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# “All Good Things Flow . . . ”: Rule of Law, Public Goods, and the Divided American Metropolis

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# **“ALL GOOD THINGS FLOW . . . ”: RULE OF LAW, PUBLIC GOODS, AND THE DIVIDED AMERICAN METROPOLIS**

*James J. Kelly, Jr.\**

## ABSTRACT

*This essay is a review of and a response to Urban Decay, Austerity, and Rule of Law, an article written by Brent White, Simone Sepe, and Saura Masconale. Building upon an intuitively compelling social contract theory insight, the article sets out the theoretical and empirical cases for the authors’ contention that sustained investment in highly visible, essential local public goods provides crucial support for rule of law. White, Sepe, and Masconale offer their theory as a “make ‘gov’ not war” alternative to the Broken Windows Theory, which underlies order-maintenance policing strategies. In the final section of the piece, the authors employ this Urban Decay Theory (UDT) to argue that the federal and state governments should fund substantial fiscal guarantees of municipal governments’ capacities to provide urban infrastructure.*

*In this invited response, Professor Kelly welcomes the article’s introduction of the rule of law paradigm to domestic urban policy, finds fault with its selection of public goods that purportedly influence rule of law, and contends that the UDT has far greater potential than the poor support it can offer the authors’ flawed policy proposal. By conceptualizing the domestic urban policy goal as rule of law rather than order, the authors open measurements of success to go beyond crime rates and majoritarian perceptions of personal safety. Without losing the groundedness necessary for empirical investigation, rule of law can incorporate ideal aspects of lawful order that address sustainability and inclusion of minority perceptions of legitimacy. While the article does not succeed in constructing as compelling an understanding of the most salient public goods, an improved analysis of the root causes of the fiscal degradation of America’s legacy cities can unlock a potentially valuable reframing of urban, metropolitan, and regional policy debates.*

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\* Clinical Professor of Law, Notre Dame Law School. I would like to thank Nicole Garnett, Nestor Davidson and Dan Kelly for their encouragement, comments and suggestions. I am also grateful for the responses I received after sharing an earlier version of this essay with Brent White, Simone Sepe, and Saura Masconale.

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## INTRODUCTION

As he rallied his fellow citizens to defend the exceptionally open society that was Athens, Pericles spoke of the city's commitments to democracy, social equality, tolerance, and rule of law as key features that set it apart from Sparta, its militaristic enemy in the Peloponnesian War. All these he connected to the Athenians' achievement of prosperity through free exchange more so than by conquest: "Then the greatness of our city brings it about that all the good things from all over the world flow in to us."<sup>1</sup> Pericles died in an epidemic early on in that war, a war that Athens ultimately lost.<sup>2</sup> But, modern-day proponents of openness and transparency in political and economic institutions have championed classical Athenian ideals around the globe. Rule of law continues to hold its place in the development advocacy platform next to democracy and free markets as the cornerstones of sustainable progress.

Brent White, Simone Sepe, and Saura Masconale, in their article, *Urban Decay, Austerity and Rule of Law (Urban Decay)*,<sup>3</sup> bring the concept of rule of law back home to the cities of the developed world, specifically those of the United States. The authors contend that investment in public goods provides crucial support for rule of law.<sup>4</sup> This ambitious piece covers a broad spectrum of legal and political analysis, moving in turn from conceptual framework to game theory hypothesis formation to complex empirical analysis. It ends by advocating for increased financial support of cities by federal and state government.

The article begins with its most important contribution: the application of social contract theory to the pursuit of an urban environment that is safe and sound for all. Much of the legal literature discussing urban public safety and city residents' perceptions of safety have focused on order as the posited goal. White, Sepe, and Masconale reconceptualize this key objective as the flourishing of the rule of law, which "stands at the heart of the social contract, whereby individuals voluntarily unite into civil society and agree to be subject

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<sup>1</sup> THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 146 (Rex Warner trans., Penguin Books 1954) (c. 431 B.C.E.).

<sup>2</sup> See *id.* at 163.

<sup>3</sup> Brent T. White, Simone M. Sepe & Saura Masconale, *Urban Decay, Austerity, and the Rule of Law*, 64 EMORY L.J. 1 (2014).

<sup>4</sup> *Id.* at 9–32.

to that society's laws in exchange for social order."<sup>5</sup> Citizens' faith in that constructive bargain, the authors claim, depends on their confidence in the government itself, as the delegate of the cooperating community.<sup>6</sup> The local failure of government to provide public goods to its citizens signals that the health of the overall social contract is not particularly strong.<sup>7</sup> Using game theory analysis, the article shows why rational actors are more likely to make the necessary sacrifices to abide by rules if they perceive that others are doing so as well.<sup>8</sup> A community's investment in public goods, the authors hypothesize, can predict the extent to which rule of law obtains in that community.<sup>9</sup>

They then test this hypothesis using data sets collected from countries around the world. As an indicator of the strength of public goods and citizen perceptions of their quality, the authors combine objective traffic death data compiled by the World Health Organization and Gallup poll data measuring resident satisfaction with urban infrastructure.<sup>10</sup> To quantify the vitality of rule of law, the analysis uses the Corruption Perceptions Index, a poll of business people regarding the prevalence of bribery and other corrupt governmental practices in their home countries.<sup>11</sup> They employ complex and still more complex regressions to establish a correlation between the public goods index and the rule of law index.<sup>12</sup> The second set of statistical operations is designed to show that public goods investment specifically and uniquely predicts rule of law rather than the other way around.<sup>13</sup>

Having set forth the empirical case for the connection between investment in highly visible public goods and rule of law, White, Sepe, and Masconale outline their own policy prescription for saving cities such as Detroit. Earlier in the piece, they set their own account of urban decay against that of the Broken Windows Theory (BWT), which has been the basis for much of the urban public safety scholarship that has championed order-maintenance policing. Where the BWT stresses the importance of visible signs of disorder, both

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<sup>5</sup> *Id.* at 5 (footnote omitted).

<sup>6</sup> *Id.* at 14.

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

<sup>8</sup> *Id.* at 14–17.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> *Id.* at 33–34.

<sup>11</sup> *Id.* at 34–36.

<sup>12</sup> *Id.* at 37–43.

<sup>13</sup> *Id.* at 39–43.

physical and social, as signals of acquiescence in the face of rule breaking, the Urban Decay Theory (UDT), as I will refer to it throughout this essay, proposed by White, Sepe, and Masconale, highlights governmental effectiveness in delivering public goods as a barometer for a social contract constantly being monitored by its constituents. BWT has been increasingly presented as the rationale for vigilant enforcement activity by police against low-level criminal activity in urban areas.<sup>14</sup> The authors urge federal and especially state policymakers interested in inspiring greater rule abidance in urban areas to focus on shoring up the desperate finances of the municipal governments that provide the public goods infrastructure that shapes so many residents' perceptions of their environment. Specifically, they call for a fiscal guarantee at the state and federal levels that would ensure sustained investment in urban infrastructure.<sup>15</sup>

In this essay, I will focus my response on the conceptual and policy sections of the *Urban Decay* article.<sup>16</sup> First, I will explore the significance of rule of law as a paradigm that incorporates at least some normative elements and the possibilities it offers over and above social order as a core urban policy goal. Next, I will examine the taxonomic challenges presented by the formulation of the causal connection's other half: the set of public goods that the authors group under the heading of "urban infrastructure." This part of the conceptual appraisal will discuss not only the diversity of relevant public goods but also the variety of both the providers and the means of funding the public goods and services they supply. The authors' failure to explore the ways in which various public goods are paid for by those who use them is particularly problematic given that the state of urban infrastructure signals "government's ability to continuously coordinate individual contributions to such goods."<sup>17</sup> After brief comments on the data and the statistical analysis, this essay will conclude by examining the largely unfulfilled policy potential for the UDT approach.

Any disappointment expressed in the final section largely relates back to the need for greater attention at the theoretical level to relevant differences in

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<sup>14</sup> E.g., RUDOLPH W. GIULIANI WITH KEN KURSON, LEADERSHIP 47 (2002); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 9–10 (2004).

<sup>15</sup> White et al., *supra* note 3, at 55–58.

<sup>16</sup> I will give only brief comments, from a lay perspective, on the authors' empirical evidence. *See infra* notes 65–71 and accompanying text.

<sup>17</sup> *Id.* at 14.

public goods and to difficult fiscal questions, the latter of which are not eliminated by proposals to centralize funding responsibility for urban public goods. *Urban Decay*'s account of inner city decline also suffers from an omission all too common to domestic urban policy analyses that are grounded in predictions and data about the aggregated choices of rational actors: the lack of any discussion of how segregation based on class and race have shaped metropolitan areas in the United States. In the end, however, the need for a more sophisticated discussion of the deplorable state of urban public goods and how they got that way speaks to this ambitious article's accomplishments rather than any shortcomings it may have. The authors' reframing of the first step toward the flourishing of urban life as a more broad-based support for rule of law, rather than for mere pacification of the would-be unruly, allows crucial questions of legitimacy and the experiences of minorities to be explored and measured alongside the more dominant subjects of institutional efficiency and majority preference. This groundbreaking article opens the door for new research programs and richer discussion rather than succeeds so completely as to make those future inquiries superfluous.

## I. CONCEPTUAL PROGRESS

### A. *Rule of Law*

Rule of law has been a focal point of scholarship and policy analysis concerning the development of legal structures, particularly those of countries located outside of Western Europe and North America.<sup>18</sup> Citing an address President Clinton made to the United Nations more than twenty years ago, Maxwell Chibundu referred to “[d]emocracy,’ the ‘free market,’ and the ‘rule of law’ . . . as a trinity that underpin liberal capitalism.”<sup>19</sup> Rule of law is touted as a prerequisite to functioning markets, protection of minority interests,

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<sup>18</sup> See Peter Boettke & J. Robert Subrick, *Rule of Law, Development, and Human Capabilities*, 10 SUP. CT. ECON. REV. 109 (2003); Stephen Knack & Paul J. Zak, *Building Trust: Public Policy, Interpersonal Trust, and Economic Development*, 10 SUP. CT. ECON. REV. 91 (2003); David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607 (2011); Tor Krever, Note, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52 HARV. INT'L L.J. 287 (2011).

<sup>19</sup> Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 IND. J. GLOBAL LEGAL STUD. 79, 79 (1999) (citing President William Jefferson Clinton, Remarks to the 48th Session of the United Nations General Assembly (Sept. 27, 1993), available at <http://www.state.gov/p/io/potusunga/207375.htm>).

development of public institutions and greater social capital in general.<sup>20</sup> White, Sepe, and Masconale concur with a number of authors who have observed a lack of consensus as to its meaning.<sup>21</sup> But, a core list of its components includes a government that is open, accountable and not degraded by corruption; effective protection of citizens' rights to safety and security and of their other fundamental liberties; and a system for resolving disputes and responding to injustices that applies rules consistently and impartially.<sup>22</sup>

Rule of law, however, has not been a guiding concept in the discussion of either urban policy or state and local government law in the United States. Apart from the occasional rhetorical flourish applying human rights standards to domestic matters,<sup>23</sup> rule of law is rarely explored in connection with the United States' legal system. Scholars of links between crime rates and social disorder in American cities have instead devoted attention to the achievement of order in urban areas.<sup>24</sup> Police practices regarding low-level crimes have been their primary if not exclusive focus.<sup>25</sup> Citing the BWT as a foundational idea, scholars, police officials and politicians promoting a "sweat-the-small-stuff" approach to detention and arrest procedures have taken credit for significant and sustained drops in crime, especially in New York.<sup>26</sup>

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<sup>20</sup> See, e.g., Boettke & Subrick, *supra* note 18, at 112–13; Knack & Zak, *supra* note 18, at 107.

<sup>21</sup> White et al., *supra* note 3, at 9–10 & nn.30–31.

<sup>22</sup> See, e.g., *What is the Rule of Law?*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/what-rule-law>. An ABA-commissioned white paper provides the following definition: "a rules-based system of self-government that includes a strong and accessible legal system featuring an independent bar and judiciary." THEO J. ANGELIS & JONATHAN H. HARRISON, HISTORY AND IMPORTANCE OF THE RULE OF LAW 4 (2003), [http://worldjusticeproject.org/sites/default/files/history\\_and\\_importance\\_of\\_the\\_rule\\_of\\_law.pdf](http://worldjusticeproject.org/sites/default/files/history_and_importance_of_the_rule_of_law.pdf).

<sup>23</sup> See, e.g., Bill Richardson, *A New Human Rights Agenda for the United States: New Realism, Human Rights, and the Rule of Law*, 21 HARV. HUM. RTS. J. 1, 5 (2008).

<sup>24</sup> See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA (2010); WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990); Garnett, *supra* note 14; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–73 (1997).

<sup>25</sup> For a look at order maintenance in the context of land use law, see GARNETT, *supra* note 24; Garnett, *supra* note 14.

<sup>26</sup> WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (1998); GIULIANI, *supra* note 14, at 47 ("'Sweat the small stuff' is the essence of the Broken Window theory that I embraced to fight crime."); FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 36–37 (2007) (noting that scholarly claims about the effectiveness of order maintenance policing in reducing crime came largely after the search for causes of actual crime declines began). For an empirical challenge to the case that order-maintenance policing effectively reduces crime, see Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006).



As order-maintenance activity extends beyond responses to minor *malum prohibitum* crimes to local legal efforts to prevent nuisances, an unexamined conception of order becomes even more problematic. Nicole Garnett, a scholar of the order-maintenance movement, has examined local economic regulation and land use policies as attempts to suppress and relocate disorder.<sup>27</sup> Citing Jane Jacobs' critique of the segregation of commercial and residential uses that characterizes Euclidean zoning, Garnett observes that ham-fisted attempts to impose a promulgated sense of order frequently have the effect of destroying the order fostered organically by the interplay of various activities.<sup>28</sup>

Order, as formulated by the most ardent of BWT supporters, tends to focus on the immediate fact of rule abidance without much attention to an adherent's motivation for following or disregarding a rule, much less the role that the perceived legitimacy of the rule plays in it being observed or ignored. Rules are rules because they have been actually promulgated by those with the authority to issue them as evidenced by the power that they have to enforce them.<sup>29</sup> Dan Kahan in his analysis of influencing rule abidance through social meaning leaves behind this hard positivist conception of legally induced order by examining rule enforcement's ability to express social norms and to encourage members of the community to internalize them.<sup>30</sup> But, even this incorporationist approach to law as expressing social norms looks past the substantive legitimacy of the rules imposed and the constitutional validity of both the rules and those who enforce them.<sup>31</sup>

If the subject of study were confined to the prevention of serious crimes, then order-maintenance researchers would have good cause both to presume rule legitimacy and to maintain that any related abuse of authority presents a wholly distinct research question. But, as order-maintenance theorists such as

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<sup>27</sup> See GARNETT, *supra* note 24.

<sup>28</sup> *Id.* at 51 (citing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961)). For an analogous discussion of police displacement of less artificial sources of order, see Garnett, *supra* note 14, at 40–41 (discussing “depolicing” as a means of making room for community-based methods of rule enforcement and conflict resolution).

<sup>29</sup> This more unreflective use of “order” as compliance with actual rules echoes John Austin's theory of legal positivism, in which the criterion for classifying a norm as law is limited to the social fact of promulgation by a functioning sovereign. 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 34–36 (Robert Campbell ed., 5th ed. rev. 1885).

<sup>30</sup> Kahan, *supra* note 24, at 362–63.

<sup>31</sup> For a postmodernist approach to this line of criticism, see 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, 368–71 (1998).

Garnett have recognized, order maintenance involves discouraging, suppressing, and displacing a wide range of activity deemed to be disorderly.<sup>32</sup> Police abuse of discretion, racial discrimination, and the unintended consequences of interference with liberty all become central questions as attention expands to low-level crime enforcement and nuisance prevention.<sup>33</sup> Narrow conceptions of “order” do not eliminate the need to consider the accountability of rule makers and rule enforcers. They merely prevent their inclusion in many order-maintenance research programs.

Crime rates can be an important metric of the current state of social order and compliance with rules. But, a social influence theorist such as Kahan also clearly values information about the attitudes and motivations of those who comply and those who fail to comply with rules because these data indicate to some extent the stability of social order and the intractability of disorder.<sup>34</sup> As important as it may be to show that a state of order is backed not merely by effective coercion but also by a populace’s internalization of legal norms, order-maintenance researchers would not claim that testing underlying attitudes constitutes an examination of social order itself. The concept of order is itself too shallow and immediate, too sharply focused on actual compliance with actual rules, to accommodate what Hart called law’s “internal aspect.”<sup>35</sup> By putting forth “rule of law” in place of “order,” White, Sepe, and Masconale offer a deeper, more long-term, and more balanced understanding of rule abidance.

Rule of law implies not only the existence of rules that are socially relevant because they are enforced but also four interrelated factors necessary to the basic functioning of a legal system. First, for rule of law to obtain, neither the rules themselves nor their application can be arbitrary. White, Sepe, and

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<sup>32</sup> Garnett, *supra* note 14, at 7–23 (discussing governmental responses to street disturbances, abandoned buildings as well as conflicts among competing types of land uses).

<sup>33</sup> *Id.* at 23–26 (discussing urban renewal as heavy-handed blight elimination); Harcourt, *supra* note 31, at 377–84 (documenting rise of police abuse complaints during the move to order-maintenance policing).

<sup>34</sup> See Kahan, *supra* note 24, at 351.

<sup>35</sup> H. L. A. HART, *THE CONCEPT OF LAW* 56–57, 88–91 (3d ed. 2012). According to Hart, laws, although commands backed by coercive threat, are distinct from orders given by and backed by the threat of a gunman in a bank in that they are generally recognized by citizens as being promulgated with official authority and this recognition as law can be a reason for compliance apart from fear of official enforcement activity. *Id.* at 82–86. Hart’s embrace of what he calls the internal point of view distinguishes his approach to legal positivism from that of John Austin.

Masconale endorse this criterion by contrasting “rule of law” with “rule of men.”<sup>36</sup>

Second, persons having legal authority cannot themselves be completely unconstrained by the law in either their personal or official capacities. Related to the rejection of arbitrariness, this principle shows that law is not merely a one-way accountability relationship between sovereign and subject. Instead, rule of law measurements involve the prevalence of appropriate constraints on authority as well as on the general citizenry. White, Sepe, and Masconale explicitly recognize this aspect of rule of law as essential to supporting the *pactum subjectionis*, the vertical aspect of the social contract.<sup>37</sup> Their understanding of rule of law as a two-way street comes through in the conception of rule of law that they explicitly adopt. For the authors, rule of law is an equilibrium between “‘social cooperation’ (rule abidance) and ‘social advocacy’ (taking actions to hold both fellow citizens and public officials accountable to the law).”<sup>38</sup>

Third, the law must have some social relevance in that it is regularly enforced by those in authority and recognized as law by those subject to it. This facet illustrates the great overlap between rule of law and order even as it also expresses the former’s internal aspect.

Fourth, and more controversially for those committed to some form of legal positivism, rule of law requires that the law, as written and as applied, has some basic orientation to the public good, even if this requirement yields few indispensable procedural rights and no substantive rights. Lon Fuller and Jeremy Waldron have each argued that the procedural guarantees associated with rule of law express a necessary respect for self-determination and human dignity.<sup>39</sup> Joseph Raz has resisted importation of moral norms into the definition of law. For him rule of law is analogous to the sharpness of a knife; instead of slicing, law guides individual behavior. But, rule of law, as a normative concept, is limited to this instrumental purpose.<sup>40</sup> Most of these

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<sup>36</sup> White et al., *supra* note 3, at 9–10.

<sup>37</sup> *Id.* at 11–12.

<sup>38</sup> *Id.* at 7 (citing Gillian K. Hadfield & Barry R. Weingast, *Microfoundations of the Rule of Law*, 17 ANN. REV. POL. SCI. 21, 23 (2014)).

<sup>39</sup> See Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW & PHIL. 239, 250 (2005) (citing LON FULLER, *THE MORALITY OF LAW* (1964)); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW 3 (James E. Fleming ed., 2011).

<sup>40</sup> Murphy, *supra* note 39, at 247–48 (citing and quoting JOSEPH RAZ, *AUTHORITY OF LAW* 226 (1979)).

debates focus on what qualifies certain procedural and substantive rules as law. Rule of law, on the other hand, is a characteristic of an entire legal system. A legal system may be made up of laws, most of which are just and others of which are unjust, perhaps some even extremely so. The debate about the role of justness in the definition of law comes into play both in determining whether identified rules qualify as law and in judging if, and to what extent, the presence of injustice in a legal system vitiates rule of law as a whole.

In these last two criteria for rule of law, we see more clearly how the concept of “rule of law” straddles the borderline between positive and normative, between fact and value, between actual and ideal.<sup>41</sup> Even my summary above minimizes the extent to which the category known as “rule of law” is disputed. White, Sepe, and Masconale note the range of conceptions of rule of law and the relevance of the controversy in an extended footnote that does not itself state the authors’ allegiance.<sup>42</sup> Their empirical project does suggest, however that they believe it is possible to measure rule of law through opinion surveys, a belief which may preclude a central role for substantive moral factors.

Given that research paradigms with significant normative content can upend quantitative empirical studies, which depend upon quantifiable facts and stated perceptions as data points, White, Sepe, and Masconale are understandably reticent about embracing the normative aspects of rule of law. Despairing of the possibility of objective criteria delineating rule legitimacy, empirical researchers tend to report majoritarian perceptions of legitimacy. But, by redefining the core policy goal from order to a deeper, more sustainable sense of social stability, White, Sepe, and Masconale give us a richer but no less grounded metric for appraising the health of the social contract.

### *B. Public Goods*

As a theory proposing a policy lever that can bring about, or at least help bring about, an improved state of affairs, UDT has as its central concern, its independent variable, urban infrastructure. As important as the authors’ introduction of the concept of rule of law to the domestic urban policy

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<sup>41</sup> See Gülriz Uygur, *The Rule of Law: Is the Line between the Formal and the Moral Blurred?*, in *LAW, LIBERTY, AND THE RULE OF LAW* 103 (Imer B. Flores & Kenneth E. Himma eds., 2013).

<sup>42</sup> White et al., *supra* note 3, at 9 n.31.

discussion is, sustained investment in a certain set of urban public goods is their proposed solution. Their social insurance policy proposal ultimately rests upon a proper understanding of which goods should be guaranteed funding.

In this section, I will examine what kinds of goods qualify as “urban infrastructure” and what, if any, affect does the government’s role with respect to those goods have on their inclusion on that list. The section will begin with a survey of how public and private goods differ in the way that they are consumed and how those differences shape our general understanding of infrastructure. Looking at the explicit and implicit requirements of UDT theory, I will critique the urban infrastructure list provided by the authors and determine which public goods are most likely to perform the signaling function that is the core of the theory. As a list of public goods that “play[] an especially salient role in underpinning the rule of law,”<sup>43</sup> the authors urban infrastructure categorization is both overinclusive and underinclusive; but, the article’s more significant shortcoming stems from its failure to examine the government’s role in revenue collection as part and parcel of its public goods resource management function.

Purely private goods tend to be both excludable and rivalrous. A good is excludable to the extent that its supplier can legally and cost effectively control its consumption. The consumption of a rivalrous good by any user directly reduces the consumption opportunities of other consumers.<sup>44</sup> Public goods typically are, at least to some degree, non-excludable, non-rivalrous, or both.<sup>45</sup> Even when the suppliers of public goods can exclude consumers at a feasible cost, infrastructure goods are generally offered on a common carrier basis, available to all consumers without discrimination as to the user or the use.<sup>46</sup> This open access is often legally mandated because infrastructure goods are essential to the consumption or production of other goods.<sup>47</sup> When a public good is at least partially rivalrous, either the government or a private utility bears the responsibility of maintaining sufficient capacity, which is often

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<sup>43</sup> *Id.* at 9.

<sup>44</sup> Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 942 (2005).

<sup>45</sup> *Id.* at 935 n.62.

<sup>46</sup> *Id.* at 936–37.

<sup>47</sup> *Id.* at 926–27.

accomplished through user fees when the good is also at least partially excludable.<sup>48</sup>

Because the UDT theory states that rule of law is affected by public goods investment through that investment's signaling function, a proper description of urban infrastructure will include those public goods for which the government bears sufficient responsibility as to be credited or blamed for their condition. In cataloguing public goods that qualify as urban infrastructure, *Urban Decay* provides the following non-exhaustive list: "roads and highways, electrical supply, water resources, air quality, public transportation systems, traffic control, safe travel, and a pleasing overall aesthetic."<sup>49</sup> The authors describe public goods more generally as consisting of "essential goods and services . . . that individuals fail to supply . . . [including] a country's internal and external security, health care, education and—most importantly for the purposes of this Article—urban infrastructure."<sup>50</sup> The authors claim that suppliers of these goods lack the power to exclude "free riders who [do] not contribute to their production."<sup>51</sup>

The authors struggle in their attempts to privilege capital-intensive goods that shape the built environment of the city over other essential goods and services such as "internal and external security, health care, [and] education."<sup>52</sup> The authors argue, without success, that the benefits associated with the former set "provide a signal to individuals about the legitimacy and stability of legal rules, as well as the polity's shared commitment to abide by law."<sup>53</sup> Certainly the benefits the authors list—"allowing people and goods to move efficiently,"<sup>54</sup> "preventing the spread of diseases,"<sup>55</sup> and "decreasing the likelihood of accidents"<sup>56</sup>—do not differ in kind from the benefits associated with hospitals, health clinics, and, most importantly, police protection. The authors contend that the signaling function is performed best by those goods

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<sup>48</sup> *Id.* at 954.

<sup>49</sup> White et al., *supra* note 3, at 19. In the associated footnote, the authors also add "sanitary systems, public facilities (e.g., libraries) and parks" but leave these off the primary list because they fall outside the data set they obtained for the empirical section of the article. *Id.* at 19 n.67.

<sup>50</sup> *Id.* at 12.

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

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 20.

<sup>54</sup> *Id.* at 19.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

that “directly and inescapably affect[] the daily lived experience of all citizens.”<sup>57</sup> Even if elementary and secondary education services do not directly impact every local household, few public goods are given more attention by homebuyers and homeowners, irrespective of their own need for them.<sup>58</sup> The authors’ urban infrastructure requirement that the quality of included public goods be of the type that are constantly and directly monitored by citizen–consumers has intuitive appeal. This element of the argument would seem to exclude zoning, subdivision platting, and other long-term planning controls as public goods that signal effectively, but it does nothing to push aside education, health care and, particularly, public safety. As discussed below, the authors are keen to present public goods investment as an alternative to government’s coercive activity, but rule enforcement is an essential public service the administration of which reflects on governmental competence.<sup>59</sup> The authors provide no principled reason for excluding these enforcement services from other vital public safety services such as snow plowing and emergency fire response, which would presumably be included in urban infrastructure.

In describing the ways in which adequate provision of these goods affects public confidence, the authors ignore both the fact that many of these public goods are not directly provided by governmental entities and the possibility that the level of taxation required of citizens to fund certain goods might influence their satisfaction with them. About 70% of Americans receive their electricity from for-profit utilities.<sup>60</sup> Is the fact that these private businesses are subject to extensive public regulation a sufficient governmental nexus to have the quality of their services signal to their users the health of the social contract? It seems unlikely. Each utility company generally provides only one particular public good. Its ineffectiveness or even insolvency does not necessarily signal anything about the overall stability of the social contract, no

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<sup>57</sup> *Id.*

<sup>58</sup> WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 40–51, 148–50 (2001) (noting the value of strong school performance, among other public goods controlled by local governments, is capitalized into local land values).

<sup>59</sup> The relevance of housing and building code enforcement to the authors’ understanding of urban infrastructure is implicit in their references to the problem of privately owned abandoned buildings in Detroit. See White et al., *supra* note 3, at 3, 21.

<sup>60</sup> Diane Cardwell, *Power to the People: More Cities Weigh Taking Electricity Business From Private Utilities*, N.Y. TIMES, Mar. 14, 2013 at B1, available at <http://www.nytimes.com/2013/03/14/business/energy-environment/cities-weigh-taking-electricity-business-from-private-utilities.html>.

matter how essential electricity is to daily life. Those goods that are neither actually delivered by local government nor truly non-excludable because their consumption depends on payment of a substantial user fee should not be held up as accomplishing the signaling function.

With private utility goods and services put to the side then, our attention turns to those goods and services funded by tax dollars. If citizens' feelings about taxation affect their satisfaction with public goods, then adequacy of funding for these aspects of urban infrastructure can no longer completely account for the signaling function that shapes citizen confidence.

Perhaps the authors could advance arguments that minimize the impact that local tax burdens have on residents' assessment of the quality of essential public goods and services. The focus on the "daily lived experience"<sup>61</sup> as the frame in which citizens make the connection between the sufficiency of public goods and the stability of social cooperation would seem to marginalize tax rate considerations as much as it did long-term planning functions. If this is correct, then citizens might focus only on the outcomes from government goods and services without respect to how heavily they are taxed to achieve those results. But, this assertion seems implausible on its face, at least at certain levels of taxation. Consumers of all kind are price sensitive. It is difficult to imagine any citizen whose evaluation of one or more public goods would not be affected by the cost imposed on her for those goods.

A somewhat more promising line of argument stems from the authors' observation that the cities with the most degraded urban infrastructure often have the higher tax rates than the well-appointed suburbs that surround them.<sup>62</sup> If better infrastructure does not translate into higher taxes, the argument might run, that perhaps dissatisfaction with tax rates should not be looked at as tempering the ability of infrastructure quality to signal effective government. But, the stark contrast between the fiscal situations of the inner city and the suburb does not counter the intuition that better infrastructure costs more and does not address the still open question of whether or not it is adequacy or efficiency in the delivery of public goods that inspires confidence in citizens.

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<sup>61</sup> See *supra* note 57 and accompanying text.

<sup>62</sup> White et al., *supra* note 3, at 49. The authors do not discuss how this counterintuitive state of affairs came to be, although I will in this essay's final section. See *infra* notes 79–93 and accompanying text.



In any attempt to establish a connection between municipal public goods and rule of law, local tax burdens should not be ignored. The root observation of the scholarly work of Wallace Oates and Charles Tiebout, both cited in the *Urban Decay* article, is that the ease with which residents move from one local taxing jurisdiction to another, often without changing jobs, makes resident sensitivity to taxes a more central issue at the municipal level than at the state or federal levels.<sup>63</sup> Even with adequate public goods, overtaxed citizens will vote with their feet. Those who stay may be no less law abiding than those who leave. Even if their departure, however, has little obvious effect on the social cooperation aspect of rule of law, its impact on social advocacy will be felt, if only because they were the ones more willing to hold local officials accountable.<sup>64</sup> With the use of exit, communities also lose voice.

### C. *Urban Decay Theory v. Broken Windows Theory*

The authors do not tout rule of law as a true alternative to order, nor do they acknowledge any overlap between provision for public safety and urban infrastructure. Both of these apparent omissions are understandable in light of the authors' desire to place UDT in competition with BWT. For UDT to truly displace BWT, it must address largely the same dependent variable as BWT does: rule abidance. At the same time, UDT must introduce a clearly distinct independent variable as the new protagonist. Rule of law, as a concept, does encompass the preservation of social order that is the focus of BWT. If the *Urban Decay* article, however, had devoted a significant amount of space to discussing why rule of law was preferable to order maintenance as a goal, readers might come away with the impression that BWT and UDT address quite distinct problems. To my mind, UDT clearly addresses the same problem as BWT, but in a deeper and a more comprehensive way.

Ironically, the real concern for the proponents of UDT is not any subject-matter disconnect with BWT but a strong overlap between BWT's independent variable (unaddressed, low-level physical and social disorder) and UDT's independent variable (investment in urban infrastructure). As I have argued above, there is no principled reason to exclude rule enforcement infrastructure from the types of public goods by which citizens judge the health

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<sup>63</sup> See WALLACE E. OATES, FISCAL FEDERALISM (1972); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>64</sup> See *supra* note 41 and accompanying text.

of the social contract. But, if UDT involves urban residents making rule abidance decisions based on a perceived lack of governmental commitment to rule enforcement then UDT seems to be little more than an expanded version of BWT rather than a rival to it. White, Sepe, and Masconale might respond by claiming that the mechanism connecting public safety spending and rule abidance is different in each case. With respect to public goods, UDT stresses the levels of sustained investment, the quality of the outcomes, or both of these elements as the signals to which citizens are attuned. With BWT, it is the absence of the coercive threat, which physical disorder and unchecked social disorder are communicating. But, if perception of law enforcement is a common denominator between the two, the nuance of UDT's emphasis on social cooperation and BWT's focus on coercive capacity may be lost on policy makers who hear from both sides that putting more cops on the street will get the job done.

Ultimately, White, Sepe, and Masconale struggle in their attempt to make a purely theoretical case for increased investment in one sort of public goods, urban infrastructure, to the cost of another, increased police presence. Of course, a well-designed, compelling study contrasting these two types of investments might accomplish that task more effectively than even the most clearly articulated conceptual analysis.

## II. EMPIRICAL EVIDENCE

To establish an empirical case for their assertion that the adequacy of urban infrastructure funding predicts rule of law, the authors perform regression analyses on four sets of data. Traffic death statistics and citizen satisfaction surveys are combined to form URBAN, an independent variable indexing public goods.<sup>65</sup> As noted above, the dependent variable, rule of law, is represented by the Corruption Perception Index (CPI).<sup>66</sup> Last, the authors bring in an instrumental variable, the significance of which will be explained presently, to confirm the conclusions of specific prediction provisionally indicated by the correlations established between the independent and dependent variables data sets. This instrumental variable, labeled by the authors UNESCO, indicates the number of world heritage sites in each location.<sup>67</sup> The data sets were gathered

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<sup>65</sup> White et al., *supra* note 3, at 33–34.

<sup>66</sup> *Id.* at 34–35; *see also supra* notes 10–13 and accompanying text.

<sup>67</sup> *Id.* at 41.

from nations all over the globe and it appears that the data for each country is taken from that country as a whole. An obvious objection to the use of data sets from foreign countries is that they do not speak to the experience of U.S. residents. But, if they succeed in demonstrating that public goods investment predicts rule of law in many different countries, the burden would be on those rejecting the evidence to show why the American experience of social contract requires exclusively domestic data.

The more troubling disconnect lies between the authors' use of countrywide data to establish the connection between austerity and decay, and their focus on municipalities as the political communities within which that connection plays out. If the city is the locus of UDT, then UDT would be more convincingly established by comparing the experiences of many different cities. If my assumption about the data being collected across the whole of each country is wrong and the resident satisfaction results are actually confined to urban residents, then the traffic death data and the corruption survey results should be similarly limited. If all the data is confined to urban areas, then the various urban areas should be the points of comparison not the nations.

Still, the authors are quite clear that they work with the data that they have, not the data they wish they had. To establish that public goods investment specifically predicts rule of law, the authors would prefer to have panel data, sets of these measurements collected at different points in time.<sup>68</sup> In the absence of such longitudinal evidence, the authors resort to a two-stage least squares regression in which their initial results are mediated through an instrumental variable.<sup>69</sup> If an instrumental variable that correlates to the independent variable but does not correlate to the dependent variable is selected, a correlation between both the instrumental and independent variables, on the one hand, and the dependent variable, on the other hand, can show that the original correlation between the independent and dependent variable does not result either from happenstance or from the “dependent” variable inducing a response in the “independent” variable (i.e., reverse causation).<sup>70</sup>

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<sup>68</sup> *Id.* at 40.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 40 nn.172 & 174 (citing, *inter alia*, Lubimor P. Litov, Simone M. Sepe & Charles K. Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, 102 GEO. L.J. 413, 436–38 (2014)).

After conducting the second stage regression analysis, they conclude “(1) that the quality of urban infrastructure has a measurable impact on the rule of law, (2) that a higher quality urban infrastructure causes a country to have a strengthened rule of law, and (3) that a weaker urban infrastructure leads to a weakened rule of law.”<sup>71</sup> Even after reading through the complex statistical arguments the authors offer in support of UDT, I was unable to determine if the authors viewed adequate investment in public goods as a necessary condition for rule of law, a sufficient condition, both, or neither. Even if the answer is neither, I would still want to know how significant a causal factor infrastructure investment is. Perhaps, the numerical answer was right there in front of me as I read, but I need more help to understand it. The authors’ stated finding of “a measurable impact” is generally insufficient to support major changes in fiscal structure, especially if UDT is going to challenge BWT when the latter’s order-maintenance policing is taking credit for declining crime rates across the nation.

### III. THE PUBLIC POLICY PAYOFF

The authors identify signaling public goods with urban infrastructure in both the conceptual and empirical sections in order to build the case for their proposed solution to what they see as the unmitigated disaster that is Detroit’s bankruptcy. To balance the need for the sustained infrastructure so significant to rule of law with the need for local accountability, the article offers partial government insurance as a compromise solution. State and federal statutes would be enacted to backstop municipal finances and assure “the uninterrupted operation of quality municipal services.”<sup>72</sup> The authors offer no evidence that the actual default on Detroit’s obligations to its creditors drastically curtailed essential goods and services that had been in a deplorable condition for years.<sup>73</sup> They also do not specify the level of fiscal distress that would trigger this matching funds approach to municipal bailout. Given the breadth of UDT as a theory about the relationship between the strength of the government as a

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<sup>71</sup> *Id.* at 42–43.

<sup>72</sup> *Id.* at 55.

<sup>73</sup> Part of the Bankruptcy Court’s charge in handling a municipal petition is to make sure that vital services continue on uninterrupted. *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 648 (Bankr. E.D. Mich. 1994) (“Because the purpose of municipalities (i.e. police protection, fire protection, sewage, garbage removal, schools, hospitals) is to provide essential services to residents, it is crucial that chapter 9 relief allow these entities enough flexibility to remain viable.” (citing H.R. REP. NO. 100-1011, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4115, 4116)).

coordinator of public goods and the degree of positive citizen engagement with the legal rules that delineate the social contract, it is surprising and disappointing to have UDT's policy payoff be more lucrative for municipal creditors than beneficial to inner-city residents looking for sustained growth that does not push them aside. The authors' focus on Detroit's bankruptcy and the preceding refusal of the State of Michigan to guarantee its debts seems to have shaped their application of UDT to contemporary urban affairs. While it is undeniable that the fiscal insolvency of one of America's largest cities is a scandal, it is one that has a long, if not unique, history, in which state-level austerity policies play only a small role.

In discussing Tieboutian sorting, the process by which residents of a metropolitan area seek the best public goods bargain for themselves by relocating to the most favorable jurisdiction accessible to them, White, Sepe, and Masconale close in on the true cause of urban fiscal distress. Neither of the arguments that the authors advance against fiscal decentralization, however, meet the core Tieboutian/fiscal federalist contention that jurisdictional fragmentation in the provision of metropolitan public goods is as natural as it is efficient. Taking them in reverse order, the authors' second argument against decentralization is based on its incompatibility with UDT.<sup>74</sup> If sustained investment in public goods is essential to rule of law, then it is counterproductive to isolate financially the governmental bodies responsible for that investment.<sup>75</sup> Here, however, the authors' lack of clarity about the extent to which public goods investment determines rule of law prevents any strong showing that the lack of a fiscal safety net is fundamentally destabilizing to rule of law at the local level.

Their first argument offered for social insurance is that municipal finances need to be backstopped through recessions.<sup>76</sup> Keynesians contend that the public fisc should stand prepared to spend greater amounts of money precisely at those times when economic downturns bring revenues up short.<sup>77</sup> This macroeconomic line of reasoning is very relevant to state-level debates of constitutional balanced budget requirements and "rainy day" funds generally. Perhaps, it may even convince some fiscal decentralists to rein in their

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<sup>74</sup> White et al., *supra* note 3, at 51.

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

<sup>76</sup> *Id.* at 48.

<sup>77</sup> *Id.* at 48 n.208 (citing, *inter alia*, JOHN MAYNARD KEYNES, *Notes on the Trade Cycle*, in *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 313 (Macmillan Press Ltd. 1973) (1936)).

concerns about moral hazard and agree to some form of cross-jurisdictional insurance to facilitate counter-cyclical deficit spending when needed. But, the chronic inability of residents of legacy cities, such as Detroit, to expect even the most basic public goods has very little to do with the vagaries of the business cycle. City budget crises do get worse when the economy slows. It was no coincidence that Detroit's insolvency reached a point of no return during the Great Recession and so soon after the near collapse of General Motors and Chrysler. But, for the reasons described below, Detroit's fundamental fiscal reality has been desperate for decades and its trajectory towards that desperation began decades earlier.<sup>78</sup>

As William Fischel points out in his book, *The Homevoter Hypothesis*, the development of suburbs around America's cities late in the nineteenth century gave no early sign of an inexorable march toward fragmentation and the fiscal isolation of the city center.<sup>79</sup> Suburbs formed, but they also combined with other suburbs and the larger city because of the efficiencies that such mergers and annexations allowed.<sup>80</sup> As long as real estate development investment flowed unimpeded across jurisdictional lines, suburbs found no irresistible advantage in preserving their autonomy.<sup>81</sup> But, when a Supreme Court that had been largely suspicious of economic regulation unexpectedly upheld local zoning authority in its 1926 decision in *Village of Euclid v. Ambler Realty Co.*, local governments were given the power to tailor the quality and per-household cost of the public goods they offered their residents.<sup>82</sup> By being able to set large minimum-lot sizes for new houses and effectively ban apartment buildings, which were portrayed in the *Euclid* opinion as parasites on single-family homes, suburban governments could effectively guarantee their residents that they would be choosing and funding public goods only with fellow residents who had a substantially similar socioeconomic status.<sup>83</sup> With the power of fiscal zoning, local voters recognized the extent to which their

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<sup>78</sup> See Joel Kurth, Mike Wilkinson & Louis Aguilar, *Six Decades—How Abandonment, Racial Tensions and Financial Missteps Bankrupted an Iconic American City*, DETROIT NEWS, Oct. 4, 2013, at S8, available at <http://www.detroitnews.com/article/20131004/METRO01/310040001>.

<sup>79</sup> FISCHEL, *supra* note 58, at 209–13.

<sup>80</sup> *Id.* at 209–11.

<sup>81</sup> *Id.*

<sup>82</sup> 272 U.S. 365, 386–89 (1926).

<sup>83</sup> Fischel credits the scholarship of Bruce Hamilton for explaining the important role of exclusionary zoning in preventing Tieboutian sorting becoming a futile game of the poor chasing after the affluent in order to enjoy higher quality public goods. FISCHEL, *supra* note 58, at 65–69 (citing Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975)).

property taxes were investments in public goods that in turn strongly determined their land values and jealously guarded their ability to control both land use and public goods funding, especially school finance.<sup>84</sup> Fischel's account of the legal facilitation of, what Robert Reich has called, the secession of the successful,<sup>85</sup> however, omits its worst chapter: the part that racial discrimination played in the genesis of the modern American suburb.

The role of race in the creation of the suburb goes at least as far back as the Supreme Court's validation of zoning in *Euclid*, which was issued as the Great Migration was reaching its peak.<sup>86</sup> As the federal government began to facilitate mortgage lending to homebuyers looking to take advantage of transportation advances, the Federal Housing Administration drew up maps of areas at risk of racial change and refused to support loans to those areas.<sup>87</sup> Moreover, the agency encouraged the use of racially restrictive covenants before and after the U.S. Supreme Court found their enforcement to be unconstitutional.<sup>88</sup> Despite the racial discrimination in the founding of the suburbs, the Court refused to enforce the school desegregation mandate in *Brown* against suburbs that had no history of de jure discrimination in education.<sup>89</sup>

White, Sepe, and Masconale ultimately respond to those who praise Tieboutian sorting by pointing out the apparent futility of resident mobility in the absence of the authors' proposed fiscal safety net: "Having lived in one municipality that has been ignored by the mass of people—as embodied by the state or federal government—how can one have faith that the next municipality won't suffer the same fate?"<sup>90</sup> The question that the authors pose is rhetorical,

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<sup>84</sup> *Id.*

<sup>85</sup> See Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at A16, available at <http://www.nytimes.com/1991/01/20/magazine/secession-of-the-successful.html>.

<sup>86</sup> Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 606–07 (2001). Years earlier, the Court had invalidated ordinances that blocked acquisition of property by African-Americans in certain designated areas, not because they violated equal protection but because they interfered with the property rights of would-be sellers. *Id.*

<sup>87</sup> See DOUGLAS S. MASSEY & SALLY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 51 (1993).

<sup>88</sup> See *id.* at 50; see also *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948). William Julius Wilson has argued that the elimination of discriminatory housing barriers, such as racially restrictive covenants, induced working-class and middle-class African-American residents to flee declining inner-city neighborhoods exacerbating concentration of poverty in those neighborhoods. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7–8 (2d ed. 2012).

<sup>89</sup> *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974).

<sup>90</sup> White et al., *supra* note 3, at 51.

but, after the review of fiscal zoning, race-based mortgage facilitation, and the near elimination of interdistrict school desegregation, the answer is apparent: Long before the advent of the gated community, America built communities with invisible walls and no gates at all.

Judging from the rhetorical question they pose, White, Sepe, and Masconale seem to see Detroit as a city that has lost out to other large cities rather than a city that watched its tax base relocate to nearby Oakland County. In reality, Detroit is merely the most extreme example of the fate that has befallen many postindustrial cities in the United States due to massive “white flight” to the surrounding suburbs.<sup>91</sup> Tieboutian sorting among different metropolitan areas is not only possible but an increasingly relevant reality. But, even those observing this phenomenon note that the conventional Tieboutian model is entirely focused on movement within a metropolitan area.<sup>92</sup> Starting in the 1950s, the construction of highways and housing projects under the banner of urban renewal as well as the ensuing riots and proliferation of narcotics dealing produced violent and undercrowded inner-city neighborhoods in many similarly situated cities.<sup>93</sup> But, even if the authors of *Urban Decay* have missed Detroit’s departing tax base as the central cause of its lack of fiscal viability, the UDT theory and its focus on rule of law open up new avenues to understanding and addressing the barriers to a more just, more peaceful and more prosperous metropolitan community.

## CONCLUSION

Through a deeper inquiry into the signaling effects of the funding as well as of the delivery of local public goods, the UDT approach can establish a sturdier critique of the shortsightedness of both fiscal decentralization and the

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<sup>91</sup> In the so-called Rust Belt, the contrast in the fiscal fortunes of urban and suburban areas is somewhat lessened because of the unrelenting blows that decades of deindustrialization have delivered to the economies of entire metropolitan regions. See EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 41–67 (2011).

<sup>92</sup> Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 65–66 (2013) (“On the demand side of Tiebout’s metaphorical marketplace, people choose among residential options in a given metropolitan area by evaluating the bundle of public goods offered at the local level. Correspondingly, the type of government the model contemplates to supply this targeted bundle is paradigmatically a local government of general jurisdiction. In short, Tieboutian localism depends on local governments competing for mobile residents in a defined metro area.” (footnote omitted)).

<sup>93</sup> It is little wonder that the increasingly common electoral victory by an African-American candidate running for citywide office was observed by one legal scholar to be the winning of a “hollow prize.” See HAROLD A. MCDUGALL, BLACK BALTIMORE: A NEW THEORY OF COMMUNITY 91–112 (1993).



urban pacification strategies of order-maintenance policing. With the inclusion of vital local public goods such as primary and secondary education, researchers exploring the causal link at the core of UDT can examine the resident experience of public goods not just as a type of consumer satisfaction, but also as a constitutive element of the citizen experience of the social contract. City residents perceive not only the desperate inadequacy of these public goods but also the inequity behind it. Inner-city youth that are sent to failing schools do not merely worry about the soundness of the overall social contract, they doubt very much that they are party to it at all. The application of order-maintenance policing in inner-city high schools has created a school-to-prison pipeline that marginalizes all students enrolled not just those incarcerated. Abstract analysis will not tell us who is affected or how, but empirical research, qualitative as well as quantitative, may help sort out whether the expressive potential of “zero tolerance” policies are helping students internalize pro-social norms or contributing to a message that they are to be contained rather than included. If the study of signaling public goods is not artificially narrowed to serve a particular policy recommendation, the UDT approach to urban affairs can foster a more complete understanding of how government services shape citizen interaction with authority. The endeavor to identify those inputs that will produce the desired social outcome frequently, and understandably, overshadows any effort to understand fully the end itself. But, by positing rule of law as UDT’s objective, White, Sepe, and Masconale have laid a broader foundation for discussion of possible paths to a sustainably safe and sound metropolitan environment.

A robust conception of the rule of law can allow researchers interested in minority perspectives to move beyond a myopic focus on crime rates. In 2001, the City of Cincinnati experienced weeks of rioting triggered by a police shooting but attributed to the pent-up frustration with violently aggressive police tactics in dealing with African-American residents.<sup>94</sup> More recently, the St. Louis suburb of Ferguson, Missouri experienced similar unrest that local officials acknowledged stemmed in part from the repeated imposition of harsh fines on low-level African-American offenders.<sup>95</sup> Empirical inquiries into rule

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<sup>94</sup> Peter Bronson, Op-Ed., *Lessons for Ferguson From Cincinnati’s 2001 Riots*, WALL ST. J., Aug. 23, 2014, at A11; Jane Prendergast, *Changes in Policing*, CINCINNATI ENQUIRER, Apr. 2, 2011, at F4, available at <http://archive.cincinnati.com/article/20110403/NEWS01/104030306/Changes-policing>.

<sup>95</sup> Megan Davies & Dan Burns, *In Riot-Hit Ferguson, Traffic Fines Boost Tension and Budget*, REUTERS (Aug. 19, 2014 7:44 PM EDT), <http://www.reuters.com/article/2014/08/19/us-usa-missouri-shooting-tickets-insight-idUSKBN0GJ2CB20140819>.

of law are not limited to the actual instances of massive social unrest. They can and should investigate any feelings of alienation and rage that broad segments of the population may have towards law enforcement. Where assessments focused on order recognize only the resulting violence, researchers measuring rule of law can grasp the instability already present before the riot. Any research program structured to examine rule abidance from a majoritarian perspective cannot reveal the true benefits of investment in a more equitable approach to the funding and delivery of vital public goods. *Urban Decay* opens a new perspective on these urban and regional policy issues and should be valued as a call for further inquiry into the role of public goods investment in the promotion of rule of law in American cities.