policy precisely because it relies upon such predictive decisionmaking.<sup>12</sup> *Ex ante* decisions designed to minimize disorder often impose high “prevention costs” because the predictions enshrined in land-use policy are inevitably overbroad.<sup>13</sup> Moreover, they sometimes are simply wrong.<sup>14</sup> The costs of integrating these predictions into formal policies are worthy of more in-depth consideration than they have received in the legal literature to date.

This Article will proceed as follows: Part I will briefly review the debate over efforts to refocus urban policy in general, and police strategies in particular, on curbing urban disorder. A rich social-norms scholarship champions this trend, arguing that public-order efforts are needed to reinforce the non-legal social controls that keep disorder in check.<sup>15</sup> In response, criminal procedure scholars

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<sup>12</sup> See, e.g., Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 *Wm. & Mary L. Rev.* 1191, 1238 (2001) [hereinafter Garnett, *Home-Business Dilemma*] (reviewing literature); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 *U. Pa. L. Rev.* 28, 52 (1981) (arguing that zoning is “incapable of assimilating rapid changes in design, technology, or community preferences”); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 *Urb. Law.* 335, 342–43 (1993) (characterizing zoning as a constraint on neighborhood change); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 *Geo. Mason L. Rev.* 827, 836 (1999) (arguing that zoning “fails wherever the objective is the transition from one type of use to another”).

<sup>13</sup> See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. Chi. L. Rev.* 681, 762 (1973).

<sup>14</sup> See, e.g., Garnett, *Ordering the City*, *supra* note 10, at 5.

<sup>15</sup> See, e.g., Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* 89–93 (1990); Ellickson, *Controlling Chronic Misconduct*, *supra* note 5; Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 *J. Legal Stud.* 609 (1998); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 *Law & Soc’y Rev.* 805 (1998) [hereinafter, Meares & Kahan, *Inner City*].

warn that order-promoting criminal laws threaten to undermine civil liberties<sup>16</sup> and that order-maintenance policing fails to reduce crime.<sup>17</sup> Thus far, these criticisms, especially the former, have resonated with some judges considering challenges to new public-order policies.<sup>18</sup>

This background review will set the stage for a discussion, in Part II, of disorder-relocation policies adopted, at least in part, to respond to cases invalidating order-maintenance policing innovations. This Part will examine three mechanisms—homeless campuses, neighborhood-exclusion zones, and regulatory sweeps—through which local officials use property-regulation tools to manage urban disorder. This Part will further evaluate how well these strategies respond to the legal objections to order-maintenance policing.

Part III then will explore past efforts to treat urban disorder as a land-management problem, including “skid rows,” “red light districts,” and the construction and current demolition of high-rise public-housing projects. This historical record will reveal that disorder-relocation efforts are nothing new. Urban policy has wavered between disorder-concentration and disorder-dispersal for over a century. It also will provide important insight into how well new disorder-relocation efforts answer the concerns about “justice” and “efficacy” raised by order-maintenance opponents.

Part IV will turn to the “cost of rights” question and explore how well disorder-relocation strategies respond to the primary critiques of order-maintenance policing. Unfortunately, disorder-relocation policies raise serious concerns about economic and racial justice and may prove less efficacious. “Disorder zones”—skid rows, red light districts, and high-rise public housing—may shield other areas of a city from urban problems. These zones, however, have proven so problematic that policymakers sought to disperse the disorder

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<sup>16</sup> See, e.g., David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *Geo. L.J.* 1059, 1062–63 (1999); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *Mich. L. Rev.* 291, 294 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. Crim. L. & Criminology* 775 (1989).

<sup>17</sup> See *infra* note 40 and accompanying text.

<sup>18</sup> See *infra* notes 41–43 and accompanying text.

within them, which in turn exposed more neighborhoods to disorder. Furthermore, the competing disorder management techniques advance different, and possibly inconsistent, urban policy goals: Concentration strategies are used to clean up downtown, by containing the disorderly in less-desirable, poorer, neighborhoods; dispersal strategies aim to protect these poorer neighborhoods.

The Article will conclude in Part V by examining the implications of moving from a criminal-law to a land-management model of disorder control. Order-maintenance proponents argue that an over-scrupulous understanding of rights imposes the cost of disorder on poor neighborhoods. Despite this warning, however, courts continue to worry about the risks entailed in policies requiring the police to maintain disorder. In light of the potential costs imposed by the land-management alternatives discussed in this Article, this final Part will ask whether more searching judicial review of disorder-relocation policies would appropriately “rebalance” the cost of rights.

## I. ORDER-MAINTENANCE POLICING AND ITS CRITICS

Disorder-relocation policies are adopted against a longstanding debate about when, how, and if local governments should address urban disorder. This Part briefly outlines that debate in an attempt to place these efforts in their legal and historical context.

### *A. The Re-Revolution in American Policing*

Over the past century, American policing practices evolved from proactive peacekeeping to a response-oriented focus on “law enforcement” to a renewed emphasis on preventing disorder (thus, a partial return to peacekeeping). This well-known story need only be briefly reviewed here.<sup>19</sup> In short, until the latter half of the twentieth century, municipal police forces focused primarily on regulating and minimizing disorder. During this time, most order-maintenance efforts were undoubtedly informal.<sup>20</sup> As James Q.

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<sup>19</sup> See generally Kelling & Coles, *supra* note 8; Livingston, *supra* note 4.

<sup>20</sup> See, e.g., Howard M. Bahr, *Skid Row: An Introduction to Disaffiliation* 227–29 (1973) (reviewing arrest data); Ellickson, *Controlling Chronic Misconduct*, *supra* note 5, at 1200 (describing public-order regime); Livingston, *supra* note 4, at 595 (“Before the constitutional reforms of the 1960s and 1970s, police operated . . . under a broad



Wilson described in his classic, *Varieties of Police Behavior*, the patrolman “approaches incidents that threaten order *not in terms of enforcing the law but in terms of ‘handling the situation.’*”<sup>21</sup> The availability of legal sanctions for breaches of the public order, however, provided an important backup to informal order-maintenance efforts.<sup>22</sup> Vagrancy, loitering, and public-drunkenness prohibitions gave police officers vast discretion to decide when to arrest an individual for a breach of the peace.<sup>23</sup> Unfortunately, the peacekeeping regime was not always a just one, as even strong proponents of order-maintenance policing acknowledge. The poor and minorities frequently were targets of uneven and discriminatory enforcement.<sup>24</sup> Moreover, as Caleb Foote’s study of Philadelphia vagrancy proceedings devastatingly illustrated, the legal system frequently turned a blind eye to the myriad injustices perpetrated in the name of public order.<sup>25</sup>

These realities formed the backdrop of the radical deregulation of our urban public spaces. The Warren Court’s “criminal procedure revolution” accelerated this deregulation, but these changes also were in keeping with contemporary policing theory. Twentieth-century police reformers argued against beat officers and accused them of corruption and unequal enforcement.<sup>26</sup> By the early 1970s, the public-order enforcement regime largely had been eliminated by reforms downplaying officers’ crime-prevention

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delegation of authority that licensed them to maintain order in public places largely as they deemed appropriate.”).

<sup>21</sup> James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* 31 (1968).

<sup>22</sup> See, e.g., Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 *Am. Soc. Rev.* 699, 702–03 (1967) (describing the threat of law enforcement as a backup to informal order maintenance); Wilson & Kelling, *supra* note 4, at 35 (arguing that police need “the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed”).

<sup>23</sup> See, e.g., Livingston, *supra* note 4, at 595 (“Many citizens were rendered almost perpetually subject to arrest pursuant to catchall vagrancy laws.”); William J. Stuntz, *Crime Talk and Law Talk*, 23 *Rev. Am. Hist.* 153, 157 (1995) (“Prior to the 1960s, vagrancy and loitering laws made it possible for police to arrest pretty much anyone.”).

<sup>24</sup> See, e.g., Cole, *supra* note 16, at 1060 (noting “abuse of the criminal law to reinforce racial subordination”).

<sup>25</sup> Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 *U. Pa. L. Rev.* 603 (1956) (describing summary vagrancy proceedings).

<sup>26</sup> See Cole, *supra* note 16, at 1062–63 (noting that “beat” officers were associated with corruption and racial discrimination).

functions.<sup>27</sup> The limitations of these reforms became apparent by the end of the decade.<sup>28</sup> Frustration with the new “law-enforcement” model of policing in turn led to new reforms refocusing on order maintenance in more recent decades.<sup>29</sup>

These policies have found forceful support among social-norms scholars who argue that order-restoration efforts will not only curb disorder, but also reduce serious crime.<sup>30</sup> They reason that because people tend to be law abiding when they perceive that their neighbors are obeying the law,<sup>31</sup> disorder “erode[s] deterrence by emboldening law-breakers and demoralizing law-abiders.”<sup>32</sup> Thus, intervening to check disorder will reinvigorate the informal social controls necessary for orderly, law-abiding communities.<sup>33</sup> Wesley Skogan’s *Disorder and Decline* used survey evidence from forty residential neighborhoods in six cities to link disorder with neighborhood decline, safety, and, importantly, serious crime.<sup>34</sup>

### B. The Critics Respond

The academic commentary generated by the order-maintenance revolution primarily addresses the constitutional limits on police

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<sup>27</sup> See generally Kelling & Coles, *supra* note 8, at 80–85 (reviewing history); Livingston, *supra* note 4, at 565–68 (same).

<sup>28</sup> See, e.g., Kelling & Coles, *supra* note 8, at 85–89 (describing the collapse of reform-era policing strategies); Livingston, *supra* note 4, at 568 (describing frustration with rising crime rates).

<sup>29</sup> See, e.g., George L. Kelling & Mark H. Moore, From Political to Reform to Community: The Evolving Strategy of Police, *in* *Community Policing: Rhetoric or Reality* 3, 18–23 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (discussing reform); Herman Goldstein, Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions, 33 *Crime & Delinq.* 6 (1987) (same).

<sup>30</sup> See, e.g., Dan M. Kahan, Reciprocity, Collective Action, and Community Policing, 90 *Cal. L. Rev.* 1513, 1527–38 (2002); Kahan, *Social Influence*, *supra* note 11, at 367–73.

<sup>31</sup> See, e.g. Harold G. Grasmick & Donald E. Green, Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior, 71 *J. Crim. L. & Criminology* 325 (1980) (compiling empirical data).

<sup>32</sup> Kahan, *Social Influence*, *supra* note 11, at 387.

<sup>33</sup> See *infra* Part II.B.

<sup>34</sup> See Skogan, *supra* note 15, at 65–84; see also Police Found., *The Newark Foot Patrol Experiment* 122–24 (1981) (finding that regular foot patrols did not reduce crime but lowered citizens’ fear of crime); Robert Trojanowicz, *An Evaluation of the Neighborhood Foot Patrol Program in Flint, Michigan* 85–87 (1982) (finding that foot patrols reduced crime).

efforts to curb disorder in public places.<sup>35</sup> Order-maintenance proponents assert that the law must trust police officers to exercise peacekeeping discretion.<sup>36</sup> Dan Kahan and Tracey Meares, in particular, reason that significant changes in the sociopolitical realities of inner-city America reduce concerns about police abuses.<sup>37</sup> Not only does urban disorder wreak the greatest havoc in the poorest neighborhoods, but residents of these communities demand order-maintenance policies.<sup>38</sup>

Critics attack these arguments in two ways. First, they assert that proponents seriously underestimate the extent to which order-maintenance efforts threaten to undermine the civil liberties of marginalized groups.<sup>39</sup> Second, they argue that order-maintenance policing does not work—that is, that curbing disorder will not reduce serious crime.<sup>40</sup> Moreover, while the social-norms arguments appear to be carrying the day politically, order-maintenance critics continue to win in the courts: Judicial skepticism of the “new policing” remains a significant impediment to implementing the order-maintenance agenda.<sup>41</sup> In *Chicago v. Morales*, the United States

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<sup>35</sup> See Livingston, *supra* note 4, at 564 (“[T]he new focus on the problems of disorder . . . will lead—as it already has led—to more contention over the proper bounds of police authority.”).

<sup>36</sup> See, e.g., Kelling & Coles, *supra* note 8, at 169 (arguing that “we must recognize and accept the legitimate use of police discretion”).

<sup>37</sup> See Tracey L. Meares & Dan M. Kahan, *When Rights are Wrong: The Paradox of Unwanted Rights*, in *Urgent Times: Policing and Rights in Inner-City Communities* 3, 3–30 (Tracey L. Meares & Dan M. Kahan eds., 1999) [hereinafter Meares & Kahan, *Unwanted Rights*]; Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153, 1160–71 (1998) [hereinafter Kahan & Meares, *Coming Crisis*].

<sup>38</sup> See Meares & Kahan, *Unwanted Rights*, *supra* note 37, at 15; Kahan & Meares, *Coming Crisis*, *supra* note 37, at 1160; see also Randall Kennedy, *The State, Criminal Law and Racial Discrimination: A Comment*, 107 *Harv. L. Rev.* 1255, 1256 (1994) (arguing that “a misguided antagonism toward efforts to preserve public safety” is the main problem plaguing African-Americans).

<sup>39</sup> See, e.g., Carol S. Steiker, *More Wrong than Rights*, in *Urgent Times: Policing and Rights in Inner-City Communities* 49, 49–57 (Tracey L. Meares & Dan M. Kahan eds., 1999) (questioning Meares and Kahan’s account); Cole, *supra* note 16, at 1062 (arguing that “the new discretion scholars underestimate the continuing threat of racial discrimination in the administration of criminal justice”).

<sup>40</sup> See generally Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* 59–127 (2001) (providing an empirical critique of order-maintenance claims).

<sup>41</sup> See, e.g., Livingston, *supra* note 4, at 631–38 (discussing judicial ambivalence toward police discretion and the new policing).

Supreme Court held that an ordinance that criminalized the act of loitering with a “criminal street gang member” was unconstitutionally vague.<sup>42</sup> Other courts have ruled that public-order policies run afoul of various substantive rights, including the freedom of expression, the right to travel, parental liberty, and the Eighth Amendment’s prohibition on “status” crimes.<sup>43</sup>

## II. CONTEMPORARY DISORDER-RELOCATION STRATEGIES

Against this legal backdrop, local officials seeking to implement public-order policies have learned to ask, “[W]ill we get sued?”<sup>44</sup> This concern has prompted Kahan and Meares to warn of a “coming crisis” in criminal procedure,<sup>45</sup> but lawsuit-weary officials may instead seek to avert this crisis by enacting narrower, more “rule-like” ordinances.<sup>46</sup> In this environment, the three land-management strategies discussed below—homeless campuses, regulatory “sweeps,” and “neighborhood-exclusion zones”—are attractive. They permit officials to avoid codifying—and thus subjecting to legal challenge—the exercises of police discretion by taking advantage of the traditional deference granted to regulators of private property.<sup>47</sup>

### *A. Disorder Concentration: The Example of the Homeless Campus*

Phoenix’s “human services campus” may be the most ambitious effort to centralize homelessness services, but it is not the only one. Maricopa County’s project is modeled upon a smaller “campus” in

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<sup>42</sup> 527 U.S. 41 (1999).

<sup>43</sup> See, e.g., *Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 706 (2d Cir. 1993) (enjoining an anti-begging ordinance on First Amendment grounds); *Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1091–95 (N.D. Cal. 1995) (same); see also *Hodgkins v. Peterson*, 335 F.3d 1048, 1064–65 (7th Cir. 2004) (finding a curfew violated First Amendment and implicated parental rights); *Nunez v. City of San Diego*, 114 F.3d 935, 944–46, 949–51 (9th Cir. 1997) (invalidating a curfew on First Amendment and right to travel grounds). But see *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (D.C. Cir. 1999) (upholding a juvenile curfew law); *Qutb v. Strauss*, 11 F.3d 488, 496 (5th Cir. 1993) (same).

<sup>44</sup> Kelling & Coles, *supra* note 8, at 4.

<sup>45</sup> Kahan & Meares, *Coming Crisis*, *supra* note 37, at 1153.

<sup>46</sup> See, e.g., Livingston, *supra* note 4, at 615.

<sup>47</sup> See generally Kelling & Coles, *supra* note 8, at 169–75 (discussing the need to come “to grips with police discretion”); Livingston, *supra* note 4, at 649 (asserting that the exercise of discretion is inevitable, and necessary, to public-order policies).

Orlando, Florida, which features an outdoor covered "Pavilion" providing sleeping accommodations (essentially, and somewhat disturbingly, human parking spaces), meals, and showers for 375 men, a smaller indoor residential treatment facility, and a residential facility for homeless women and children.<sup>48</sup> Smaller homeless campuses exist in Anchorage, Atlanta, Washington, D.C., Sacramento, San Antonio, Jacksonville, Ft. Lauderdale, Miami, Las Vegas, and New Orleans.<sup>49</sup> And campuses have been considered in Dayton, Chicago, Colorado Springs, Honolulu, Salt Lake City, and even Hyannis, Massachusetts.<sup>50</sup>

In an age of tight budgets and "compassion fatigue,"<sup>51</sup> why would cities build expensive homeless campuses? While city officials cite the promise of coordinated services, homeless advocates argue that campuses warehouse the homeless out of sight.<sup>52</sup> A proposal to create a "compassion zone" in Kansas City, Missouri, supports the latter hypothesis. Within the compassion zone, a new daytime drop-in shelter would provide an alternative to wandering the thirteen blocks between existing shelters and a large downtown soup kitchen. The director of the Downtown Community Improvement District calls these blocks "kind of a trail of tears." That the "compassion zone" is viewed as a way to "shoo undesirables out of the

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<sup>48</sup> See generally Coal. for the Homeless of Cent. Fla., at <http://www.centralfloridahomeless.org> (describing the Orlando campuses) (last accessed July 12, 2005); see also Ctr. for Poverty Solutions, *Helping People Off the Streets: Real Solutions to Urban Homelessness* 11-12 (1998), available at <http://www.povertysolutions.org/library/campus.pdf> (criticizing the Orlando campus).

<sup>49</sup> See Ctr. for Poverty Solutions, *supra* note 48, at 2. For a closer look at particular homeless campuses, see, for example, Bill Banks, *Shelter's Leader Called a "Model of Tenacity," Atlanta J.-Const.*, Sept. 23, 1999, at J1-7 (Atlanta); Jason DeParle, "Safety Net" for Anchorage Homeless Is Seen as both a Lifesaver and a Trap, *N.Y. Times*, Sept. 24, 1992, at B12 (Anchorage); Christina Jewett, *Homeless Programs May Face Cuts, Sacramento Bee*, Mar. 15, 2004, at B1 (Sacramento); Jan Moller, *LV Chips in to Keep Crisis Center Open, Las Vegas Rev.-J.*, Feb. 20, 2003, at 5B (Las Vegas).

<sup>50</sup> See Editorial, *A Hard Bargain, Salt Lake Trib.*, Sept. 12, 2004, at AA2; Erin Emery, *Ideas to Aid Homeless Unveiled, Denver Post*, Apr. 3, 2002, at B4; James Gonser, *Homeless Center Appears Doomed, Honolulu Advertiser*, June 1, 2004, at A1; Cynthia McCormick, *Homeless Campus Site Best of Few Option, Cape Cod Times*, Sept. 21, 2003.

<sup>51</sup> See, e.g., Ellickson, *Controlling Chronic Misconduct, supra* note 5, at 1167-68 (describing the backlash against the homeless as "compassion fatigue").

<sup>52</sup> See Ctr. for Poverty Solutions, *supra* note 48, at 8 ("The motivation behind the passage of anti-homeless ordinances seems consistent among all jurisdictions: remove homeless people from the downtown and/or business districts.").

central business district,” is made apparent when it is coupled with other city land-use plans. Officials anticipate establishing a “security zone” around the new city’s new main library. A city ordinance would exclude all individuals with criminal records from the area. Homeless advocates assert that the purpose of the policy is to prevent the new library branch from becoming a de facto daytime shelter—a role that the existing main library currently serves.<sup>53</sup>

Campuses also may deflect criticisms that using order-maintenance policing against the homeless is both inhumane and unconstitutional.<sup>54</sup> Importantly, for city officials, a successful legal challenge to a local government’s decision to establish a campus is unlikely. While the constitutionality of criminalizing behaviors linked with homelessness remains an open question, the constitutionality of most local land-use policies does not. As a matter of federal constitutional law, non-confiscatory land-use regulations are subject to rational basis review—that is, they will be upheld if some conceivable government interest justifies them.<sup>55</sup> This is certainly the case for homeless campuses. A campus serves at least two “conceivable” policy goals—improving homeless services and aiding downtown redevelopment.

Nor could the neighbors who might suffer a reduction in property values because of a campus successfully object on “takings” grounds. Government actions resulting in less than a total deprivation of all economic value are subject to ad hoc judicial review that strongly favors the government.<sup>56</sup> Moreover, any reduction in property values attributable to a homeless campus arguably would not

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<sup>53</sup> Mike Hendricks, *A Homeless Zone of their Own*, Kan. City Star, Dec. 31, 2003, at B1; see also *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 75–82 (D.D.C. 2001) (holding that the library’s expulsion of homeless man for disheveled appearance violated the First and Fifth Amendments); *Kreimer v. Bureau of Police for Morristown*, 765 F. Supp. 181, 193–94 (D.N.J. 1991) (holding that the library could not exclude homeless person from library because of his odor), rev’d, 958 F.2d 1242, 1269–70 (3rd Cir. 1992).

<sup>54</sup> See *supra* notes 39–43 and accompanying text.

<sup>55</sup> See Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 *Geo. Wash. L. Rev.* 934, 940–42 (2003) [hereinafter Garnett, *Public Use Question*] (discussing standard of review); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 *Nw. U. L. Rev.* 591, 602–04 (1998) (same); Frank Michelman, *Takings*, 1987, 88 *Colum. L. Rev.* 1600, 1607 (1988) (same).

<sup>56</sup> See, e.g., David A. Dana & Thomas W. Merrill, *Property: Takings* 121–22 (2002) (discussing standard of review).

warrant even this deferential scrutiny. Under certain narrow circumstances, “inverse condemnation” claims are available to remedy economic damages that result indirectly from government actions.<sup>57</sup> Absent a showing that the physical invasion of a plaintiff’s property was the foreseeable result of a campus construction, however, the owner likely would suffer what Abraham Bell and Gideon Parchomovsky have called a non-cognizable “derivative taking.”<sup>58</sup> In this case, neighbors harmed by campus-related disorder could seek nuisance damages, but such relief would be available only after the campus was constructed and the property owners injured.<sup>59</sup> Moreover, a few states do not permit nuisance suits against local governments;<sup>60</sup> others preclude injunctive relief.<sup>61</sup> Homeless campuses, in other words, may be expensive, but they also are virtually lawsuit proof.

*B. Disorder Dispersal Through Regulatory Enforcement:  
Housing Code “Sweeps”*

Judicial deference to private-property regulation also makes a second disorder-relocation strategy—the targeted use of aggressive property inspections—an attractive alternative to order-maintenance policing.<sup>62</sup> Consider the following example: Several years ago, the *Washington Post Magazine* featured a building inspector’s one-man crusade to incorporate his job into the District of Columbia’s “community policing” efforts. In the article, James Delgado, the “building inspector with a bullet proof vest,” argued that his city failed to understand the order-maintenance value of

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<sup>57</sup> See, e.g., *Moden v. United States*, 60 Fed. Cl. 275, 280 (2004).

<sup>58</sup> See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *Yale L.J.* 547, 559 (2001) (arguing that derivative takings fall outside the taxonomy of takings law); see also *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) (“Mere fluctuations in value during the process of governmental decisionmaking . . . are ‘incidents of ownership. They cannot be considered as a “taking” in the constitutional sense.’”) (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).

<sup>59</sup> See Robert C. Ellickson & Vicki L. Been, *Land Use Controls* 618 (2d ed. 2000); see also *Armory Park Neighborhood Ass’n. v. Episcopal Cmty. Serv.*, 712 P.2d 914, 923 (Ariz. 1985) (enjoining a soup kitchen operation).

<sup>60</sup> For an overview, see *Liability for Creation or Maintenance of a Nuisance*, 57 *Am. Jur. 2d Municipal, County, School, and State Tort Liability* § 120 et seq. (2001).

<sup>61</sup> See Ellickson & Been, *supra* note 59, at 618.

<sup>62</sup> See Garnett, *Ordering the City*, *supra* note 10, at 13–19 (discussing the use of regulatory inspections to suppress disorder).

building inspections. "The regulatory code book is pretty thick," he observed. And, his aggressive and unorthodox inspections proved that he had learned to use every page to his advantage. Delgado had closed crack houses, brothels, and drug markets for numerous regulatory infractions (for example, operating an illegal home business).<sup>63</sup>

Housing and building inspections regimes generally are considered corrupt and ineffective.<sup>64</sup> Furthermore, a substantial economic literature suggests that the cost of code compliance contributes to urban blight.<sup>65</sup> Nevertheless, the *Washington Post Magazine* article certainly leaves the impression that Delgado's efforts were welcomed by the community and that their replication holds much promise. This view apparently is shared by most city regulators. In a recent study by John Accordino and Gary Johnson, almost every respondent listed code enforcement as the single-best way to deal with property blight.<sup>66</sup>

It is easy to see why city regulators like aggressive regulatory inspections. Residents understand all too well that abandoned and deteriorating property is a sure sign of serious neighborhood decline.<sup>67</sup> Not only do blighted properties discourage neighborhood

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<sup>63</sup> See Peter Perl, Building Inspector with a Bulletproof Vest, *Wash. Post Mag.*, June 27, 1999, at 8.

<sup>64</sup> See H. Laurence Ross, Housing Code Enforcement as Law in Action, 17 *Law & Pol'y* 133, 157-58 (1995); see also Peter D. Salins & Gerard C.S. Mildner, Searchcity by Design: The Legacy of New York City's Housing Policies 42 (1992); William Spelman, Abandoned Buildings: Magnets for Crime?, 21 *J. Crim. Just.* 481, 492 (1993).

<sup>65</sup> See, e.g., Richard A. Posner, *Economic Analysis of Law* 470-74 (4th ed. 1992) (attributing shortage of affordable housing to housing codes); Stephen R. Seidel, Housing Costs & Government Regulations: Confronting the Regulatory Maze 73-75 (1978); Peter D. Salins, Reviving New York City's Housing Market, in *Housing and Community Development in New York City: Facing the Future* 53, 54-55 (Michael H. Schill ed., 1999) (blaming New York City's housing shortage in part on overly complex building regulations). On the difference between housing and building codes, see Ross, *supra* note 64, at 134 ("Housing codes differ from building codes in that they are not primarily concerned with structure and materials but rather with function and condition.").

<sup>66</sup> See John Accordino & Gary T. Johnson, Addressing the Vacant and Abandoned Property Problem, 22 *J. Urb. Affairs* 301, 309 (2000).

<sup>67</sup> See Skogan, *supra* note 15, at 36; Accordino & Johnson, *supra* note 66, at 306 (finding that city administrators believe that abandoned property has a highly negative effect on neighborhood vitality); Susan D. Greenbaum, Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market, in *The Cultural Meaning of Urban Space* 139, 140 (Robert Rotenberg &



investment, decrease tax revenues and property values, and increase insurance costs,<sup>68</sup> but “[c]rooks, killers, and losers tend to infest areas with dead buildings, like maggots on a carcass.”<sup>69</sup> Incomplete but selectively aggressive inspections can address the latter problem by closing abandoned buildings and dispersing the criminals who use them for “hangouts.” In an unguarded moment, a student of mine—a former police officer in a large city—told me that some officers would enlist building inspectors to close down buildings inhabited by drug dealers, gang members, and other “troublemakers.” The police viewed the closures as a way to prevent further neighborhood decline by forcing these individuals to find somewhere else to hang out, hopefully outside of the community. At least one study confirms the officers’ instincts, finding that crime “displacement” is a significant benefit of housing inspections.<sup>70</sup>

Moreover, the regulatory code book is, as James Delgado observed, “pretty thick.”<sup>71</sup> Academics tend to treat this “thickness” as a problem.<sup>72</sup> But as James Delgado said, it “open[s] up miraculous possibilities.”<sup>73</sup> A recent case in the United States Court of Appeals for the Ninth Circuit illustrates why. Several years ago, San Bernardino, California, conducted housing code “sweeps” in a low-income area. As the Ninth Circuit observed, the “sweeps were massive undertakings, with city officials, police, firefighters, and housing-code inspectors descending on the area to inspect dozens of pre-selected buildings.”<sup>74</sup> Over a six-month period, the city closed ninety-five buildings. The property owners alleged that the city trumped up a building-code emergency to force the eviction of

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Gary McDonogh eds., 1993) (“Empty buildings, weedy lots, quantities of unsavory litter, and angry graffiti suggest profound maladies.”).

<sup>68</sup> See Accordino & Johnson, *supra* note 66, at 303; Greenbaum, *supra* note 67, at 143; Benjamin P. Scafidi et al., *An Economic Analysis of Housing Abandonment*, 7 *J. Housing Econ.* 287, 288 (1998).

<sup>69</sup> Accordino & Johnson, *supra* note 66, at 303.

<sup>70</sup> See Spelman, *supra* note 64, at 492–94.

<sup>71</sup> See Perl, *supra* note 63, at 26–27.

<sup>72</sup> See Ellickson & Been, *supra* note 59, at 529 (“A building code is a technical document with a level of difficulty that at times may rival that of the Internal Revenue Code.”); Ross, *supra* note 64, at 143.

<sup>73</sup> Perl, *supra* note 63, at 26.

<sup>74</sup> See *Armendariz v. Penman*, 75 F.3d 1311, 1313 (9th Cir. 1996) (en banc).

tenants with criminal records and gang affiliations.<sup>75</sup> A panel of the Ninth Circuit rejected the claim that the sweeps were arbitrary, and therefore, unconstitutional.<sup>76</sup> The majority reasoned that even if the city “faked” a housing-code emergency, “the reduction of crime by relocating criminals and reducing urban blight bears a rational relation to the public health, safety and general welfare.”<sup>77</sup> The panel reached this conclusion over the vigorous dissent of Judge Trott, who argued,

[t]he action cannot be justified as a means to control crime. If criminals are living in the units, the police should arrest them. If crime . . . is rampant, the police should put a stop to it. The city cannot simply start throwing innocent people out of private property to reduce crime in a troubled neighborhood. A contrary rule is simply unimaginable.<sup>78</sup>

A divided en banc court affirmed.<sup>79</sup>

This lax oversight undoubtedly is one reason<sup>80</sup> many cities are incorporating sweeps into order-maintenance efforts.<sup>81</sup> For example, Albuquerque, New Mexico’s super squad of code-enforcement officers, known as the “Safe City Strike Force,” inspected 1450 properties between 2002 and 2004.<sup>82</sup> In May and June of 2003, Tampa, Florida’s “Operation Commitment” sent dozens of police officers, drug and

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<sup>75</sup> *Id.* at 1314.

<sup>76</sup> *Armendariz v. Penman*, 31 F.3d 860, 866–68 (9th Cir. 1994), vacated in part, 75 F.3d 1311 (9th Cir. 1996) (en banc).

<sup>77</sup> *Id.* at 867.

<sup>78</sup> *Id.* at 872 (Trott, J., dissenting).

<sup>79</sup> 75 F.3d at 1313, 1328.

<sup>80</sup> Lower Fourth Amendment standards may be another reason. See *infra* notes 260–271 and accompanying text.

<sup>81</sup> See, e.g., Erin Grace, *Clock Ticking on Junk Cars, Weeds*, *Omaha World Herald*, Apr. 30, 2003, at 1B; Jonathan Heller, *Escondido Targets Housing Violations*, *San Diego Union-Trib.*, Nov. 3, 2001, at 1; Iliana Limon, *Code Enforcers*, *Albuquerque Trib.*, July 19, 2004, at A1; Lakiesha McGhee, *Businesses Face Cleanup Order: County Takes Cooperative Approach in Citing Code and Blight Woes In Orangevale*, *Sacramento Bee*, Feb. 6, 2005, at N1; Flori Meeks, *City Targets Code Violators on Long Point; Sweep Finds Nearly 200 Illegal Issues*, *Houston Chron.* (Memorial/Spring Branch/Uptown edition), Oct. 18, 2000, at 1; Michael Pearson, *Raising Lowe Lane: Gang Area Targeted by Alpharetta Cops*, *Atlanta J.-Const.*, Nov. 3, 2002, at E1; Erik Siemers, *City Focuses on La Mesa Area For Cleanup*, *Albuquerque Trib.*, Mar. 16, 2005, at A2; Janet Zink, *Zoning Code Leniency Ending*, *St. Petersburg Times*, Oct. 15, 2004, at 3B.

<sup>82</sup> Limon, *supra* note 81.

prostitution counselors, and property inspectors through the city's worst neighborhoods. One sweep netted seven felony arrests and 122 code violations.<sup>83</sup> Recent mayoral candidates in Dallas, Detroit, and Indianapolis made election promises to step up enforcement sweeps, suggesting that the practice likely will continue.<sup>84</sup>

*C. Disorder Dispersal Through Public-Space Zoning:  
Neighborhood-Exclusion Zones*

Other local government entities have begun to use zoning laws to exclude the "disorderly" from troubled communities. Several years ago, Robert Ellickson hypothetically suggested that zoning laws, which usually dictate the appropriate uses of private property, might be extended to govern the acceptable uses of public spaces as well. He proposed dividing a city's public spaces into three zones, with "three codes, of varying stringency, governing street behavior" within each zone. Most city streets would fall into a "yellow zone," where episodic (but not chronic) disorder is permitted. The remainder would be divided between "green zones," where aberrant behavior is strictly curtailed in an effort to create "places of refuge for the unusually sensitive" and "red zones" where significant social disorder is tolerated. Ellickson's zoning scheme would manage disorder primarily by concentrating it in "red zones," which he specifically analogized to skid rows.<sup>85</sup>

In contrast to Ellickson's hypothetical concentration strategy, most formal public-space zoning policies employ a disorder-dispersal strategy. In Ellickson's terms, some local governments are seeking to use public-space zoning to make their "red" zones "yellow." A number of public-housing authorities exclude nonresident troublemakers from projects, much as a private landlord might.<sup>86</sup> Additionally, Portland, Oregon, and Cincinnati, Ohio,

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<sup>83</sup> Tamara Lush, *East Tampa Crime Sweep Includes Counselors*, *St. Petersburg Times*, May 13, 2003, at 6B.

<sup>84</sup> See Editorial, *Broken Windows are a Clue to Livability*, *Indianapolis Star*, Jan. 18, 2002 at A14 (Indianapolis); Cameron McWhirter, *Archer Tries to Balance Budget and Re-Election*, *Detroit News*, Mar. 4, 2001, at 1A (Detroit); Colleen McCain Nelson, *City Trains Sights on Neighborhood Blight*, *Dallas Morning News*, May 6, 2002, at 1A (Dallas).

<sup>85</sup> See Ellickson, *Controlling Chronic Misconduct*, *supra* note 5, at 1220-23.

<sup>86</sup> See, e.g., New York City Housing Authority, *Trespass Policy for Felony Drug Arrests* (2005), available at [http://www.nyc.gov/html/nycha/pdf/trespass\\_policy.pdf](http://www.nyc.gov/html/nycha/pdf/trespass_policy.pdf).

have adopted “drug-exclusion zone” laws that apply the anti-trespass principle to entire troubled neighborhoods.<sup>87</sup> For example, Cincinnati’s drug-exclusion law banned all persons arrested for drug offenses within any designated “drug-exclusion zone” from the “public streets, sidewalks, and other public ways” in the zone for ninety days; upon conviction, the exclusion was extended to one year.<sup>88</sup> Persons excluded under the ordinance were subject to prosecution for criminal trespass if they return during that time.<sup>89</sup>

In its regulatory takings cases, the Supreme Court often has stated that the “right to exclude” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>90</sup> With neighborhood-exclusion zones, local governments seek to borrow this treasured strand<sup>91</sup> of the property-rights bundle to augment order-maintenance efforts. Thus trespass-zoning laws incorporate two different property-regulation devices—zoning laws, which divide cities into various “use districts,” and trespass laws, which protect the right to exclude.<sup>92</sup> Trespass-zoning laws differ from traditional zoning laws in important respects, of course. A neighborhood-exclusion zone scheme establishes the appropriate users of public streets and sidewalks, rather than the appropriate uses of private property.

Neighborhood-exclusion zones are, in many respects, the mirror image of homeless campuses. While campuses concentrate the “disorderly” to a central location, exclusion zones disperse them.

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<sup>87</sup> See Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those With A Criminal Past*, 79 *Notre Dame L. Rev.* 327, 330–31 (2003); see also Stephanie Smith, Note, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 *U. Chi. L. Rev.* 1461, 1465–68 (2000) (describing Cicero, Illinois’s use of civil banishment sanctions to exclude gang members).

<sup>88</sup> See *Johnson v. City of Cincinnati*, 310 F.3d 484, 487–88 (6th Cir. 2002).

<sup>89</sup> *Id.* at 488 (citing Cincinnati Mun. Code § 755-5 (1996)).

<sup>90</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna*, 444 U.S. at 164); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (same); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (same).

<sup>91</sup> *Loretto*, 458 U.S. at 435.

<sup>92</sup> See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *Ohio St. L.J.* 1409, 1430 (2001) (discussing drug-exclusion zone policies); Kim Strossnider, *Anti-Gang Ordinances after City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 *Am. Crim. L. Rev.* 101, 129 (2002) (same).

The two strategies also advance very different policy goals. Homeless campuses seek to draw disorder away from the central business district to aid redevelopment. In contrast, neighborhood-exclusion zones—like regulatory sweeps—seek to protect the most vulnerable neighborhoods from the ravages of disorder.<sup>93</sup> The underlying theory is that some communities are so overwhelmed by drugs and violence that the threat of additional disorder is simply untenable. Thus, in order to protect these communities, it becomes necessary to exclude individuals who previously helped create disorder.<sup>94</sup>

In contrast to the two disorder-relocation policies discussed previously, however, city officials cannot expect courts automatically to extend *carte blanche* approval to exclusion-zone policies. Regulations governing the acceptable users of public spaces raise different constitutional concerns than regulations governing the acceptable uses of private property. While lawsuit-weary officials may see exclusion zones as a way to avoid the “vagueness” concerns that plague new order-maintenance policing efforts,<sup>95</sup> these policies remain vulnerable to other constitutional challenges.

*First Amendment Expression Claims.* The Supreme Court unanimously turned away a First Amendment “overbreadth” challenge to a public-housing exclusion-zone policy in *Virginia v. Hicks*.<sup>96</sup> Kevin Hicks had argued that his exclusion from a public-housing project for lacking a “legitimate business or social purpose” was inconsistent with the First Amendment because housing-authority officials might use the policy to exclude individuals who wished to engage in expressive activities. The Court reasoned that Hicks’s exclusion resulted from non-expressive conduct (trespassing and

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<sup>93</sup> The Kansas City proposal discussed above suggests that neighborhood-exclusion zones also also direct disorder away from “gentrifiable” areas. See *supra* note 53 and accompanying text.

<sup>94</sup> See *Johnson v. City of Cincinnati*, 310 F.3d 484, 487 (6th Cir. 2002) (noting that Cincinnati’s ordinance protects “neighborhoods with a ‘significantly higher incidence of conduct associated with drug abuse than other areas of the City’”) (quoting Cincinnati, Ohio Ordinance No. 229-1996, § 1(A), (D) (Aug. 7, 1996)); see also *id.* at 488 (“The Ordinance defines drug-exclusion zones as ‘areas where the number of arrests for . . . drug-abuse related crimes . . . is significantly higher than that for other similarly situated/sized areas of the city.’”).

<sup>95</sup> See, e.g., Livingston, *supra* note 4, at 646–50 (discussing the vagueness doctrine).

<sup>96</sup> 539 U.S. 113 (2003).

vandalism) and that expressive activity presumably would be a “legitimate business or social purpose.”<sup>97</sup>

*Hicks*, however, does not rule out a First Amendment challenge to a broader neighborhood-exclusion zone policy.<sup>98</sup> When applied in a public-housing project, no-trespass rules arguably are a straightforward application of a landlord’s right to exclude outsiders from a quasi-private development. It is unclear whether the Court’s approval of the use of trespass laws in this context would extend to the exclusion of individuals from public thoroughfares in a large section of a city.<sup>99</sup> That said, the reasons given for upholding the trespass policy at issue in *Hicks* apply with equal force to the drug-exclusion zones in Portland and Cincinnati. The policies are clearly content-neutral and any questions about whether exclusions deprive would-be speakers of “adequate alternative channels of communication” could presumably be addressed with a variance provision like the one in place in *Hicks*.<sup>100</sup>

*Right to Travel Claims.* The United States Court of Appeals for the Sixth Circuit recently ruled that Cincinnati’s drug-exclusion law violated the Fourteenth Amendment “right” to intrastate travel.<sup>101</sup> The Ohio Supreme Court also invalidated the Cincinnati ordinance on right-to-travel grounds, reasoning that “[e]very citizen of this state . . . enjoys the freedom of mobility . . . to roam about innocently in the wide-open spaces of our state parks or through the streets and sidewalks of our most populous cities.”<sup>102</sup> While these decisions render Cincinnati’s ordinance unenforceable, they do not close the book on exclusion-zone policies.<sup>103</sup> Indeed, the right-to-travel questions are complicated by at least two factors. First, before considering the contours of a substantive due process “right to

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<sup>97</sup> *Id.* at 122.

<sup>98</sup> *Hicks* is the second recent decision to grant the government-qua-landlord significant leeway to restore order. See *Dep’t of Hous. Auth. v. Rucker*, 535 U.S. 125 (2002) (upholding a “one-strike-and-you’re-out” eviction policy for illegal drug activity).

<sup>99</sup> The parties briefed this point, but the Court did not discuss whether the concerns of public housing were unique. See Brief for Petitioner at 32–43, *Hicks* (No. 02-371).

<sup>100</sup> See, e.g., John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 1647 (6th ed. 2000) (reviewing cases discussing “content neutrality” and “time, place, and manner” regulation of speech).

<sup>101</sup> *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002).

<sup>102</sup> *State v. Burnett*, 755 N.E.2d 857, 865 (Ohio 2001).

<sup>103</sup> The Supreme Court subsequently denied the City’s petition for certiorari. *City of Cincinnati v. Johnson*, 539 U.S. 915 (2003).

travel” claim, a court must contend with the “more specific provision” rule of *Graham v. Connor*.<sup>104</sup> This rule provides that “[w]here a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’”<sup>105</sup> Thus if, as Cincinnati claimed, the inability to enter an exclusion zone is a governmental “seizure,” then the Fourth Amendment’s reasonableness test—rather than strict scrutiny—“provides the exclusive analytical framework to assess” the restrictions imposed by neighborhood-exclusion zones.<sup>106</sup>

Assuming that the exclusion is not a “seizure,” neighborhood-exclusion zones only restrict the freedom to travel intrastate. The Supreme Court has never explicitly recognized the right of intrastate travel.<sup>107</sup> As recently as 1999, a majority of the Court declined to join an opinion articulating this right;<sup>108</sup> in other decisions, a majority of the Court arguably has rejected it in dicta.<sup>109</sup> And the fed-

<sup>104</sup> *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>105</sup> *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham*, 490 U.S. at 395).

<sup>106</sup> *Johnson*, 310 F.3d at 491. The federal courts are divided over whether post-arrest travel restrictions constitute continuing seizures. See *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (endorsing seizure theory); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222–25 (3d Cir. 1998) (same); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997) (same). But see *Kingsland v. City of Miami*, 382 F.3d 1220, 1235 (11th Cir. 2004) (rejecting seizure rule); *Reed v. City of Chicago*, 77 F.3d 1049, 1052–54 n.3 (7th Cir. 1996) (same). The Sixth Circuit distinguished post-arrest travel restrictions from the exclusions, reasoning that parolees were “seized” by orders requiring them to appear for trial. *Johnson*, 310 F.3d at 491; see also *Albright*, 510 U.S. at 279 (1994) (Ginsburg, J., concurring) (“[A] defendant released pretrial is . . . still ‘seized’ in the constitutionally relevant sense . . . so long as he is bound to appear in court and answer for the state’s charges.”).

<sup>107</sup> See *Johnson*, 310 F.3d at 496–97 (noting that “the Supreme Court has not expressly recognized a fundamental right to intrastate travel”). The right of interstate travel is firmly established. See *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *United States v. Guest*, 383 U.S. 745, 757 (1966).

<sup>108</sup> See *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion) (asserting that the Due Process Clause guarantees the right to intrastate travel).

<sup>109</sup> See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 277 (1993) (observing that “a purely intrastate restriction does not implicate the right of interstate travel”); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255–56 (1974) (declining to decide whether the constitution protects intrastate travel but expressing skepticism that it does). But see *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (noting that an anti-loitering law “implicates consideration of the constitutional right to freedom of movement”).

eral courts of appeals remain divided on the issue.<sup>110</sup> Indeed, only a few months before invalidating the Cincinnati law, a different panel of the Sixth Circuit rejected a right-to-travel challenge to a public-housing authority's "no trespass" policy, reasoning "that right is essentially a right of interstate travel."<sup>111</sup> Finally, even if the Court were to endorse a right to intrastate travel, criminal behavior frequently results in the curtailment of constitutional rights. Just as presumptively constitutional travel restrictions are routinely imposed as a condition for parole or probation, a city also may be permitted to restrict the movement of individuals as a result of drug arrests.<sup>112</sup>

*Associational Rights.* The Sixth Circuit also ruled that Cincinnati's exclusion-zone policy violated the Fourteenth Amendment right of intimate association as it applied to two individuals excluded from the "Over-the-Rhine" neighborhood (which was designated the city's first drug-exclusion zone in 1998).<sup>113</sup> The plaintiffs each claimed that their exclusions interfered with important personal relationships—one was prevented from helping to rear her grandchildren and another from visiting his attorney.<sup>114</sup> In contrast, the Ohio Supreme Court rejected a freedom-of-association challenge to the Cincinnati ordinance because the plaintiff failed to establish that his exclusion actually interfered with his associational rights.<sup>115</sup> Such "as-applied" problems presumably could be addressed by an appropriate variance provision.<sup>116</sup>

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<sup>110</sup> See *Hutchins v. District of Columbia*, 188 F.3d 531, 536–39 (D.C. Cir. 1999) (discussing division in circuits and expressing skepticism that the right to intrastate travel is fundamental); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (finding that a curfew implicated the "fundamental right of free movement").

<sup>111</sup> See *Thompson v. Ashe*, 250 F.3d 399, 406 (6th Cir. 2001).

<sup>112</sup> See, e.g., *Alonzo v. Rozanski*, 808 F.2d 637 (7th Cir. 1986) (holding that a parolee has no right to travel); *Bagley v. Harvey*, 718 F.2d 921 (9th Cir. 1983) (same).

<sup>113</sup> See *Johnson v. City of Cincinnati*, 310 F.3d 484, 488 (6th Cir. 2002); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984) (recognizing the right to "enter into and maintain certain intimate human relationships" as a core liberty protected by the Fourteenth Amendment).

<sup>114</sup> *Johnson*, 310 F.3d at 489, 500.

<sup>115</sup> *State v. Burnett*, 755 N.E.2d 857, 862–63 (Ohio 2001).

<sup>116</sup> See *Johnson*, 310 F.3d at 488 (noting that variances were available to those who were employed or resided in the exclusion zone and for "reasons relating to the health, welfare, or well-being of the person excluded"). Plaintiffs also have asserted that exclusions violate the First Amendment right of "expressive association." The Court, however, has previously rejected such challenges to content-neutral laws that



*Double Jeopardy Claims.* Plaintiffs also have claimed that exclusions violated the Fifth Amendment's Double Jeopardy clause.<sup>117</sup> Because Double Jeopardy is implicated only when an individual is subjected to multiple criminal punishments for the same offense, the relevant question is whether an exclusion is a criminal or civil penalty.<sup>118</sup> The initial determination turns on the legislature's intent,<sup>119</sup> and courts considering both the Portland and Cincinnati laws have found that exclusion zones' purpose is civil—to restore the quality of life for residents in drug-plagued neighborhoods.<sup>120</sup> These same courts part company, however, with respect to the second inquiry: whether the statutory scheme was “so punitive either in purpose or in effect as to transform what was clearly intended as a civil remedy into a criminal penalty.”<sup>121</sup> Yet the social-norms justifications for drug-exclusion laws weigh heavily against concluding that an exclusion is an additional criminal penalty. The exclusions seek to shore up the informal social norms that reject drug-related disorder by signaling that the community does not tolerate drug offenders.

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Even considering the serious constitutional concerns raised by neighborhood-exclusion zones, disorder-relocation strategies entail less legal risk than their order-maintenance policing alternatives. Officials can safely presume that a decision to establish homeless campuses or conduct a regulatory sweep will not become embroiled in litigation. A narrowly drawn exclusion-zone policy should also survive review. It is hardly surprising, therefore, that

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limit where individuals may associate. See *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

<sup>117</sup> U.S. Const. amend. V (“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”).

<sup>118</sup> See *Hudson v. United States*, 522 U.S. 93 (1997).

<sup>119</sup> *Id.* at 99.

<sup>120</sup> See *Johnson v. City of Cincinnati*, 119 F. Supp. 2d 735, 748 (S.D. Ohio 2000) (finding that the purpose of the Cincinnati ordinance was civil in nature), *aff'd* 310 F.3d 484 (6th Cir. 2002); *State v. James*, 978 P.2d 415, 419 (Or. Ct. App. 1999) (“It is undisputed that [the exclusion provisions] were expressly designated as civil.”).

<sup>121</sup> *Id.*

local government officials are turning to disorder-relocation strategies with increasing frequency.

### III. HISTORICAL DISORDER-RELOCATION STRATEGIES

Local efforts to relocate urban disorder are nothing new. For many generations, police officers served as informal “urban disorder regulators,” variously employing both disorder-concentration and disorder-dispersal strategies. What is mostly new about the policies discussed above is that they incorporate disorder-relocation strategies into official land-use policy. In an effort to learn what the historical experience with the informal policies of the past might teach about formal efforts to relocate disorder, this Part examines past disorder-relocation efforts in three contexts: first, the maintenance and later destruction of “skid row” neighborhoods; second, the similar pattern of containment and dispersal of “red light” districts, and third, the construction and current demolition of high-rise public-housing projects.

#### *A. Skid Rows*

“Homelessness” is nothing new. The development of “skid rows”<sup>122</sup> to serve the needs of a subset of the homeless population, however, has been called a uniquely American phenomenon.<sup>123</sup> Skid rows developed in the years after the Civil War, when widespread economic dislocation left many people homeless and poor.<sup>124</sup> By the late nineteenth century, most American urban centers had a skid row.<sup>125</sup> Skid row populations likely peaked between 1880 and 1920—a time when rapid industrialization, the railroads, and the opening of the West created demand for transient workers. Skid

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<sup>122</sup> The term “skid row” apparently originated with the “skid road” used to drag logs into Seattle’s Puget Sound. See David Levinson, *Skid Row in Transition*, 3 *Urb. Anthropology* 79, 80 n.1 (1974).

<sup>123</sup> See Howard M. Bahr, *Skid Row: An Introduction to Disaffiliation* 31 (1973) (“Homelessness may be as old as civilization, but skid row is an American invention.”).

<sup>124</sup> See, e.g., *id.* at 35–36; Levinson, *supra* note 122, at 81.

<sup>125</sup> See Bahr, *supra* note 123, at 27 (noting that most cities in the United States had a skid row); Charles Hoch & Robert A. Slayton, *New Homeless and Old: Community and the Skid Row Hotel* 14 (1989) (noting that “SRO [single-room-occupancy hotel] districts . . . existed in just about every urban center”).

rows emerged to serve as lodging and employment centers for this large, transient, male population.<sup>126</sup> In addition to inexpensive accommodations, skid row neighborhoods also featured employment agencies and other businesses serving the workers.<sup>127</sup>

Skid rows always were unquestionably disorderly places. High concentrations of bars, burlesque shows, and the ubiquitous presence of prostitutes likely made them, in many cases, indistinguishable from red light districts. Furthermore, while many workers on skid row remained “homeless” for a short time, a distinct subclass lived transient, unattached lives in “hobohemia” for many years.<sup>128</sup> Most of these men were employed much of the time, but available work was never permanent and tended to be seasonal.<sup>129</sup> As a result, many thousands of men had significant leisure time to frequent the skid row establishments that catered to the needs and desires of unattached, single men.<sup>130</sup> Moreover, other groups of unattached men lived on skid row—including “tramps” (“migratory non-workers”) and “bums” (“stationary non-workers”).<sup>131</sup> Despite the tendency in some circles to idealize this lifestyle, most mainstream accounts depicted skid rows as dangerous and depressing places, and urban officials made efforts to prevent them from encroaching upon respectable parts of town.<sup>132</sup>

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<sup>126</sup> See Ellickson, *Controlling Chronic Misconduct*, supra note 5, at 1208; Levinson, supra note 122, at 81 (describing early skid rows); John C. Schneider, *Skid Row as an Urban Neighborhood, 1880–1960*, 9 *Urbanism Past & Present* 11–13 (1984) (describing skid row in its heyday).

<sup>127</sup> See Nels Anderson, *The Hobo: The Sociology of the Homeless Man* 87, 250–60 (1923) (describing Chicago missions); Hoch & Slayton, supra note 125, at 10–20 (describing transient housing); id. at 32–34 (describing saloons, cafes, second-hand stores, pawn brokers, burlesque theaters, and brothels); Levinson, supra note 122, at 81 (describing skid row employment agencies).

<sup>128</sup> See, e.g., Hoch & Slayton, supra note 125, at 35 (describing the temporary nature of homelessness); Levinson, supra note 122, at 82–83 (discussing “hobo” culture).

<sup>129</sup> Hoch & Slayton, supra note 125, at 39 (noting that “[t]he most important aspect of a hobo’s life, besides travel, was his occupation and the fact that he was constantly working”).

<sup>130</sup> See id. at 40.

<sup>131</sup> See, e.g., Anderson, supra note 127, at 87 (quoting St. John Tucker, former president of the “Hobo College” in Chicago).

<sup>132</sup> See, e.g., Anderson, supra note 127, at 163 (“The average man on the street . . . sees in the tramp either a parasite or a predacious individual.”); Hoch & Slayton, supra note 125, at 44–45 (describing, and questioning, the “public perception of the hobo, tramp, and bum . . . [that] emphasized social disorder, chaos, and the threat to

Still, skid row in its heyday likely was a vibrant—if disorderly—community. Contemporary accounts depicted busy sidewalks full of migratory workers who found employment and camaraderie there.<sup>133</sup> These economic and social conditions stand in stark contrast to the later declining skid rows, which were “in the minds of both the public and the academic community . . . very different and more deviant place[s].”<sup>134</sup> Skid rows began to decline around 1920 and their populations fell precipitously after World War II.<sup>135</sup> The raw numbers, however, tell only part of the story. While skid row always had been associated with social deviancy, and especially alcohol abuse,<sup>136</sup> after World War II, these factors became the area’s defining characteristics.<sup>137</sup> Several major studies of post-war skid rows all presented the same picture of dire conditions—extreme poverty, disability, alcoholism, mental illness, and social isolation.<sup>138</sup>

These studies also vividly illustrate how skid row came to be viewed as a land-use problem.<sup>139</sup> For decades, city officials primarily had regulated skid row in the same way that urban disorder had been addressed throughout American history—through order-maintenance policing.<sup>140</sup> In his classic study, Egon Bittner asserted that “the traditional attitude of civic-mindedness toward skid row

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community”); Schneider, *supra* note 126, at 12 (describing an 1898 Omaha police raid on a gambling den that had crossed the “line of respectability”).

<sup>133</sup> Anderson, *supra* note 127, at 3–13. But see Peter H. Rossi, *Down and Out In America: The Origins of Homelessness* 21 n.6 (1989) (noting that Anderson later expressed regret for over-glamorizing hobo life).

<sup>134</sup> Hoch & Slayton, *supra* note 125, at 88.

<sup>135</sup> See, e.g., Rossi, *supra* note 133, at 32 (noting that skid row populations declined by fifty percent between 1950 and 1970); Schneider, *supra* note 126, at 15 (discussing decline).

<sup>136</sup> See Hoch & Slayton, *supra* note 125, at 45 (discussing “alcoholism, thievery, and other socially deviant tendencies” on skid rows).

<sup>137</sup> See, e.g., Schneider, *supra* note 126, at 15 (comparing hobos and tramps—“rough workingmen or social misfits who simply overindulged in low-life saloons”—with the skid row man of the 1950s—“a hopeless alcoholic, enslaved by his addiction to the point where he was totally unproductive”); see also Joan K. Jackson & Ralph Connor, *The Skid Road Alcoholic*, 14 Q.J. Stud. on Alcohol 468 (1958); W. Jack Peterson & Milton A. Maxwell, *The Skid Road “Wino,”* 5 Soc. Probs. 308 (1958).

<sup>138</sup> See Rossi, *supra* note 133, at 28–31 (discussing studies); see also Howard M. Bahr & Theodore Caplow, *Old Men, Drunk and Sober* (1974) (New York’s Bowery); Leonard Blumberg et al., *Skid Row and Its Alternatives* (1973) (Philadelphia’s Skid Row); Donald J. Bogue, *Skid Row in American Cities* (1963) (Chicago).

<sup>139</sup> See Rossi, *supra* note 133, at 28–33 (summarizing the studies’ findings).

<sup>140</sup> See Anderson, *supra* note 127, at 165.

has been dominated by the desire to contain it and to salvage souls from its clutches. The specific task of containment has been left to the police."<sup>141</sup> As skid row declined, however, police officers, faced with more severe social deviancy and greater societal hostility, felt pressure to exercise a greater amount of control within skid row as well.<sup>142</sup> While police remained more tolerant of disorder on skid row than elsewhere, "sweeps" to clean up the areas became more frequent occurrences.<sup>143</sup> By the mid-1960s, the skid row containment strategy had unraveled. Indeed, most post-war studies focused on how to address the dislocations resulting from skid row demolitions.<sup>144</sup>

While most skid rows have disappeared, homelessness has not. A number of commentators have asserted that the demise of skid rows fueled the homelessness crisis of the 1980s by reducing the supply of affordable housing<sup>145</sup> and dispersing the homeless.<sup>146</sup> Moreover, skid row containment policies were abandoned at roughly the same time that public-order offenses were decriminalized. As a result, "the public could observe first hand shabbily dressed persons acting in bizarre ways, muttering, shouting and carrying bulky packages, or pushing supermarket carts filled with junk and old clothes."<sup>147</sup> As the homeless became more visible, city officials and nonprofit service providers struggled to find ways to address their needs. Politically progressive, middle-class religious congregations replaced skid row missions, with some congregations intentionally locating soup kitchens in more affluent areas to draw

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<sup>141</sup> Bittner, *supra* note 22, at 704; see also Hoch & Slayton, *supra* note 125, at 105 ("[T]he job of the patrolman was primarily to maintain the spatial order by seeing that the accepted boundaries of Skid Row were maintained. This was done by confining the men to their specific neighborhood and prohibiting spillover into middle-class sections." (internal quotations omitted)).

<sup>142</sup> See Schneider, *supra* note 126, at 17 (noting that officers were pressured to maintain more street decorum than in the past).

<sup>143</sup> See Hoch & Slayton, *supra* note 125, at 104-05 (noting increased control within skid row).

<sup>144</sup> See Rossi, *supra* note 133, at 28-29 (discussing the objectives of the studies).

<sup>145</sup> See Christopher Jencks, *The Homeless* 61-74 (1994) (linking the decline in the number of SRO units to homelessness).

<sup>146</sup> See Rossi, *supra* note 133, at 33-34 (noting that the bizarre behavior of the homeless was previously "acted out on Skid Row"); see also Levinson, *supra* note 122, at 88 (linking the destruction of skid row with the dispersal of homeless populations).

<sup>147</sup> Rossi, *supra* note 133, at 34.

attention to the homeless problem.<sup>148</sup> As a result, problems previously concentrated on skid row began to affect more “respectable” communities.<sup>149</sup>

By the early 1990s, this kind of dispersed disorder began to generate a backlash against the homeless. Commentators wrote of “compassion fatigue,” and cities passed ordinances cracking down on homelessness-related disorder, particularly panhandling and sleeping in public places.<sup>150</sup> Furthermore, growing endorsement of the “broken windows” hypothesis led some leaders to see the homeless as an impediment to renewal efforts. Through the creation of “campuses,” homeless policy seemingly has come full circle, as local governments seek to formally reestablish skid row containment strategies.

### *B. Red Light Districts*

Local governments’ efforts to control sexually-oriented businesses have followed a similar pattern of disorder concentration, followed by dispersal. Traditionally, the “sex industry” was concentrated in special disorder zones known colloquially as red light districts. As with skid rows, these containment policies were—with a few notable exceptions—informal in nature. Also, as with skid rows, the informal containment compromise unraveled when unruly red light districts came to be viewed as a threat to the cities’ greater welfare. In response to that concern, economic and legal forces combined to eliminate the red light districts and disperse their concentrated disorder. The remainder of this Part examines this pattern of regulation in two related contexts: First, the municipal “vice districts” of the early twentieth century, and second, the regulation and eventual disappearance of red light districts with high concentrations of sexually-oriented businesses.

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<sup>148</sup> See Ellickson, *Controlling Chronic Misconduct*, supra note 5, at 1215.

<sup>149</sup> *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Serv.*, 712 P.2d 914 (Ariz. 1985) (enjoining a soup kitchen’s operation because of the patrons’ effect on neighboring residents).

<sup>150</sup> Ellickson, *Controlling Chronic Misconduct*, supra note 5, at 1167–68.

### 1. Municipal Vice Districts

Some Western European nations have designated official "vice zones" within which prostitution is tolerated. While this practice has been rare in U.S. history, several American cities created official municipal vice districts in the late nineteenth and early twentieth centuries.<sup>151</sup> The best known example is New Orleans' "Storyville," which was created by an 1897 ordinance confining brothels to a narrow area of the city.<sup>152</sup> St. Louis, Missouri, and several Texas cities also established similar districts around the turn of the twentieth century.<sup>153</sup> Technically, prostitution remained a crime within these districts, but lax enforcement approximated legalization.<sup>154</sup>

All of these districts were eliminated by the advent of World War I for reasons related to the predictable consequences of concentrating disorder. In Texas, a state law encouraged cities to create vice districts by providing that a private nuisance lawsuit could not "interfere with the control and regulation of bawds and bawdy houses . . . confined by ordinance . . . within a designated district."<sup>155</sup> When the aggrieved neighbors of brothels challenged this exemption, the courts ruled that the cities had effectively and illegally authorized prostitution.<sup>156</sup> Moral outcry led to the demise of the St. Louis vice district only four years after its creation in 1870.<sup>157</sup> Storyville lasted longer. In 1900, the Supreme Court rejected a quasi-takings challenge claiming that the ordinance had resulted in an increase in disorderly and immoral behavior and diminished adjacent

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<sup>151</sup> See Gerald L. Neuman, *Anomalous Zones*, 48 *Stan. L. Rev.* 1197, 1209 (1996).

<sup>152</sup> *Id.*

<sup>153</sup> See Thomas C. Mackey, *Red Lights Out: A Legal History of Prostitution, Disorderly Houses, and Vice Districts, 1870-1917* at 124-32 (1987).

<sup>154</sup> See Neuman, *supra* note 151, at 1211.

<sup>155</sup> *Id.* (quoting 1911 *Tex. Rev. Civ. Stat.* 4689).

<sup>156</sup> See *Baker v. Coman*, 198 S.W. 141, 141 (Tex. 1917) (invalidating a Houston ordinance); *Spence v. Fenchler*, 180 S.W. 597, 602-03 (Tex. 1915) (invalidating an El Paso ordinance); *Brown Cracker & Candy Co. v. City of Dallas*, 137 S.W. 342, 343 (Tex. 1911) (invalidating a Dallas ordinance); *Burton v. Dupree*, 46 S.W. 272, 273 (Tex. Civ. App. 1898) (invalidating a Waco ordinance).

<sup>157</sup> See Joel Best, *Controlling Vice: Regulating Brothel Prostitution in St. Paul, 1865-1883*, at 17 (1998).

property values.<sup>158</sup> Concerns about disorder did, however, lead the Navy to close Storyville in 1917 in order to preserve the health and good order of American servicemen.<sup>159</sup>

While the formal designation of vice districts was relatively rare, most large cities had large, quasi-official vice districts during this same time period.<sup>160</sup> The police contained prostitution through selective arrests, turning a blind eye to solicitation within these districts, but arresting prostitutes elsewhere.<sup>161</sup> Respectable society accepted this compromise because it shielded other neighborhoods from prostitution.<sup>162</sup> Nevertheless, prostitution-related disorder was amplified within these districts, where theft, physical abuse of prostitutes, and even violence spawned by inter-brothel rivalries was commonplace.<sup>163</sup> Despite the disorder, and the concerted efforts of Progressive-era “social hygiene” reformers to eliminate prostitution,<sup>164</sup> most vice districts remained intact until the second decade of the twentieth century. At that point, Progressives joined forces with Prohibitionists to pass “red light abatement acts” that authorized private citizens to file a complaint against any building used for prostitution. These acts, combined with increased demand for police enforcement, meant the end of the vice districts.<sup>165</sup>

Eliminating vice districts did not, however, eliminate prostitution. Rather, prostitutes were dispersed, exposing more neighbor-

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<sup>158</sup> See *L'Hote v. City of New Orleans*, 177 U.S. 587, 594–600 (1900) (rejecting the plaintiff's claim that the decline in property values resulting from Storyville's creation was a deprivation of property without due process).

<sup>159</sup> See Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* 136–50 (1980); Neuman, *supra* note 151, at 1211.

<sup>160</sup> See John F. Decker, *Prostitution: Regulation and Control* 61–62 (1979).

<sup>161</sup> See, e.g., Best, *supra* note 157, at 19.

<sup>162</sup> See, e.g., Neil Larry Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870–1910*, 19 *J. Soc. Hist.* 665, 665–79 (1986).

<sup>163</sup> Best, *supra* note 157, at 28–30; see also *L'Hote*, 177 U.S. at 590 (describing Storyville as “the refuge of public prostitutes, lewd and abandoned women and the necessary attendants thereof, drunkards, idle, vicious and disorderly persons”).

<sup>164</sup> See Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900–1918*, at 14–37 (1982).

<sup>165</sup> See Decker, *supra* note 160, at 67; Rosen, *supra* note 164, at 30 (“In most cases, however, the chief of police responded to civic pressure simply by ordering the closing of the district.”). Federal policy also played a role. As the United States prepared to enter the First World War, Congress authorized the military to arrest any prostitute operating within five miles of a military cantonment. *Id.* at 33–34; see also *McKinley v. United States*, 249 U.S. 397 (1919) (affirming the defendant's conviction for operating “houses of ill fame” within the prohibited area).



hoods to the “oldest profession.” Street walking—long viewed as the most disorderly and dangerous form of the trade—became commonplace. Tea rooms, massage parlors, and palm reading establishments became fronts for prostitution rings.<sup>166</sup> Prostitution became more difficult to regulate as control shifted from the madams and police to pimps and organized crime syndicates.<sup>167</sup>

## 2. “Adult-Use” Districts

Underground prostitution undoubtedly took root in the adult-use districts that developed during the last century. As with their vice district predecessors, these areas featured high concentrations of sexually-oriented businesses—adult book stores, pornographic movie theaters, peep shows, exotic dance clubs, massage parlors, etc.<sup>168</sup> New York’s Times Square epitomized the extent of the disorder present in these areas. By the 1970s, visitors encountered “a smorgasbord of books, magazines, films, peep shows, . . . stripteases, and even live sex performances,” many of which concealed prostitution as well.<sup>169</sup> The area also became flooded with criminal activity—so much so that 42nd Street alone “recorded more than twice as many criminal complaints as any other street in the area, with drug offenses, grand larceny, robbery, and assault topping the list.”<sup>170</sup>

Most adult-use districts, including Times Square, resulted from an informal “containment” strategy similar to the vice district model.<sup>171</sup> Order-maintenance policing, rather than formal land-use policy, was used to regulate and contain the sex industry. A few cities, however, adopted formal land-use policies establishing adult-

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<sup>166</sup> Best, *supra* note 157, at 112–13; Decker, *supra* note 160, at 73; Rosen, *supra* note 164, at 32–33.

<sup>167</sup> See Best, *supra* note 157, at 113 (arguing that the demise of vice districts increased corruption and the role of organized crime); Rosen, *supra* note 164, at 33 (describing the role of organized crime in prostitution).

<sup>168</sup> See Alexander J. Reichl, *Reconstructing Times Square: Politics and Culture in Urban Development 57* (1999) (describing New York City’s Times Square in the 1970s).

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

<sup>170</sup> Lynne B. Sagalyn, *Times Square Roulette: Remaking the City Icon* 31 (2001).

<sup>171</sup> See Reichl, *supra* note 168, at 49–51 (discussing the development of Times Square).

use districts.<sup>172</sup> The best known example is Boston's "Combat Zone," which was designated the "adult use entertainment district" in 1974.<sup>173</sup> Unfortunately, after the containment strategy was formalized, the crime and disorder in the Combat Zone skyrocketed. Whereas prostitution, gambling, and the hard core obscenity were already present in the area, the "official" designation that these activities *belonged* there led to a rapid erosion of any discretion previously exercised by its purveyors. Norman Marcus, then counsel for the New York City Planning Commission, cautioned against emulating this model, warning that a sense of "criminal license" prevailed in the Combat Zone.<sup>174</sup> Moreover, neighboring areas, especially Chinatown, suffered serious economic and social consequences from disorder spillovers.<sup>175</sup>

Over the past few decades, adult-use districts gradually have disappeared as a result of the same economic and legal forces that precipitated the elimination of skid rows and vice districts. Importantly, the districts' downtown locations have subjected them to the pressure of urban redevelopment efforts. Some, such as Albany's "Gut," were razed during the urban renewal period as local officials came under increasing pressure to quell the disorder within them.<sup>176</sup> More recently, after decades of failed efforts, private and public forces combined to transform the Combat Zone and Times Square.<sup>177</sup> Urban-development expert Lynne Sagalyn recently described the "new" Times Square as an "internationally recognized symbol of urban redemption."<sup>178</sup> In 2003, only two adult businesses remained in the Combat Zone.<sup>179</sup>

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<sup>172</sup> See *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153 (Wash. 1978) (upholding a Seattle law that confined adult motion picture theaters to a specified district).

<sup>173</sup> Lawrence W. Kennedy, *Planning the City Upon a Hill: Boston Since 1630*, at 208 (1992).

<sup>174</sup> Norman Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 *Buff. L. Rev.* 1, 3-4 (1979).

<sup>175</sup> See Shirley Leung, *Chinatown Enjoys a Renaissance*, *Boston Globe*, Apr. 9, 1997, at A1.

<sup>176</sup> See Wilson, *supra* note 21, at 240 (noting that the "Gut" was torn down because it "was receiving too much unfavorable publicity").

<sup>177</sup> See Kennedy, *supra* note 173, at 208-09 (describing efforts in Boston); Reichl, *supra* note 168, at 58-61 (describing efforts in New York).

<sup>178</sup> See Sagalyn, *supra* note 170, at 7.

<sup>179</sup> See Steve Bailey, *Build 'Em High*, *Boston Globe*, Dec. 17, 2003, at C1.

While zoning laws were rarely used to create red light districts, they have contributed to the districts' demise, thanks in part to the Supreme Court. The Court's decisions extending First Amendment protection to sexually explicit materials undoubtedly contributed to the growth of red light districts in the 1960s and 1970s.<sup>180</sup> But later decisions permit cities to use zoning laws to control the "secondary effects" of sexually-oriented businesses, either by dispersing or concentrating them.<sup>181</sup> The proliferation of "secondary effects" studies focusing on the negative consequences of concentrations of adult businesses provides strong anecdotal evidence suggesting that most cities have opted for dispersal.<sup>182</sup> A predictable consequence of these policies has been, in the words of one commentator, " pornosprawl."<sup>183</sup> Communities without dispersal zoning find themselves inundated with adult businesses pushed out of major cities. As a result, many smaller cities and suburbs now must find ways to address the pornography-related disorder that large urban centers have rejected.

### *C. High-Rise Public Housing*

It is hard to imagine a more powerful monument to a failed disorder-concentration strategy than the crumbling towers of the Robert Taylor Homes. Featured in the 1970's-hit sitcom "Good Times," the Taylor Homes's twenty-eight buildings comprised the nation's largest public-housing project upon their completion in 1962. These "towers in the park" once lined a two-mile stretch of Chicago's Dan Ryan Expressway across from the White Sox's Comiskey Park. The Taylor Homes are almost gone now, thanks to the

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<sup>180</sup> See, e.g., Reichl, *supra* note 168, at 57 (arguing that constitutional protection for pornography facilitated the growth of the commercial sex industry in Times Square).

<sup>181</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1985) (upholding a zoning ordinance that had the effect of concentrating adult motion picture theatres); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding a zoning law that prohibited adult businesses from locating "within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area").

<sup>182</sup> See Community Defense Counsel, *Protecting Children and their Neighborhoods, Secondary Effects Studies* (2004), at <http://www.communitydefense.org/cdcdocs/landuse/secondaryeffects> (last accessed Apr. 16, 2005) (collecting secondary effects studies).

<sup>183</sup> See Ellen Perlman, *Pornosprawl: X-Rated Businesses are Leaving the City for the Suburbs: The Suburbs Aren't Ready*, *Governing Mag.*, Oct. 1997, available at <http://www.governing.com/archive/1997/oct/porn.txt>.

federal government's massive "Hope VI" program, which funds the demolition of urban-renewal-era public-housing projects and their partial replacement with low-rise, mixed-income projects. Only five of the original buildings remain; all of them will be closed by the end of 2005.<sup>184</sup>

Unlike red light districts and skid rows, of course, high-rise public-housing projects never were maintained solely to concentrate urban disorder. A complex array of social, ideological, and economic factors resulted in the Taylor Homes. Still, high concentrations of poverty-related disorder were the foreordained result of post-war federal public-housing policy, for a number of reasons. First, federal law mandated the elimination of one unit of substandard housing for every unit built, a requirement that virtually guaranteed that most public-housing units would be built in urban areas.<sup>185</sup> Second, most high rises were built at a time when city planners favored "towers in the park"-style buildings—both because they sadly were influenced by LeCorbusier<sup>186</sup> and because they sought to minimize the space consumed by low-income dwellings.<sup>187</sup> Third, other federal policies—especially reserving public-housing units for the most needy and the failing to allocate adequate renovation funds—led to high concentrations of destitute families in rapidly deteriorating buildings.<sup>188</sup>

By the late 1980s—after over two decades of efforts to de-concentrate public-housing tenants<sup>189</sup>—crime and disorder had

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<sup>184</sup> See Chi. Hous. Auth., Robert Taylor Homes (2003) at [http://thecha.org/housingdev/robert\\_taylor.html](http://thecha.org/housingdev/robert_taylor.html) (last accessed Apr. 16, 2005).

<sup>185</sup> See Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. Chi. L. Rev. 497, 504 (1993) (describing federal housing laws).

<sup>186</sup> LeCorbusier's "Radiant City" proposal called for high-rise residential towers in parks set on superblocks. See LeCorbusier, *The City of Tomorrow and Its Planning* 280 (1924); see also Jesse Dukeminier & James E. Krier, *Property* 955 (5th ed. 2002) ("LeCorbusier's ideas had an immense impact on public housing.").

<sup>187</sup> See Bernard J. Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* 23 (1989) (arguing that "city renewal directors were searching for 'the blight that's right'—places just bad enough to clear but good enough to attract developers").

<sup>188</sup> See Schill, *supra* note 185, at 501–13 (discussing factors contributing to housing distress).

<sup>189</sup> The Housing and Community Development Act of 1974 required public-housing authorities to avoid concentrations of low-income and deprived families with serious social problems. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(c)(6), 88 Stat. 633, 634–35 (1974). Since the early 1970s, federal housing as-

come to define high-rise projects.<sup>190</sup> In 1989, Congress established the National Commission on Severely Distressed Public Housing to address these problems.<sup>191</sup> The Commission's final report found that six percent of public housing—roughly 86,000 units—was severely distressed.<sup>192</sup> Moreover, the Commission found that all public-housing residents were “very poor and getting poorer,” a reality that translated into “an aggregation of particularly vulnerable households in many family developments” as well as “tremendous isolation” and “[i]nstitutional abandonment” of the most distressed projects.<sup>193</sup>

Congress responded by appropriating \$300 million for the “Urban Revitalization Demonstration” project, or what is now known as “Hope VI.”<sup>194</sup> After operating for several years as a demonstration project, the Hope VI program was authorized for the first time in the Quality Housing and Work Responsibility Act of 1998,<sup>195</sup> which solidified the preference for de-concentrating the disorders associated with public housing. Perhaps most significantly, the 1998 Act eliminated the requirement that public-housing authorities replace demolished public-housing on a one-for-one basis,<sup>196</sup> thus

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sistance also has shifted to favor demand-oriented programs that enable poor tenants to rent apartments on the private market in particular. See Schill, *supra* note 185, at 524–25.

<sup>190</sup> See Schill, *supra* note 185, at 497–98 (describing popular accounts of problems of public housing).

<sup>191</sup> See *id.*, at 498; see also Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, §§ 501–07, 103 Stat. 1987, 2048–52.

<sup>192</sup> See Nat'l Comm'n on Severely Distressed Pub. Hous., *The Final Report* 2–3 (1992) (finding that three conditions characterized the most distressed developments: “[r]esidents living in despair and generally needing high levels of social and support services”; “physically deteriorating buildings”; and “[e]conomically and socially distressed surrounding communities”).

<sup>193</sup> *Id.* at 47–48.

<sup>194</sup> See U.S. Dept. of Hous. and Urban Dev., *Hope VI Program Authority and Funding History* (Aug. 2003), available at <http://www.hud.gov/offices/pih/programs/ph/hope6/about/fundinghistory.pdf> (noting that Hope VI was an immediate response to the Commission's findings) (last accessed July 12, 2005).

<sup>195</sup> Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2518 (codified in scattered sections of 38 U.S.C.); see also Patrick E. Clancy & Leo Quigley, *Hope VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 *Geo. J. on Poverty L. & Pol'y* 527 (2001) (describing and defending Hope VI).

<sup>196</sup> Louise Hunt et al., *Summary of the Quality Housing and Work Responsibility Act of 1998*, at 11 (1998), available at <http://www.hud.gov/offices/pih/phr/about/titleiv.pdf>.

clearing the way for the demolition of high-rise projects and their replacement with privately managed, less dense, mixed-income developments.<sup>197</sup> Increased reliance on demand-oriented housing subsidies is a necessary corollary to this policy; displaced tenants must be given housing vouchers to replace demolished apartments that will not be replaced.

These Hope VI projects generally are viewed as a success in the popular press.<sup>198</sup> Critics, however, assert that the program is a costly and unjust disorder-dispersal device. The program, in this view, “succeeds” by depriving the neediest tenants of the resources that they need to secure housing and forcing them to resettle in equally dangerous and segregated communities.<sup>199</sup> Empirical studies tend to paint a more hopeful picture of displaced tenants relocating to wealthier, more diverse, and safer neighborhoods—albeit to ones that remain relatively poor, segregated, and dangerous. These results hold true across all three categories of displaced tenants—those returning to public housing, those using Housing Choice Vouchers, and those who are unsubsidized renters.<sup>200</sup>

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<sup>197</sup> See Clancy & Quigley, *supra* note 195, at 528–30 (describing Hope VI programmatic focus).

<sup>198</sup> For recent commentary, see, for example, Jeanette Almada, *Construction Begins on Roosevelt Square Project*, Chi. Trib., Dec. 12, 2004, at 9; Ilene Lelchuk, *Back Home in North Beach: Residents of Project Glad to Return After Renovation*, S.F. Chron., Oct. 2, 2004, at B1; Brigid Schulte, *New Public Housing Courts Middle-Income Tenants; Chatham Square Replaces the Berg*, Wash. Post, Nov. 11, 2004, at T3; Eric Siegel, *For O'Malley, a Legacy in Improvement*, Balt. Sun, Sept. 16, 2004, at 2B; Leslie Williams, *Home Sweet Home: Old St. Thomas Site Blooms*, City Officials Open River Garden, New Orleans Times-Picayune, Nov. 17, 2004, at 1.

<sup>199</sup> See, e.g., Michael S. FitzPatrick, Note, *A Disaster in Every Generation: An Analysis of Hope VI*, HUD's Newest Big Budget Development Plan, 7 Geo. J. on Poverty L. & Pol'y 421 (2000) (summarizing these arguments); Nat'l Hous. Law Project, *False Hope: A Critical Assessment of the Hope VI Public Housing Redevelopment Program* (2002), available at <http://www.nhlp.org>; Nat'l Alliance of HUD Tenants, *Report on the Loss of Subsidized Housing in the U.S.* (2002), available at [http://www.saveourhomes.org/Senate\\_Report.htm](http://www.saveourhomes.org/Senate_Report.htm) (summarizing data showing the loss of subsidized housing attributable to Hope VI).

<sup>200</sup> See, e.g., Larry Buron, *An Improved Living Environment? Neighborhood Outcomes for Hope VI Relocateses*, Metropolitan Housing and Community Center, Brief No. 3, 1–2 (Sept. 2004), available at <http://www.urban.org/Template.cfm?Section=ByAuthor&NavMenuID=63&template=/TaggedContent/ViewPublication.cfm&PublicationID=8984> (“Our findings indicate that relocateses generally moved to neighborhoods with lower levels of poverty, slightly more racial diversity, and significantly less criminal activity.”).

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In each of the contexts discussed above, local authorities initially sought to control disorder by concentrating it into “disorder zones”—skid rows, red light districts, and high-rise projects. Concentration efforts usually were an unofficial compromise that shielded respectable communities from urban disorder. Concentrating disorder, however, amplified it and caused spillovers that threatened neighborhoods outside of the containment zone. Eventually, the disorder-concentration compromise became socially and politically unacceptable, and government officials sought to disperse disorder in order to minimize its costs.

#### IV. A COST OF RIGHTS PROBLEM?

Order-maintenance policing proponents argue that judicial decisions preventing the police from addressing urban disorder create a “cost of rights” problem. Echoing Justice Thomas’s dissent in *Chicago v. Morales*, they assert that legal protections designed to shield individuals from unlikely police abuses result in a certainty of crime and disorder in our nation’s most vulnerable communities.<sup>201</sup> As the discussion above illustrates, disorder-relocation strategies dodge many of the legal pitfalls of order-maintenance policing by transferring the power to regulate disorder away from the police. The question remains, however, whether these strategies help solve the cost of rights problem. That is, do disorder-relocation strategies reduce disorder and avoid the racial-justice and civil-liberties concerns raised by order-maintenance policing?

This Part takes up this important question. Specifically, it asks whether, in an effort to avoid legal challenges, local officials may be turning to disorder-relocation strategies that impose high costs of their own. I use the questions raised in the order-maintenance debate—“are these policies just” and “will they work”—as guideposts to predict the “costs” of disorder-relocation strategies. These questions are particularly important for two distinct reasons. First,

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<sup>201</sup> 527 U.S. 41, 98, 115 (1999) (Thomas, J., dissenting) (“By focusing exclusively on the imagined ‘rights’ of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice Stevens . . . elevates above all else—the ‘freedom of movement.’ And that is a shame.” (citation omitted)).

both sides of the debate have endorsed them as the relevant benchmarks for “success”; and second, the disorder-relocation strategies discussed here are arguably being adopted in response to them. Thus, this Part applies those questions to the disorder-relocation strategies discussed in this Article, asking first whether these efforts will reinvigorate the private norms necessary to curb disorder, and second, how well they address the racial- and economic-justice issues raised by order-maintenance opponents.

### *A. A Land-Use Critique of Disorder Relocation*

The historical experience described above casts a shadow of doubt upon current efforts to use formal land-use policy to relocate disorder. Over the past century, urban policymakers discovered that efforts to contain or disperse urban disorder impose serious social costs. Unfortunately, there are reasons to worry that the costs of contemporary disorder-relocation efforts that shift power from police to land-use planners will exceed those of their historical counterparts. When police officers informally managed disorder, local officials could modulate the costs of relocation because of the inherent flexibility of informality: The police exercised their discretion to make *ex post* determinations about what behaviors, and which individuals, threatened the public order.

The policies discussed in this Article seriously limit that flexibility. Disorder-relocation strategies change more than the nature of the regulator; they also change the type of decisionmaking shaping the order-maintenance agenda. Disorder-relocation strategies—like all land-use regulations—require *ex ante* determinations of who are the disorderly and where disorder is most harmful. A number of legal scholars have criticized American land-use policy precisely because it relies upon such predictive decisionmaking.<sup>202</sup> *Ex ante* decisions designed to minimize disorder often impose high “prevention costs”<sup>203</sup> because they codify the “better safe than sorry” principle. The predictions enshrined in zoning law, for ex-

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<sup>202</sup> See, e.g., Garnett, *Home-Business Dilemma*, *supra* note 12, at 1238 (reviewing the literature).

<sup>203</sup> See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. Chi. L. Rev.* 681, 694 (1973).



ample, are inevitably overbroad, and sometimes they are simply wrong.<sup>204</sup>

The codification of these predictions also deprives policymakers of the flexibility needed to rapidly respond to changing circumstances.<sup>205</sup> I previously have argued that cities may make a serious mistake by assuming that existing land-use policies—especially zoning laws designed to carefully segregate private land uses—suppress disorder. This assumption is deeply rooted in American law. In recent years, however, an increasing number of urban planners have come to endorse the view, identified strongly with the work of Jane Jacobs, that such policies undermine vibrant, healthy, urban environments. Nearly a century of tinkering with regulations ordering private land uses has, in this view, largely failed: While the persistence of these “order-construction” regulations results in part from a desire to make our cities orderly, a strong case can be made that they in fact contribute to the disorder that plagues our cities and undergird the renewed interest in order-maintenance policing.<sup>206</sup> If relying on existing land-use policies to order our cities does more harm than good, then new land-use policies explicitly adopted to relocate disorder may compound the previous error.

### *B. Disorder Relocation as Disorder Suppression*

Admittedly, however, these critiques of private land-use regulations are not directly applicable to the disorder-relocation policies examined in this Article. Perhaps policies adopted with the express intent of acting directly to suppress disorder by relocating the disorderly will prove more efficacious than private zoning efforts. Thus, the remainder of the Section draws upon the historical experience with disorder-relocation efforts and the social-norms arguments used to promote order-maintenance policing, and to evaluate disorder-relocation efforts.

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<sup>204</sup> See Garnett, Home-Business Dilemma, *supra* note 12, at 1238.

<sup>205</sup> See, e.g., Douglas W. Kmiec, Deregulating Land Use: An Alternative Free Enterprise Development System, 130 U. Pa. L. Rev. 28, 52 (1981) (arguing that zoning law is “incapable of assimilating rapid changes in design, technology, or community preferences”).

<sup>206</sup> See Garnett, Ordering the City, *supra* note 10, at 42.

*1. Disorder Concentration: The New Skid Rows*

At first glance, homeless campuses seem to be an excellent response to the criticisms of “policing” the homeless through the criminal law. Cities seek to use the promise of services and shelter, not the threat of arrest, to lure homeless individuals away from downtown streets. Ideally, this disorder-relocation strategy will reduce the amount of police intervention needed to suppress disorder and, therefore, minimize the possibility that police officers may abuse their authority. Furthermore, if, as Dan Kahan has observed, “[p]ublic drunkenness, . . . aggressive panhandling and similar behavior signal . . . that the community is unable or unwilling to enforce basic norms,”<sup>207</sup> then it seems self-evident that reducing such disorder will help send the opposite signals. This likelihood is particularly important for those who worry that an absence of street decorum drives law-abiding individuals away, thus impeding efforts to enliven moribund central business districts.<sup>208</sup> In this sense, the homeless campuses can be seen as part of a broader movement to create local government institutions that will help reinvigorate decaying downtown neighborhoods.<sup>209</sup> While new “sublocal” governments, like business improvement districts, enable downtown property owners to solve collective-action problems and tackle the physical (and to a lesser extent social) disorders that plague redevelopment efforts,<sup>210</sup> homeless campuses seek to minimize downtown disorder by concentrating it away from city centers.

If the only goal of order-maintenance policies were to encourage downtown redevelopment, or perhaps the gentrification of some urban residential neighborhoods, then disorder-concentration ef-

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<sup>207</sup> Kahan, *Social Influence*, supra note 11, at 370.

<sup>208</sup> See Ellickson, *Controlling Chronic Misconduct*, supra note 5, at 1174 (“[C]hronic panhandlers, bench squatters, and other disorderly people may deter some citizens from gathering in the agora.”); Meares & Kahan, *Inner City*, supra note 15, at 823 (“If they can, law-abiding citizens are likely to leave a neighborhood that is pervaded by disorder . . . Law-abiders who stick it out, moreover, are more likely to avoid the streets, where their simple presence would otherwise be a deterrent to crime.”).

<sup>209</sup> See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 *Minn. L. Rev.* 503 (1997) (discussing the emergence of new local government institutions).

<sup>210</sup> See, e.g., Richard Briffault, *A Government For Our Time? Business Improvement Districts and Urban Governance*, 99 *Colum. L. Rev.* 365, 377–404 (1999); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *Duke L.J.* 75, 91–105 (1998).

forts might “work.” After all, concentration strategies long served to shield respectable neighborhoods by drawing disorder into unrespectable ones. Yet the story is not so simple. Social-norms scholars promise that disorder-suppression is not a zero-sum game; that is, a reduction in disorder in one neighborhood need not mean an increase in disorder elsewhere. According to the social-influence theory, disorder suppression should have a multiplier effect. Government intervention to curb disorder will bolster private efforts to do the same. The result will be less disorder everywhere.

But, history suggests that disorder concentration often is, in fact, a zero-sum game. Relocating homeless services (and their patrons) may well make central business districts healthier, more vibrant places, but the cost of reducing disorder downtown may be increasing it elsewhere. Indeed, concentration strategies tend to amplify disorder. Policymakers who informally maintained disorder zones accepted the higher level of disorder within them to prevent the erosion of norms of order elsewhere. Eventually, however, the amplified disorder that resulted led them to switch from a concentration to a dispersal strategy. This point is particularly important because proponents promise that order-restoration efforts will not just save downtown, but will also save the poorest, most disorder-plagued urban communities. Sadly, these communities are the least likely to be shielded from disorder by a concentration strategy.

A homeless campus is a classic “LULU” (locally undesirable land use);<sup>211</sup> a proposal to establish one is frequently greeted by screams of protest from neighbors.<sup>212</sup> These objections undoubtedly reflect a healthy dose of “not in my backyard” or “NIMBYism” (for example, a neighbor of Colorado Springs’ proposed campus referred to the project as “Wino Wal-Mart”).<sup>213</sup> But they also may suggest that the campuses raise the economic- and racial-equity concerns flagged by opponents of order-maintenance policing. Unfortunately, in order to relocate homeless individuals away from

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<sup>211</sup> See Vicki Been, *What’s Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 *Cornell L. Rev.* 1001, 1001 (1993) [hereinafter *Been, Fairness*] (characterizing homeless shelters and drug treatment centers—both of which may be located in campuses—as LULUs).

<sup>212</sup> See, e.g., Erin Emery, *Homeless Center Draws Praise, Ire*, *Denver Post*, June 25, 2000, at B4 (describing a neighbor’s objection to a proposed homeless campus, including worries about increased traffic, violence, and property damage).

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

downtown streets, local officials may well choose to construct campus facilities in poor neighborhoods. Indeed, the “environmental justice” literature illustrates why political decisionmakers may concentrate homeless services in poor minority neighborhoods, even absent discriminatory intent. Neighborhood opposition may be weaker, residents may have less political clout, and planners may view their communities as “hopeless” or “unsalvageable.” And, importantly, land may be more readily available and less expensive than in more affluent communities.<sup>214</sup>

Phoenix chose to locate its campus near where existing service providers had concentrated informally.<sup>215</sup> Residents in the neighborhood already suffer from so much disorder that existing zoning laws actually discourage new social services from moving into the area. Teachers at the local elementary school worry about homeless men lining up in the soup kitchen line, keep students inside during recess to avoid contact with prostitutes, and encourage area parents to walk their children to school after welfare checks are distributed.<sup>216</sup> Under these circumstances, the creation of a homeless campus may amplify disorder in the very communities that are least likely to have the social wherewithal to withstand an onslaught of new disorder. This result would not only be unjust, it may also fuel the downward spiral of disorder and decay that plagues so many poor urban neighborhoods. Indeed, the vulnerability of such neighborhoods to disorder—and the weakness of social norms that might counter it—undergirds arguments in favor of order-maintenance policies.

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<sup>214</sup> See, e.g., Vicki Been and Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *Ecology L.Q.* 1, 33–34 (1997) (summarizing a study of siting decisions and finding some correlation between LULUs and racial demographics); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *Yale L.J.* 1383, 1398–1406 (1994) [hereinafter *Been, Locally Undesirable Land Uses*] (concluding that evidence of disproportionate siting is mixed); Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity and Environmental Justice*, *J. Envtl. L. & Litig.* 121 (1994) (reviewing the literature).

<sup>215</sup> See Maricopa County, *Human Services Campus: Project Info* (2004), at <http://www.maricopa.gov/hscampus/status.aspx#plan> (last accessed July 12, 2005) (displaying renderings of existing providers and the proposed campus site).

<sup>216</sup> See Sarah Anchors, *Agency Stirs Safety Concerns for School*, *Ariz. Republic*, Feb. 26, 2003, at 1.

The history of skid row vividly illustrates what such a community might expect from a new homeless campus. Skid row neighborhoods “worked” as disorder zones under a combination of legal, economic, and social realities that cannot be replicated today. First, in their heyday, skid row neighborhoods served the economic and social needs of the itinerant working poor. Skid row residents might have been social misfits, but they were not economic ones. On the contrary, the late-nineteenth- and early-twentieth-century economies depended on transient laborers.<sup>217</sup> Furthermore, while municipal governments and religious institutions always provided last-resort aid for the truly destitute, most skid row service providers were responding to free-market forces.<sup>218</sup> As economic decline led to the disappearance of these market-driven services, the deviancies always present on skid row came to define it.<sup>219</sup>

A new campus would operate under conditions at least as bad as skid rows in their darkest days. Indeed, sociological studies of the “new” homeless suggest that many suffer from more severe social pathologies—especially mental illness and severe drug addiction—than the classic “skid row drunk.”<sup>220</sup> Furthermore, a new campus would lack the private businesses that had economic incentives to enforce some social norms of decorum on the old skid rows.<sup>221</sup> Importantly, the disappearance of the single-room-occupancy (“SRO”) hotels that traditionally provided the bulk of skid row housing likely would exacerbate the disorder of “campus” life. Today, emergency shelters serve as the primary means of addressing the homelessness problem.<sup>222</sup> The very poor, however, have always

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<sup>217</sup> See, e.g., Hoch & Slayton, *supra* note 125, at 39 (noting that the “hobo labored at the wide variety of skilled and unskilled tasks that were part of the taming of the North American continent”).

<sup>218</sup> See, e.g., Hoch & Slayton, *supra* note 125, at 53–60, 64–65, 223.

<sup>219</sup> See *supra* note 139–144 and accompanying text.

<sup>220</sup> On the causes of the modern homelessness crisis, especially its connection to drug abuse and the de-institutionalization of the mentally ill, see generally Jencks, *supra* note 145, at 21–74.

<sup>221</sup> See Andrew Mair, *The Homeless in the Post-Industrial City*, 5 *Pol. Geography*, 355, 357–63 (suggesting that private businesses serving homeless needs made skid row a viable neighborhood).

<sup>222</sup> See Martha R. Burt et al., U.S. Dep’t of Housing and Urban Dev., *Evaluation of Continuums of Care for Homeless People 3–4* (2002) (finding that the number of emergency shelter beds increased twelve percent, from 275,000 to 307,000, between 1988 and 1996).

viewed shelters as a last resort. While the physical conditions of SRO and cubicle hotels likely were deplorable, even the worst “cage hotel” unit offered privacy and autonomy that shelters could not offer.<sup>223</sup> Homeless advocates have suggested replicating SRO-style accommodation, but the cost of these projects can prove prohibitive.<sup>224</sup> Moreover, containing skid row disorder will be much more difficult today than in the past, when municipal officials simply expected patrol officers to maintain the “line of respectability” within the city. Neither the courts nor decent society would countenance some of the informal methods of disorder control used in the past, which undoubtedly included the occasional “roughing up” of “bums” found in the wrong part of town, and the decriminalization of public-order offenses has deprived police of the legal tools employed to backup their informal order-maintenance efforts.<sup>225</sup>

The City of Los Angeles’s effort to formally combine land-use and homelessness policy illustrates some of the challenges that a campus would face. During the 1970s, the city scrapped plans to demolish its downtown skid row area, partly in response to the suggestion by poverty advocates that dispersing the homeless could lead to disorder.<sup>226</sup> Instead, the city council approved an official skid row containment policy. The local Community Redevelopment Agency spent millions of dollars to support service agencies and rehabilitate skid row housing. It also relocated missions and other homeless services away from downtown and into the skid row and has (until recently) resisted any efforts to provide homeless services outside of skid row. The containment policy was bolstered both by police efforts and physical barriers, such as landscaping and building designs, that emphasized the separation of skid row from the rest of downtown.<sup>227</sup>

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<sup>223</sup> See Jencks, *supra* note 145, at 107–09 (discussing reasons why the homeless shun shelters).

<sup>224</sup> Hoch & Slayton, *supra* note 125, at 225.

<sup>225</sup> See Wilson, *supra* note 21, at 118–19 (discussing public-drunkenness arrests and noting that police actions depend upon who and where the intoxicated individual is: A vagrant in a central business district will be arrested, but a respectable middle-class individual is permitted to sober up).

<sup>226</sup> See Edward G. Goetz, *Land Use and Homeless Policy in Los Angeles*, 16 *Int’l J. of Urb. & Regional Res.* 540, 544 (1992) (noting that skid row was preserved as a part of a bargain between the local government and homeless activists).

<sup>227</sup> *Id.* at 545.

During the homelessness “crisis” of the 1980s, this skid row containment policy unraveled. In 1984 and 1985, informal temporary accommodations, such as “tent cities” and cardboard shelters, appeared on skid row. Efforts to remove these structures were met with public protest and lawsuits by homeless advocates, and city policy vacillated between accommodation and crackdown. While the city struggled to devise some permanent solution (experimenting, for example, with an “urban campground”), police occasionally cleared the homeless from public parks and skid row streets when prompted by complaints from skid row businesses. By the end of the decade, both city officials and homeless advocates clearly were disillusioned with the compromise. A skid row bursting at its seams threatened downtown renewal efforts, and homeless advocates worried that concentrating the homeless allowed others to turn a blind eye to their plight and impeded efforts to reintegrate them into society.<sup>228</sup>

In November 2002, the Central City Association, which represented three hundred downtown businesses, issued a report characterizing skid row as a “downtown[ ] human tragedy” and blaming the “over concentration of ‘homeless’ service centers” for an “anything-goes” mentality in the area.<sup>229</sup> That same month, Los Angeles Police Chief William Bratton targeted skid row for street sweeps that aimed to search for parole and probation violators. (The ACLU challenged these sweeps in a lawsuit ending in an out-of-court settlement.<sup>230</sup>) More recently, “Bring L.A. Home,” a partnership of civic and city leaders formed in 2003, released a draft of its ten-year strategic plan to end homelessness.<sup>231</sup> The plan calls for

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<sup>228</sup> *Id.* at 545–51. See generally Bernard E. Harcourt, Policing L.A.’s Skid Row: Crime and Real Estate Development in Downtown Los Angeles, 2005 Chicago Legal Forum (forthcoming 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=739130](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=739130) (providing a recent detailed account of L.A.’s skid row).

<sup>229</sup> See Central City Association of Los Angeles, *Downtown’s Human Tragedy: It’s Not Acceptable Anymore: A Public Health and Safety Plan 2* (2002), available at [http://www.ccala.org/legislative/11\\_02/Public%20Health%20Safety%20White%20Paper%20Final.pdf](http://www.ccala.org/legislative/11_02/Public%20Health%20Safety%20White%20Paper%20Final.pdf).

<sup>230</sup> See Denise M. Bonilla, Judge Calls Halt to Skid Row Searches, *L.A. Times*, Apr. 15, 2003, at B4.

<sup>231</sup> See Bring L.A. Home!, *Draft Framework for the 10-Year Strategic Plan to End Homelessness 9* (Oct. 4, 2004) available at [http://www.bringlahome.org/docs/BLAH\\_Draft\\_Framework.pdf](http://www.bringlahome.org/docs/BLAH_Draft_Framework.pdf).

greater dispersal of homeless services to serve the needs of the entire metropolitan area.

## *2. Disorder Dispersal: Neighborhood-Exclusion Zones and Regulatory Sweeps*

But what of policies designed to shield such vulnerable communities from disorder by expelling the disorderly, either through the formal designation of an “exclusion zone” or as the not-so-unintended result of regulatory sweeps? The case for relocating disorder away from drug-infested neighborhoods would appear to be at least as strong as the social-norms justifications for relocating it to a new skid row. While many city central business districts struggle, few have fallen to the depths of despair reached in Cincinnati’s “Over-the-Rhine,” which was designated the city’s first (and only) “drug-exclusion zone.” If open-air drug markets have come to symbolize inner-city chaos, then Over-the-Rhine is an urban disaster poster child. Featured in the movie *Traffic* as the urban wasteland where the U.S. drug czar (played by Michael Douglas) searches for his wayward daughter, Over-the-Rhine is home to 7,600 people and averages 2,300 drug arrests per year.<sup>232</sup>

Obviously, to the extent that drug crime sends the negative social signals that encourage antisocial and disorderly behavior—and it is difficult to imagine otherwise—then removing drug dealers from such a neighborhood should have positive social-influence effects. At the very least, reducing the number of known drug offenders present in a community like Over-the-Rhine should help negate the perception that the community tolerates drug offenses, and, by extension, more serious crimes. The social-influence hypothesis would predict, therefore, that exclusions could help create an atmosphere where norms favoring law-abiding, orderly behavior will reemerge. Not only will the exclusions reduce the most visible sign of disorder in the community—rampant drug criminality—but residents may feel less apprehensive venturing out of their homes and reasserting their right to use public spaces, and so forth. Similarly, drug-exclusion policies may enable residents who otherwise would seek to “escape” to remain in the community and even

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<sup>232</sup> Daniel Lazare, Cincinnati and the X-Factor, 40 Colum. Journalism Rev. 43 (2001).



encourage other law-abiding individuals to relocate there.<sup>233</sup> Finally, both of the dispersal strategies discussed above minimize the exercise of police discretion—sweeps transfer disorder-control authority to regulators and exclusion-zone policies target particular offenders. Both therefore address opponents' concerns that police will abuse their authority to control disorder.

Nevertheless, adding a spatial dimension to order-maintenance policy raises racial-justice concerns. As is the case with homeless campuses, land-use policies like neighborhood-exclusion zones and regulatory sweeps single out poor, minority communities for enforcement—albeit to protect them from disorder, rather than to foist disorder upon them. Despite this, targeting the “worst” neighborhoods may send counterproductive signals. A number of property-law scholars have suggested that regulations “singling out” individual property owners for disparate regulatory treatment may heighten the perception of unfairness (and weigh in favor of compensation for regulatory takings).<sup>234</sup> Similarly, “singling out” a poor minority neighborhood—either as a drug-exclusion zone or for particularly vigorous regulatory enforcement—may generate resentment. For example, following recent race riots in the Over-the-Rhine neighborhood, commentators rushed to provide a sociological explanation for the violence. Cincinnati's drug-exclusion law was indicted, along with various other land-use policies, as contributing to a powder keg of racial tensions. One commentator observed, for example, that more than 1500 people were “banished” from the area between 1996 and 2000, and that the exclusions had soured police-community relations.<sup>235</sup>

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<sup>233</sup> See Meares & Kahan, *Inner City*, *supra* note 15, at 823.

<sup>234</sup> See Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333, 1344–45 (1991) (arguing that the justification for compensation is greatest when “the government singles out a private party, in the sense that the government’s aims could have been achieved in many ways but the means chosen placed losses on an individual”); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1954 (1992) (arguing that greater scrutiny is needed when concentrated groups impose costs on individuals); Thomas Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 Denv. U. L. Rev. 859, 880 (1995) (noting that the “fair share” justification for the regulatory takings reflects the principle that the Takings Clause prohibits “spot” redistribution).

<sup>235</sup> See Lazare, *supra* note 232, at 43, 44. For other explanations, see Wesley Hogan, *Cincinnati: Race in the Closed City*, 32 Soc. Pol’y 49, 49–50 (2001) (blaming city redevelopment efforts for bad police-community relations); Michelle Cottle, *Boomerang:*

Similar issues have been raised about Chicago's response to the *Morales* decision. In addition to narrowing the definition of gang loitering, Chicago also limited the areas where the ordinance can be enforced to gang "hot spots" designated by the chief of police.<sup>236</sup> A major controversy over the designation of these hot spots has ensued, with opponents arguing that they escalate the perception of arbitrary and discriminatory enforcement against minorities.<sup>237</sup>

The literature on "expressive theories" of law may help explain these controversies. There are two versions of "expressivism." One focuses on the moral claims made by the law (for example, racial discrimination is wrong);<sup>238</sup> the other is concerned with the instrumental consequences of the values expressed by the law.<sup>239</sup> For example, Richard McAdams has argued that the law, and especially local ordinances like exclusion-zone policies, serve an "attitudinal" function; that is, it "changes behavior by signaling the underlying attitudes of a community."<sup>240</sup> Both theories shed light on the wis-

Did Integration Cause the Cincinnati Riots?, *New Republic*, May 7, 2001, at 26 (same); Heather MacDonald, *What Really Happened in Cincinnati*, *City J.*, Summer 2001, at 28 (rejecting "gentrification" as the cause of the race riots).

<sup>236</sup> See Constitutional Rights Foundation Chicago, CRFC Focus Issue: Gangs, Jan. 2, 2002, at <http://www.crfc.org/gangs.html> (reprinting new Gang Loitering Ordinance); see also David Einzmann, *Chicago Police to Broaden Area for Loitering Arrests*, *Chi. Trib.*, May 2, 2004, at 3 (discussing enforcement policy).

<sup>237</sup> See, e.g., Erik Luna, *Criminal Law: Constitutional Road Maps*, 90 *J. Crim. L. & Criminology* 1125 (2000); Strosnider, *supra* note 92 at 137; Fran Spielman, *Judge OKs Revised Anti-Loitering Law*, *Chi. Sun-Times*, Mar. 20, 2002 at 10; Gary Washburn, *Daley Pursuing Anti-Gang Law; Despite Challenges, Protests, Mayor to Keep Pushing For Loitering Ordinance*, *Chi. Trib.*, Jan. 12, 2000 at 1.

<sup>238</sup> See, e.g., Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 *Mich. L. Rev.* 936, 939 (1991) ("[T]he cultural consequences of the means selected to pursue . . . instrumental goals can undermine their realization."); see also, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. Pa. L. Rev.* 1503, 1531 (2000) ("Expressive accounts [of law] . . . eliminate the conundrums that wholly consequentialist approaches generate.").

<sup>239</sup> See Lewis A. Kornhauser, *No Best Answer?*, 146 *U. Pa. L. Rev.* 1599, 1624-25 (1998) (distinguishing two versions of expressivism in legal literature; one focuses on the instrumental/consequential value of legal expression and the other on its intrinsic value).

<sup>240</sup> Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 *Or. L. Rev.* 339, 340 (2000); see also, e.g., Robert Cooter, *Expressive Law and Economics*, 28 *J. Legal Stud.* 585, 586 (1998) (articulating how the law's expression of values serves a norm-building function); Cass R. Sunstein, *On the Expressive Function of Law*, 144

dom of disorder dispersal strategies. Reactions to the drug-exclusion policies in Cincinnati and the strategies employed in Chicago to target gang-loitering suggest that policies targeting minority neighborhoods for heightened enforcement can be interpreted as signaling official disfavor of minorities.

While city officials hope that the norm-reinforcing function of these policies will outweigh these potential expressive harms, the consequential effects of neighborhood-specific dispersal strategies also are unclear. Kahan and others have suggested that visible private crime-prevention strategies, such as bars on windows, may have the perverse effect of signaling the prevalence of crime, thus “emboldening law-breakers and demoralizing law-abiders.”<sup>241</sup> The same might be said of a policy designating a “drug exclusion zone” or targeting a neighborhood for a sweep. These policies, in essence, become an official declaration that crime is out of control in the community. Thus, policies seeking to “save” poor neighborhoods by excluding individuals engaged in drug criminality can backfire, leading both to the appearance of racial bias and signaling that community renewal efforts are hopeless.

Ultimately, it is difficult to sort out the expressive effects of dispersal strategies. For example, conventional wisdom among criminologists questions the efficacy of criminal (and presumably regulatory) enforcement “sweeps.” Kelling and Coles observe, for example, that “[s]weeps, inherently a short term and legally marginal placebo, often worsen the situation for residents and local police: they alienate innocent youths caught up in them (as well as their parents), and are meaningless to real troublemakers for whom an arrest is a minor irritant.”<sup>242</sup> Conversely, some studies of order-maintenance policing suggest that residents prefer proactive tactics like sweeps to more amorphous “community policing” efforts.<sup>243</sup> Nevertheless, the possibility that dispersal strategies may send a negative moral message—that is, the government is targeting minorities for unfair enforcement—is particularly troubling be-

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U. Pa. L. Rev. 2021, 2024–25 (1996) (examining “how legal ‘statements’ might be designed to change social norms”).

<sup>241</sup> Kahan, *Social Influence*, *supra* note 11, at 387.

<sup>242</sup> Kelling & Coles, *supra* note 8, at 166.

<sup>243</sup> See, e.g., David Thatcher, *Conflicting Values in Community Policing*, 35 *L. & Soc’y Rev.* 765, 769 (2001) (reviewing several studies of police practices).

cause disorder-dispersal strategies themselves reflect a concern that order-maintenance policing could lead to the perception of racial bias.

### V. REBALANCING THE COST OF RIGHTS?

The risks inherent in disorder-relocation strategies illustrate what might be called a constitutional irony. Beginning in the 1960s, the judicial imposition of strict constitutional limits on police discretion accelerated the radical deregulation of urban public spaces. In recent years, the order-maintenance revolution has reignited the debate about the appropriate scope of police authority to curb disorder: Order-maintenance proponents warn that constitutional limits on police discretion undermine police officers' ability to restore order to the nation's most troubled neighborhoods.<sup>244</sup> Opponents counter that relaxing these rules would threaten civil rights and invite widespread police abuses.<sup>245</sup>

Both sides of the order-maintenance debate, however, understand that police discretion will, and should, continue to be limited in scope. While order-maintenance proponents assert that the internal police controls should provide the primary check on discretion,<sup>246</sup> they also recognize that the judiciary will never wash its hands of policing the police. Yet, as a result of judicial skepticism of police discretion—and, importantly, of opponents' determination to use that skepticism to their every advantage<sup>247</sup>—the responsibility for curbing disorder is being transferred to planners with essentially limitless, unchecked discretion. After all, the judiciary has washed its hands of policing the planners and regulators. As discussed above, the chances of judges interfering with the site selection for a homeless campus—or preventing the government

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<sup>244</sup> See, e.g., Kahan & Meares, *Coming Crisis*, *supra* note 37, at 1153 (predicting the “imminent death” of the constitutional rules designed to “delimit the permissible bounds of discretionary law-enforcement authority”); Kelling & Coles, *supra* note 8, at 165–66 (discussing the need for discretionary enforcement authority in the Robert Taylor Homes in Chicago).

<sup>245</sup> See generally *supra* notes 42–46 and accompanying text.

<sup>246</sup> See Kelling & Coles, *supra* note 8, at 179–93 (recommending guidelines for internal control of police discretion).

<sup>247</sup> See, e.g., *id.* at 176 (describing the familiar cycle of citizen demand for order, followed by the police response, followed by successful legal challenges by civil libertarians).

from closing buildings during regulatory sweeps—are virtually nil. This is the “unimaginable” regime that the dissent warned of in *Armendariz v. Penman*.<sup>248</sup> Judge Trott was incorrect to observe that a “city cannot simply start throwing innocent people out of private property to reduce crime in a troubled neighborhood.”<sup>249</sup>

The most obvious reason for treating property regulation and law enforcement differently is that more important civil-liberty interests are at stake in the criminal law context. Put simply, the police can throw you in jail, whereas regulators cannot.<sup>250</sup> Yet, for all of the reasons discussed above, the transfer of authority from the police to land-use planners may prove more problematic than conventional wisdom, or current constitutional law, recognizes. Moreover, the consequences of the predictive decisionmaking that pervades land-use policy are particularly troublesome when policymakers are designing disorder-relocation policies. The costs for a poor community of a rule prohibiting, for example, home businesses should not be underestimated.<sup>251</sup> But these “prevention costs” differ in kind from those costs that might follow from the transfer of order-maintenance authority to land-use planners. As the above discussion illustrates, disorder-relocation strategies require planners to designate a community so helpless as to warrant special protection from the disorderly (an exclusion zone or regulatory sweep) or, alternatively, so hopeless as to serve as the perfect location for a concentration of urban disorder. In either case, planners may codify the very stereotypes that motivate concern about order-maintenance policing.

That said, as long as disorder and crime continue to plague inner-city communities, the widespread endorsement of order-maintenance policies is likely to continue as the constitutional scale is tipped in favor of disorder-relocation strategies.<sup>252</sup> So long as the

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<sup>248</sup> 31 F.3d 860 (9th Cir. 1996).

<sup>249</sup> *Id.* at 871 (Trott, J., dissenting).

<sup>250</sup> This reality partially explains the searching judicial examination of exclusion zones. These policies not only placed drastic restrictions on offenders’ freedom of movement, but they also depended upon the police to enforce them.

<sup>251</sup> Garnett, Home-Business Dilemma, *supra* note 12, at 1216–19; Garnett, Ordering the City, *supra* note 10, at 56–57.

<sup>252</sup> See Meares & Kahan, Inner City, *supra* note 15, at 805 (noting that, despite the overall drop in the crime rate, “America’s inner cities remain extremely dangerous, and as a result tragically hopeless, places to live”).

courts impose relatively strict constitutional limits on the police and relatively lax ones on regulators, city officials will view land-use policy as an attractive alternative to order-maintenance policing. Order-maintenance proponents argue that prophylactic rules that seek to avoid police abuses, such as the vagueness doctrine, impose high “prevention costs” of their own. This Article highlights other costs that have not been adequately considered in the literature: Limits on order-maintenance policing increase the likelihood that city officials will underestimate the costs of disorder-relocation strategies.

These concerns bolster my inclination to endorse the argument that courts unnecessarily expose poor communities to a certainty of crippling disorder by overprotecting against the possibility of police abuses. The reality, reflected in *Morales*, is that judicial restrictions on police discretion will persist. If disorder-relocation strategies are themselves problematic, it is necessary to ask whether courts should play a role in rebalancing the cost of rights by policing the planners, that is, by scrutinizing disorder-relocation strategies. For example, the Sixth Circuit’s decision invalidating Cincinnati’s exclusion zone makes such policies less attractive to city officials. More searching scrutiny undoubtedly would curb enthusiasm for the other disorder-relocation strategies discussed in this Article as well. The remainder of this Article examines the wisdom of such a “rebalancing” approach.

#### *A. The “Easy” Answer: Two Wrongs Don’t Make a Right*

Two objections to this “rebalancing” approach are worthy of serious consideration. First, any suggestion that courts should increase scrutiny of land-use policies invites screams of “*Lochnerism*.” Since *Village of Euclid v. Ambler Realty Co.*,<sup>253</sup> both federal and state courts have refused to second-guess local governments’ predictive judgments about the proper ordering of land uses. As Justice O’Connor observed in a related context, “[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”<sup>254</sup> I am deeply skeptical of the

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<sup>253</sup> 272 U.S. 365 (1926).

<sup>254</sup> *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

animating assumption behind most American land-use policy—that government intervention to order urban land uses serves a crucial order-maintenance function.<sup>255</sup> That said, I do not advocate substantive review of local land-use policies as the solution to the cost of rights problems posed by disorder-relocation strategies. Such review would alter our constitutional order far more so than relaxing restrictions on police discretion.

Moreover, and importantly, scrutiny of disorder-relocation strategies would further limit the options available to local officials struggling to control urban disorder. These officials operate with one hand tied behind their backs by constitutional limits on order-maintenance policing. It is arguably unwise to encourage judges to tie the other hand by carefully reviewing disorder-relocation policies as well. Robert Ellickson suggests that, despite his view that police likely are better disorder managers than land-use planners,<sup>256</sup> “[h]aving pushed cities in the direction of formal public-space zoning, judges should not strictly scrutinize the policies of municipalities that have accepted this invitation.”<sup>257</sup>

### *B. A Middle Ground?*

These concerns weigh against judicial review of disorder-relocation policies. Yet, as long as courts continue to carefully scrutinize order-maintenance policing innovations, local officials may seriously discount the potential costs of disorder-relocation efforts. A more appropriate alternative to substantive review might be for courts to enforce diligently existing procedural rules so as to minimize the possibility that planners will abuse their vast discretion. This Section explores the ways that the enforcement of such procedural limitations can help foster more careful deliberation in the planning process without eliminating any weapons in the order-maintenance arsenal. That this job would fall primarily on state courts who are closer to, and more familiar with, the problems facing local communities would further dispel concerns about the undue interference with the policymaking prerogatives of local officials.

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<sup>255</sup> See generally Garnett, *Ordering the City*, *supra* note 10.

<sup>256</sup> See Ellickson, *Controlling Chronic Misconduct*, *supra* note 5, at 1243–46.

<sup>257</sup> *Id.* at 1246.

### 1. Sweeps: The Regulatory Search Doctrine

First, courts might be more vigilant in policing the line between law-enforcement and regulatory searches. The regulatory search doctrine provides that inspectors conducting “regulatory” searches are governed by different Fourth Amendment standards than police officers enforcing the criminal law. A property inspector need only demonstrate that “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling” in order to obtain an “administrative” search warrant. And, importantly, warrantless inspections are permitted in regulatory “emergency situations.”<sup>258</sup> As a result, building inspectors may be permitted to go places that police officers could not, especially because a case likely can be made that housing code violations rise to “emergency” levels in many older neighborhoods. The regulatory search doctrine thus makes code enforcement particularly attractive to local officials by guaranteeing inspectors access to suppress physical disorder and relocate the disorderly.

This situation may create a temptation to blur the line between regulatory and law enforcement. Consider an example from the Robert Taylor Homes. A decade ago, after a series of shootings in these troubled projects, the Chicago Public Housing Authority instituted warrantless law enforcement “sweeps” in the projects. During the sweeps, housing-authority police searched all of the residential units in the targeted buildings for weapons. A federal court invalidated the policy as inconsistent with the Fourth Amendment, failing to find the exigency necessary to overcome the warrant requirement.<sup>259</sup> The court permitted the housing authority to inspect units for health and safety violations.<sup>260</sup> Those in-

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<sup>258</sup> See *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967); see also *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987) (articulating the administrative reasonableness standard for regulatory searches); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 320 (1978) (same). See generally Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.9 (2d. ed. 1992) (reviewing the administrative inspections doctrine). The Supreme Court has further suggested that “warrants should normally be sought only after entry is refused.” *Camara*, 387 U.S. at 539.

<sup>259</sup> See *Pratt v. Chi. Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994).

<sup>260</sup> See *Herring v. Chi. Hous. Auth.*, 850 F. Supp. 694, 696 (N.D. Ill. 1994) (noting that in “*Summeries v. Chicago Housing Authority*, . . . [t]he district court eventually entered a Consent Decree . . . [that] permitted the CHA to conduct inspections to



spections, as described by the Chicago Housing Authority chairman, accomplished many of the same goals as the police sweeps: "We sent in a team of people to identify physical deficiencies in each unit . . . . Very often, during that process, they ran across drugs, contraband, weapons, and other illegal items."<sup>261</sup>

In such situations, police officers often accompany inspectors for "protection." The multi-agency cooperation encouraged by community policing strategies often places police officers in what Debra Livingston has called their "community caretaking" role.<sup>262</sup> When inspectors descend upon a dangerous neighborhood to conduct a sweep, it is likely true that they need police protection and also that the police can piggyback on an inspection to conduct law enforcement functions that they might otherwise be unable to perform. Once lawfully present inside a building, the officers may then seize evidence in "plain view," arrest individuals on outstanding warrants, or perhaps catch them committing crimes.

This cooperation undercuts the traditional justifications for the regulatory search doctrine. First, it increases the temptation to use sweeps for law enforcement purposes. Several years ago, for example, a federal court held that such cooperation between a housing inspector and police officers in Youngstown, Ohio violated the Fourth Amendment. The officers and the inspector jointly developed lists of addresses with housing code violations and/or suspected drug activity. The inspector, accompanied by some number of officers, would then go to the property, introduce himself as a housing inspector, and warn residents who resisted that refusal to admit him constituted a misdemeanor offense.<sup>263</sup> When the practice was challenged, the District Court ruled that the inspections were a pretext for conducting warrantless searches for drugs without probable cause and refused to permit the officials involved to "insulate their Constitutional improprieties under the cloak of departmental cooperation."<sup>264</sup>

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identify and remove unauthorized occupants and to inspect the condition of the housing units").

<sup>261</sup> Vincent Lane, *Public Housing Sweep Stakes: My Battle with the ACLU*, Summer 1994 *Pol'y Rev.* 68, 69 (describing sweeps and the events leading up to them).

<sup>262</sup> See generally Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 *U. Chi. Legal F.* 261.

<sup>263</sup> *Jones v. City of Youngstown*, 980 F. Supp. 908, 915–16 (N.D. Ohio 1997).

<sup>264</sup> *Id.* at 915.

Second, the regulatory inspections doctrine rests on the presumption that investigatory searches intrude more on privacy interests than regulatory ones. William Stuntz has observed, “[t]he regulatory state does not usually snoop around in people’s bedrooms, and the privacy content of what police can find there is plausibly distinguishable from the kinds of information that the state seeks for regulatory purposes.”<sup>265</sup> But a property owner or tenant facing a swarm of inspectors, accompanied by a “protective” police force, is unlikely to be impressed by this argument. For example, the Chicago Housing Authority acting as the regulatory state did snoop in people’s bedrooms; the inspectors “looked under beds to see if the tiles were loose [and] . . . in the closets to make sure there were no leaks.”<sup>266</sup>

Careful review of police-regulator cooperation, such as that characterized by the *Youngstown* case discussed above, would not remove regulatory sweeps from the order-maintenance arsenal—inspectors likely would have little trouble securing search warrants for the simple reason that it would not be difficult to demonstrate “probable cause” that regulatory violations exist. This procedural hurdle, however, might dissuade officials from viewing sweeps as a quick fix to the problem of disorder: Undoubtedly, the right to enter a building without a search warrant currently makes sweeps particularly attractive to local government officials.

The use of regulatory inspections to accomplish disorder-relocation goals raises questions about the disparate treatment of law enforcement and regulatory searches. Under current law, even if the “administrative” motive for an inspection is purely pretextual, police-inspector collusion may be perfectly legal because “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”<sup>267</sup> Perhaps, as Steven Schulhofer has argued, the “distinction which has preoccupied the Court, between

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<sup>265</sup> See William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 *Mich. L. Rev.* 1016, 1061 (1995). But see Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 *Sup. Ct. Rev.* 87, 89 (arguing that diminished privacy interests do not support the administrative search doctrine).

<sup>266</sup> See Lane, *supra* note 261, at 69.

<sup>267</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996); see also *New York v. Burger*, 482 U.S. 691, 712–13 (1987) (upholding warrantless inspections of junkyards for stolen goods, despite the fact that the “inspections” were conducted by police officers searching for evidence of criminal conduct).

regulation and 'normal' law enforcement should also be recognized as chimerical and irrelevant."<sup>268</sup> A full discussion of the implications of that claim is beyond the scope of this Article.<sup>269</sup> But, the aggressive use of regulatory inspections for order-maintenance purposes may eventually force courts to consider it.

## 2. *Homeless Campuses: Participation and Fairness*

With respect to official disorder zones, like homeless campuses, a relatively simple approach would be for courts to guarantee that local governments carefully adhered to the procedural guarantees in standard land-use law. Several different procedures might shield struggling communities from a new infusion of disorder. First, public participation is an integral part of the American land-use planning process; open-meeting requirements are imposed both by general state open-meeting laws and by planning and zoning legislation.<sup>270</sup> Second, neighboring landowners might be given some formal role in the planning process. For example, the Standard State Zoning Enabling Act provides that if neighboring landowners protest a rezoning proposal, a change requires a supermajority approval.<sup>271</sup> Careful attention to these procedural hurdles may prevent a local government from simply singling out the most vulnerable neighborhood for a campus; it might also help diffuse the perception that minority voices are ignored.<sup>272</sup>

Given the possible environmental justice concerns raised by campuses, another alternative would be for state legislatures to adopt "fair siting" requirements. Vicki Been has usefully identified several different types of fairness requirements: First, "dispersion

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<sup>268</sup> See Schulhofer, *supra* note 265, at 89.

<sup>269</sup> The Court's answer might be to lower "regular" Fourth Amendment standards rather than to increase regulatory ones. Cf. William J. Stuntz, *Local Policing After the Terror*, 111 *Yale L.J.* 2137, 2144-50 (2002) (arguing that Fourth Amendment practices should fluctuate with crime rates).

<sup>270</sup> See Daniel R. Mandelker, *Land Use Law* § 6.78 (4th ed. 1997).

<sup>271</sup> See Julian Conrad Juergensmeyer & Thomas E. Roberts: *Land Use Planning and Control Law* § 5.7 (1998). Because a homeless campus proposal will frequently entail a rezoning, this supermajority requirement could provide significant protection for neighboring landowners.

<sup>272</sup> See, e.g., Garnett, *Public-Use Question*, *supra* note 55, at 971-72 (objecting to "quick take" eminent domain procedures that deprive property owners of the chance to organize effective political resistance to a project).

strateg[ies]” prohibit LULU concentrations; second, “the impact statement approach” requires “that decision-makers consider the impact a siting will have on the ‘quality of life’ in the community”; third, the “fair share approach” ensure that LULUs are spread over all communities; fourth, hybrid approaches combine aspects of the impact-statement and fair-share requirements; and fifth, the “suspect class” guarantees that any proposal to site a LULU in a vulnerable community will receive heightened scrutiny.<sup>273</sup> None of these procedures would preclude local governments from creating homeless campuses, but they might check the political impulse to site them in neighborhoods where crime and disorder levels already are unacceptably high. Moreover, local governments’ willingness to use such criteria in the disorder-dispersal context suggests that the measurement problems that plague fair-share and impact-statement requirements are not insurmountable.<sup>274</sup> As discussed previously, high levels of drug crime or gang activity triggers special neighborhood-level protection in Cincinnati, Chicago, and Portland.

I am generally skeptical of the over-proceduralization of private land-use regulation, and I tend to agree with the view that procedural hurdles like impact statements contribute to the rigidity that plagues land-use planning law.<sup>275</sup> The stakes arguably are higher, however, when the planning decision concerns a project that is designed in part to foist a large amount of relocated and concentrated disorder on its neighbors. In this situation, it may not be unreasonable to force policymakers to consider the “fairness” of siting a project in a neighborhood that is already overloaded with disorder (or, at a minimum, to ensure that affected voices are heard during the planning process).

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<sup>273</sup> See Vicki Been, *Conceptions of Fairness in Proposals for Facility Siting*, 5 Md. J. Contemp. Legal Issues 13, 13–17 (1993).

<sup>274</sup> See Been, *Fairness*, *supra* note 211, at 1066–67 n.351 (reviewing literature suggesting that impact-statement and fair-share mandates pose significant measurement difficulties).

<sup>275</sup> See, e.g., Stewart E. Sterk, *Environmental Review in the Land Use Process: New York’s Experience with Seqra*, 13 Cardozo L. Rev. 2041, 2055 (1992) (criticizing the use of the environmental review process to “delay, recast, or kill development projects for ends unrelated to environmental goals”).

## CONCLUSION

At first glance, the land-use policies highlighted in this Article seem to respond well to critiques of order-maintenance policing. Disorder-relocation is not, however, a panacea. Historically, cities have found that both concentration and dispersal strategies entail serious social costs. Incorporating disorder-relocation efforts into formal land-use policy likely will increase these costs by eliminating the flexibility of relying on order-maintenance policing to enforce the policies (and tweak them as necessary). This Article sounds a cautionary note to both sides of the order-maintenance debate. While risk-averse policymakers naturally favor policies that can survive (or avoid) judicial scrutiny, they should take care to avoid codifying the failed informal strategies of the past. Moreover, the legal advocates who have pushed government officials toward using land-management practices to control disorder should stop to consider these costs before challenging order-maintenance policing innovations.