Legal Studies Paper No. 2014-26

Georgetown Journal on Poverty Law & Policy (2014)

Peering

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by

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"Peering" designates a legal practice of gazing at poor people. Legal actors literally peer, that is, look at the poor; they also peer in another fashion, which determines whether the visual subject is their peer. If the observed falls short of the observer's social class, the law fixes them in their "proper place." In the Fifth Amendment takings context, this means they are at risk for condemnation.

This article traces peering's evolution in Fifth Amendment law. It notes peering's initial descent: From the 1920s until the 2000s, courts looked "down" at the poor, often describing them as monstrous. "Slums" – edifices typically depicted as housing contagious subhumans -- proved perfect objects of condemnations since they threatened the upper strata. In the 1980s, however, another legal gaze flourished: One that looked "up," and whose bearers peered themselves with wealthy developers. In cases stemming from Michigan's 1981 Poletown Neighborhood Council v. City of Detroit to *the Supreme Court's 2005* Kelo v. City of New London, *we find rhetoric signaling legislative and judicial alignment with affluence. Here, lawmakers and judges approved condemnations that fostered "world class" and "cutting edge" corporate factories. I call this the ascendant or aspirational gaze, and in its exuberant optics, both the poor and the middle class find themselves vulnerable to "economic rejuvenation" takings. An active lobby of activists and judges challenge this gaze with petit bourgeois perspectives, leading to reform. But the poor submerge in these visuals, finding vanishing chances to escape "blight" condemnations.*

To understand and combat peering, I study Columbia University's recent expansion into West Harlem. I contemplate New York Court of Appeals' 2010 Matter of Kaur v. New York State Urban Development Corporation, *which approved of Manhattanville's condemnation, and also the political*

rhetoric and blight reports that justified the taking. I additionally reference interviews with members of the Harlem community, and offer their home photographs as counter-images to the ones that filled the blight reports. Inspired by the legal history I recount, as well as the testaments and images offered by Harlem residents, I describe the racist, classist, and violent meanings of blight findings. I reject "blight" as unsalvageable, but sketch a Fifth Amendment doctrine that would foster what one Harlem leader describes as a "decent life."

Problem # 1: Poverty in the United States.[1]

Problem # 2: Legal blindness, that is, the astigmatism of what Ralph Ellison called "the *inner* eyes, those eyes with which [we] look through [our] physical eyes upon reality."[2]

Problem # 3: The perilous combination of # 1 and # 2, which results in courts' and legislatures' inabilities to behold poor people. Such myopia results in the double act of *peering*, rather than seeing: legal subjects are viewed (peered at) and also positioned in relation to the observer (that is, qualified as peers or inferiors). Poor people are not the peers of the inevitably wealthier lawyers who decide their fates. They find themselves either seen through a distorted lens, or rendered invisible.

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* Professor, Loyola Law School. Many thanks to Alicia Barksdale, Robert Hockett, Karl Manheim, David Dana, Ilya Somin, Dan Selmi, Rick Hills, Hilary Saunders, George Carrano, Jonathan Fisher, and Chelsea Davis. My gratitude also goes out to John Echeverria who invited me to deliver *Poverty, Visual Culture, and the Fifth Amendment* at the 2013 Takings Conference hosted by New York University Law School.

[1] *See, e.g.,* United States Census, POVERTY: HIGHLIGHTS, *available at* http://www.census.gov/hhes/www/poverty/about/overview/ ("In 2011, the official poverty rate was 15.0 percent. There were 46.2 million people in poverty.") (Last revised, Sept. 12, 2012) (consulted on June 15, 2013); Paul Bucheit, *Half of Americans below or near poverty line*, SALON.COM, May 30, 2013, *available at* http://www.salon.com/2013/05/30/half_of_americans_living_below_or_near_poverty_line_partner/.

[2] INVISIBLE MAN 3 (1952).

In 1954, the U.S. Supreme Court in *Berman v. Parker* considered whether the U.S. Constitution's Fifth Amendment authorized the District of Columbia Redevelopment Act of 1945. This statute allowed D.C.'s Redevelopment Land Agency to condemn blighted territories.[3] Over ninety-seven percent of the 5,012 people removed under this program were African-American.[4] The Court deferred to the legislature's interpretation of the Fifth Amendment's demand that state takings of private property satisfy a "public use."[5] "[W]hen the legislature has spoken, the public interest has been declared in terms well-night conclusive. . . . This principle admits of no exception merely because the power of eminent domain is involved."[6] Yet the Court still scanned the blighted area, looking in a direction that can only be described as "down:"

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[7]

The *Berman* Court used horror imagery, characterizing D.C.'s residents as subhuman beasts tainted with a fecal contagion. The Court engages a very specific perspective: It shoots its gaze down through hallucinatory space, and spies not its own peers, but rather too-earthly creatures rendered remote and unreal because of their vast distance from the high bench.

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[3] 348 U.S. 26, 28-29 (1954).
[4] *Id*. at 30.
[5] The Fifth Amendment reads: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. 5.
[6] *Id*. at 32.
[7] *Id.*

The *Berman* Court peers at the poor: It sees them in an act that is less perceptive than creative, positioning them in their appropriately low place.

Fifty-six years later, peering had evolved. In 2010 the New York Court of Appeal addressed another blight condemnation, this one involving Columbia University's expansion into an area of West Harlem deemed blighted by the Empire State Development Corporation. In *Matter of Kaur v. New York State Urban Development Corporation*,[8] the court, like *Berman*, deferred to the legislature. Insofar as the *Kaur* court looked "down," it refrained from *Berman*-like grotesqueries, instead mildly noting "deteriorated facades . . . and unsafe conditions. [Investigators] also discovered widespread vermin on the streets and graffiti. . . . [The area] had more than three times the average number of building violations as the parcels acquired by Columbia over the previous several years."[9]

Kaur, however, played with altitude in a new way: The court didn't just look down, it now also looked "up." It bolstered its assessment of public purpose by descrying the wealth and prestige Columbia's expansion promised for New York: "The Project contemplates the construction of a new urban campus that would consist of 16 new state-of-the-art buildings, the adaptive reuse of an existing building and a multi-level below-grade support space,"[10] it wrote excitedly, employing curiously promotional jargon. The court also cited as true New York officials' findings that

> the Project would create 14,000 jobs during the construction of the new campus as well as 6,000 permanent jobs following the Project's completion. . . . [The] Project would generate . . . $122 million for the State and $87 million for New York City. . . . [T]he Project site would create approximately 94,000 square feet of accessible open space and maintained as such in perpetuity that will be punctuated by trees, open vistas, paths, landscaping and street furniture and an

[8] 15 N.Y.3d 235 (2010).
[9] *Id*. at 250.
[10] *Id*. at 245.

> additional well-lit 28,000 square feet of space of widened sidewalks that will invite east-west pedestrian traffic. . . . [And] Columbia would open its facilities--including its libraries and computer centers--to students attending a new public school that Columbia is supplying the land to rent-free for 49 years. Columbia would also open its new swimming facilities to the public.[11]

The people of Manhattanville submerged under this ascendant gaze. The court peered, just as had the *Berman* Justices, but *Kaur's* focus diverted from the poor. The majority did not bother describing the people on the ground. Having looked up into higher education's dazzling summits, it could no longer see the vulnerable individuals affected by the proposed condemnation.

Blindness, horror, and bedazzlement blinker legal vision's perception of low-income people: Are there any spectacles that can correct its internal eyes?

This paper constitutes the first of a two-part series about gazes and class, and how a bourgeois or wealthy gaze captures poor people in condemnation cases. My work draws from the scholarship of Laura Mulvey, who first coined the phrase *The Male Gaze,* Frantz Fanon, who identified a *Racial Gaze,* and scholars who study bourgeois contemplations of the poor. I build upon these ideas, identifying a classed gaze that courts use when observing poor people. I call this gaze *peering*, because this look is more than a noun – *the* gaze. It is a verb – to peer. When courts *peer,* they regard the poor (and the rich) in light of their class (or their aspirations to class), and also fix poor people into their positions. Peering is an activity, one with sometimes terrible consequences.

[11] *Id*. at 251-252 (internal quotation marks omitted).

Peering rivets a broad body of law. In *Roe v. Wade* the Supreme Court pivoted reproductive rights upon the specter of pullulating poor mad women.[12] In 2009's *Pinholster v. Ayers,*[13] a Ninth Circuit dissenter argued in nearly pornographic terms against a death-row inmate's habeas relief since the judge couldn't espy his "extreme deprivation."[14] And in 2013's *Lozman v. City of Rivera Beach*,[15] the Supreme Court "knew"[16] a structure was a "house" and not a "vessel" in admiralty law because photographs revealed its bourgeois décor.[17]

For the sake of space, this article focuses on peering in takings cases. In this first of two essays, I study how legal actors peer at the poor, the middle class, and the rich when confronting whether blight or economic redevelopment condemnations satisfy the Fifth Amendment's requirement that private property can only be taken for public use, and with just compensation.[18] This practice of gazing both diabolizes and erases poor people, leaving them powerless to defend against their evictions. Ousting the poor not only offers dignitary and housing dilemmas, but also proves a form of violence. Peering in these cases forms part of what Joseph Galtung and Paul Farmer term *cultural and structural violence*,

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[12] "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." 410 U.S. 113, 153 (1973).

[13] 590 F.3d 651 (2009). *Rev'd* in Cullen v. Pinholster, 131 S. Ct. 1388 (2011).

[14] "Pinholster [did not] suffer[] 'extreme deprivation.' . . . . The aunt [said] . . . that the children didn't get enough to eat, and supports it with [but] a single instance where she saw them mixing flour and water. . . [But] [t]here was no evidence of broken bones, concussions, bleeding, [or] hospitalization . . . . Pinholster's father didn't try to shoot him. . . . None of the children were gang-raped. . . . [T]here was no evidence of incest or any kind of sexual abuse. . . . . Home wasn't a 'combat zone.' . . . The children weren't locked 'in a small wire mesh dog pen that was filthy and excrement filled.' . . . Pinholster didn't grow up in a one-bedroom house described as a `chicken coop.'" Pinholster v. Ayers at 713-14.

[15] 184 L. Ed. 2d 604 (2013).

[16] *Id.* at 623 (Sotomayor, J., dissenting) ("By importing windows, doors, room style, and other esthetic criteria into the §3 analysis, the majority gives our vessel test an `I know it when I see it' flavor." (citing Jacobellis v. Ohio, 378 U. S. 184, 197 (1964) (Stewart, J., concurring).)

[17] *Id.* at 612: "Its small rooms looked like ordinary nonmaritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows."

[18] *See* note 5, *supra.*

being cultures and systems that distribute injury, sickness and death to the disadvantaged.[19] In line with other personal efforts to connect visual culture to anti-violence jurisprudence,[20] I urge for a new vision inspired by images made by those concerned with low-income people. These works – what I call *artifacts*[21] and what others have deemed *participatory photography*[22] -- counteract an elevated gaze that erases the poor. As I will show, artifacts teach us how people, not property, trigger findings of blight, and are the dross that developers and lawmakers seek to sweep away. As a consequence of this finding, and the raced and class optics that define "blight," I reject blight cleansing as a public purpose. However, renouncing blight condemnations does not solve the suffering found in low-income neighborhoods. Faced with this double-bind, I argue that efforts to see instead of peer call for a transformational property law that alleviates poverty and violence. I sketch this argument that will find fuller expression in a subsequent essay, *Seeing Instead of Peering*.

In Part I, I describe peering, and its genesis in the work of Laura Mulvey, Frantz Fanon, and class-conscious art critics. In Part II, I describe Fifth Amendment condemnation jurisprudence. Part III tracks how blight condemnations find justification in a judicial regard of poor neighborhoods as sites of monstrous destruction. This vision dehumanizes poor people with horror imagery that offers the bourgeoisie sensual and status gratification, and so proves particularly difficult to combat.

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[19] My paraphrase of Galtung borrows from Cynthia Cockburn, infra note 341. *See* also Johan Galtung, *Violence, Peace, and Peace Research,* 1 PEACE STUDIES , 31 (1969) ("the general formula behind structural violence is inequality, above all in the distribution of power."). Nancy Scheper-Hughes and Philippe Bourgois also include "humiliation" in the list of harms performed by structural violence. *See* NANCY SCHEPER-HUGHES & PHILIPPE BOURGOIS, VIOLENCE IN WAR AND PEACE 1 (2004) ("Structural violence – the violence of poverty, hunger, social exclusion and humiliation – inevitably translates into intimate and domestic violence.") In 1990, Galtung also wrote of structural violence's effects on the "mind and spirit." *See* his *Cultural Violence,* 27 J. OF PEACE RESEARCH 291, 294 (1990).

[20] *See, e.g.,* Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CAL. L. REV. 1631 (2012); *From Here I Saw What Happened and I Cried*: *Carrie Mae Weems' Challenge to the Harvard Archive*, 8 UNBOUND: HARVARD JOURNAL OF THE LEGAL LEFT 1 (2013); *Inflammatory Statehood* (forthcoming from the HARVARD JOURNAL ON RACIAL AND ETHNIC JUSTICE).

[21] My use of the term "artifacts" first emerged in *Rape Trauma, id*.

[22] *See* text accompanying notes 440-448, *infra.*

Part IV traces peering's development, showing how the legislative and judicial eye "adjusted" to the horrors eloquently documented in Fifth Amendment cases ranging from the1920s to the 1950s. As the years wore on certain courts and lawmakers began concentrating on wealth, a change of focus that rendered the poor invisible, and the middle class at risk. This new kind of gaze, which I also call *aspirational peering*, illuminates *Kaur*[23] as well as the Supreme Court's 2005 *Kelo v. City of New London*[24] and the notorious Michigan and New York cases *Poletown Neighborhood Council v. City of Detroit*[25] and *Goldstein v. New York State Urban Dev. Corp.*[26] Professionally produced "blight" reports that warranted legislative and then judicial determinations of takings' constitutionality emerge as propaganda licensing this mode of peering: They read as sales pitches for the aspirational gaze and also sensationally depict the subject neighborhoods as wastelands.

This form of peering makes middle or working class properties vulnerable to takings, either under an expansive definition of "blight" or under the auspices of "economic redevelopment."[27] Predictably, the aspirational gaze garnered criticism. It generates a duel in the judiciary between those peering with the *ne plus ultra* -- and support takings of working or middle class neighborhoods -- and jurists such as Justice Sandra Day O'Connor who peer with the middle class.[28] Middle class gazers look sweet upon hardscrabble, though not disastrously poor, neighborhoods. Their petit bourgeois regard rejects working and middle class neighborhood condemnations as unconstitutional.

In the ruckus between aspirational vs. petit bourgeois gazes, the poor vanish. With few exceptions, "real" blight cleansing remains a public purpose, and the takings that now find any

[23] *See* text accompanying notes 287-330.
[24] 545 U.S. 469 (2005). *See Kelo* discussion at text accompanying notes 198-219, *infra.*
[25] 410 Mich. 616 (1981). *See Poletown* discussion at text accompanying notes 174-183, *infra.*
[26] 13 N.Y. 3d 511 (2009). *See* text accompanying notes 257-286, *infra.*
[27] For blight, *see* section III(a). For economic redevelopment, *see* notes 198-219, *infra*.
[28] 467 U.S. 229 (1984).

resistance concern the superwealthy's suburban landgrabbing. In this new regime, the poor, in substandard housing, cannot fight their evictions.

Part V describes peering's violent effects on poor people by limning the effects of Columbia's expansion, upheld in *Kaur*. Part VI offers new visuals to challenge our mode of seeing. Here, I build on my theory of artifacts, which engages art made by legal subjects. I also depend on the work of pioneers of participatory photography – a similar concept to artifacts, as it puts cameras in the hands of subjects. After critiquing the image-rich blight report that leveraged Columbia's expansion, I offer counter-images made by generous inhabitants of West Harlem, who have sent me their family photos as rejoinders. As a response to these visuals, and the troubling history of peering that created "blight," I come to two conclusions: 1) Blight condemnations should be rejected as a public purpose; and 2) retiring blight does not do enough to answer the inequalities that continue to exist in places like West Harlem.

In Part VI, I sketch the arguments to be made in *Seeing Instead of Peering.* I adumbrate how *Hawaiian Housing Authority v. Midkiff*[29] and *Berman* offer transformative possibilities, and urge for a visual practice that might realize their promise. These difficult optics disclose the complexities of housing inequality, low-income people's endurances, and developers' perspectives, and should shape the progressive potential now obscured in the class-bound reconnaissance fixating Fifth Amendment law.

I. Peering

The critique is old but durable: The wealthy cannot see the poor clearly if at all. In Homer's *Odyssey,* Odysseus needs merely to dress in a beggar's rags to slip past the suitors guarding his palace;

[29] 467 U.S. 229 (1984).

only his dog, Argos, can discern the king despite his shoddy cloak.[30] In the 19th century, Walter Benjamin lambasted modernist photographers for "transforming even abject poverty . . . into an object of enjoyment."[31] In 1989, Maren Stange criticized late 19th century photographer's Jacob Riis's images of New York slums as "imperialist" exercises that "flattered audiences."[32] In 1994 Paula Rabinowitz noted how 1930s-1940s Farm Security Administration photographers such as Dorothea Lange pandered to the middle class when documenting the poor.[33] In 2008 Samantha A. Lyle described a "middle class gaze" that discerns the working class as abject.[34] Middle class optics entered jurisprudence in 2009, with Evan Selinger and Kevin Outterson's critique of "poverty tourists" blinded by a "bourgeois gaze."[35]

Contemporary critiques of classist gazes grow from Laura Mulvey's film criticism[36] and Frantz Fanon's narratives.[37] Mulvey coined "the male gaze" in 1975's *Visual Pleasure and Narrative Cinema*,[38] which censured Hollywood and German cinéastes for nourishing patriarchy's "fantasies and obsessions .

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[30] DONALD LATEINER, SARDONIC SMILE: NONVERBAL BEHAVIOR IN HOMERIC EPIC 185 (1998) ("Only the geriatric dog Argos immediately recognizes the scruffy stranger.").

[31] Walter Benjamin, *The Author as Producer,* in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 229, 229-30, 230 (trans. Edmund Jephcott, ed. Peter Demetz) (1978).

[32] MAREN STANGE, SYMBOLS OF IDEAL LIFE: SOCIAL DOCUMENTARY PHOTOGRAPHY IN AMERICA, 1980-1950 23 (1989). Yxta check.

[33] PAUL RABINOWITZ, THEY MUST BE REPRESENTED: THE POLITICS OF DOCUMENTARY 43-44 (1994) ("Roy Stryker's 'shooting scripts' asked Dorothea Lange in 1936 for 'some good slum pictures in the San Francisco Area . . . . Stryker's team needed to provide evidence of [poverty's] brutali[ty] . . . to [bolster]New Deal [programs].") *See also id.* at 51 (describing what the "middle-class man sees").

[34] Samantha A. Lyle*, (Mis)recognition and the Middle-Class/Bourgeois Gaze: A Case Study of Wife Swap,* 5:4 CRITICAL STUDIES 319, 320 (2008).

[35] THE ETHICS OF POVERTY TOURISM 5, 24 (2009), *available at* http://128.197.26.4/law/faculty/scholarship/workingpapers/documents/SelingerEOuttersonK06-02-09.pdf.

[36] Lyle, Selinger and Outterson cite Mulvey in their essays; Lyle, supra note 34 at 320; SELINGER & OUTTERSON, *id.* at 23-24.

[37] SELINGER and OUTTERSON cite Fanon in THE ETHICS OF POVERTY TOURISM, supra note 35.

[38] *See* PATRICIA ERENS, ISSUES IN FEMINIST FILM CRITICISM 28 (1990).

. . by imposing them on the silent image of women."[39] Woman, Muvley argues, is the pleasurable "leitmotif of the erotic spectacle,"[40] and proves important only for what she "provokes" in men."[41]

Frantz Fanon recounted the colonial gaze's wreckage in the 1950s. In *Black Skin, White Masks* Fanon alerted readers to the White regard that imprisons and alienates Black people. Like Ralph Ellison, he understood White optics' erasures:

> [W]e . . . confront[ed] the white gaze. An unusual weight descended on us. The real world robbed us of our share. In the white world, the man of color encounters difficulties in elaborating his body schema. The image of one's body is solely negating. It's an image in the third person. All around the body reigns an atmosphere of certain uncertainty."[42]

Film scholars Chris Straayer and Judith Halberstam narrate the straight look, which exists "within the storm of law and order, mental health, and financial stability."[43] Straayer describes a "heterosexual gaze," which is "strident in its disciplinary intent,"[44] as well as "voyeuristic"[45] and "privileged."[46]

These gazes operate with great significance in law. They create, regulate, and disappear people. They are active, destructive. And these looks fuse and overlap. The detached male gaze, white gaze, straight gaze, or bourgeois gaze cannot fully describe legal seeing, which bundles all of these visions. For the purposes of limning the legal gaze, I coin the term *peering* hoping it proves capacious enough to acknowledge these fusions. I also offer it because the lawyer's regard of outsiders acts more as a verb

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[39] *Id.* at 29.
[40] *Id.* at 33.
[41] *Id.*
[42] BLACK SKIN, WHITE MASKS 90 (2008).
[43] "Transgenderism [exists] . . . outside the storm of law and order, mental health, and financial stability. [Instead of] seducing the straight gaze, [it] commit[s] to the transgender look."). Judith Halberstam, *The Transgender Look,* in A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 148 (Amelia Jones, ed., 2005), *available at* http://www.hu.mtu.edu/~dshoos/HU6114/pdfs/Halberstam.PDF
[44] DEVIANT EYES, DEVIANT BODIES 4 (1996).
[45] *Id*. at 33.
[46] *Id.* at 64.

than as a noun: Peering is an activity where the legal gazer asks, "are you my peer?" and, once discovering the answer through an intensely visual process, fixes the observed in her proper place.

Though legal scholars have noted the repressive power of looking,[47] we need more studies of legal optics. Amy Adler's work on gendered gazes' influence on First Amendment jurisprudence provides an extensive study,[48] as does Margaret Russell's work on the racial "dominant gaze" found in legal-themed films.[49] As I've noted, this essay focuses on poverty and class in condemnation cases. Class and race together inspire peering in Fifth Amendment takings, and hopefully future work may examine how sexuality and gender also direct the legal gaze in this and other parts of the law.

a) My nomenclature

Before addressing these arguments, I must discuss terminology. I use terms such as "the poor," "the middle class," "the wealthy" and also "the working class," which need attention. A sophisticated theory delineating class and poverty thankfully exists, and is informed by Amartya Sen's conception of poverty as a failure of capabilities to "do" and "be." According to Sen, poverty reigns where people lack capacities to be happy, achieve self-respect, appear in public without shame, or experience social integration.[50] Judges, however, largely avoid such complex metrics of wealth and poverty. When jurists

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[47] *See, e.g.,* Maria Ashe, *Privacy and Prurience: An Essay on American Law, Religion, and Women,* 51 AMERICAN JOURNAL OF LEGAL HISTORY 461 (2011) ("[T]he state's male-gaze entirely erases the lived experiences--for women--of pregnancy and of abortion."); Lama Abu Odeh, *Critical Directions in Comparative Family Law: Honor Killings and the Construction of Gender in Arab Societies,* 58 AM. J. COMP. L. 911 (2010) (considering the male gaze in public dancing areas); L. Bennett Capers, *On Justitia, Race, Gender, and Blindness,* 12 MICH. J. OF RACE AND LAW 203, 206 n. 17 (2006 (describing the black gaze); Jeannie Suk, *Is Privacy a Woman?,* 97 GEO. L. J. 485, 488 (2009) ("Privacy is figured as a woman, an object of the male gaze."); Rebecca Tushnet, *Creativity and the Law: Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children,* 86 NOTRE DAME. L. REV. 2133, 2152-53 (2011) (describing gendered gazes); Aziza Ahmed, *When Men are Harmed: Feminism, Queer Theory, and Torture at Abu Graib,* 11 UCLA J. ISLAMIC & NEAR E. L. 1, 12-13 (2011/12) (describing torture, gazes, and pornography).

[48] *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J. L. & HUMAN. 227 (2009).

[49] According to Russell, the dominant gaze designates "through narrative and imagery, racial inequalities." Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film,* in CRITICAL RACE THEORY: THE CUTTING EDGE 56, 57 (Richard Delgado ed., 1995).

[50] *Capability and Well-Being,* in THE QUALITY OF LIFE 36-37 (Martha C. Nussbaum & Amartya Sen eds., 1993); *see also* AMARTYA SEN, INEQUALITY REEXAMINED (1992); AMARTYA SEN & SUDIR ANAND, CONCEPTS OF HUMAN DEVELOPMENT AND POETRY:

peer at classes, they avoid describing them as "poor" or "rich," though a quick read of the cases reveals broad wealth differentials. These muddled case-law class identifications correspond most to popular descriptions, like those denounced in Paul Fuller's CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM (1983), which identifies "upper," "upper middle," "middle," "lower middle," and "lower" stratas.[51] Sometimes court delineations are sufficiently hazy that they also resemble Nancy Mitford's famous specification of "U" and "Non-U" classes (that is, Upper and Non-Upper).[52]

I will track judicial usage, identifying where courts peer at the "poor," the "wealthy," the "middle class" and the "working class." This last category corresponds to Fuller's "lower middle," and is often described by courts as both abject and bucolic.[53] I also borrow from sociologists who have identified "deep poverty."[54] Since judicial language proves highly vague, this can make precision challenging. I acknowledge this problem at the outset. However, I see this as another symptom of peering's failures, as peerers prove less concerned with facts than with manufacturing reality through visual gestures that differentiate or align legal subjects with the bench or the assembly. These gestures, however, do have material consequences that trigger Sen's delineation of poverty, since identifying a neighborhood as blighted leads to its inhabitants' expulsion from care networks that foster capabilities.[55]

It is to this complex law of condemnation that I will now turn.

A MULTIDIMENSIONAL PERSPECTIVE, HUMAN DEVELOPMENT PAPERS (1997), Sabina Alkire, *Choosing Dimensions: The Capability Approach and Multidimensional Poverty, in* THE MANY DIMENSIONS OF POVERTY (2008).

[51] CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM 27 (1983).

[52] *See* NANCY MITFORD, ALAN STRODE, & CAMPBELL ROSS, NOBLESSE OBLIGE: AN ENQUIRY INTO THE IDENTIFIABLE CHARACTERISTICS OF THE ENGLISH ARISTOCRACY (1954).

[53] For examples of abjection, *see* discussion regarding *Miami Redevelopment*, note 118, *infra.* For the bucolic, see discussion of *Kelo* note 238, *infra.*

[54] *See* text accompanying note 419, *infra.*

[55] *See, e.g.,* interview with Mr. Hilary Saunders, at text accompanying notes 404-408, *infra.*

II. The law of takings

The Fifth Amendment prohibits takings of private property for public use without just compensation,[56] a prohibition that extends to the federal and state governments.[57] State constitutions generally track this protection.[58] Condemnations that shift property titles qualify as takings,[59] and will be the acquisitions I worry about in this paper.

Jurists and scholars argue over what "public use" means. Justice Clarence Thomas construes the phrase literally, in line with original intent.[60] Even before 2005's *Kelo*, however, many jurists read "public use" to mean "public purpose," a gloss justifying blight removal[61] and neighborhood-razing economic redevelopment.[62] Scholars such as David Dana lament that this evolution empties the concept of meaning,[63] though the Supreme Court assures us that narrow interpretations would "be impractical given [society's] . . . evolving needs."[64]

The transition from public use to public purpose, however, depended on a metamorphosing judicial regard that augurs sometimes disastrous consequences for poor people.

III. Peering, the poor, and public purpose

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[56] *See* note 5, *supra.*
[57] David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 366 (2007). Dana's article sets forth an excellent review of the Takings Clause.
[58] *Id.* ("[S]tate constitutions contain very similar language.")
[59] *Id.* Regulatory takings also occupy Fifth Amendment jurisprudence. *See, e.g.,* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights,* 88 CORNELL L. REV. 1549 (2003).
[60] *Kelo* at 511 ("The Clause . . . concern[s] whether the property is used by the public or the government.") (Thomas, J., dissenting).
[61] Berman v. Parker, 348 U.S. 26, 32 (1954) (blight removal is a public purpose).
[62] *Kelo* at 480 (redevelopment is a public purpose). For earlier cases, see text accompanying notes 170-173, *infra.* ("starting in the late 1800s")
[63] Dana, supra note 57 at 8: ("[T]he public use limitation on eminent domain is no limitation at all, since it is hard to imagine a project that cannot be said to generate some sort of benefit for the public.").
[64] *Kelo* at 479.

The meaning of "public use" evolved over time: It once required that apprehended property be made accessible to the public,[65] but now public rescue satisfies a public purpose.[66] The tipping point for when rescue proves necessary has also altered, a transmutation related to the shifting ways courts and lawmakers peer at people and property. After the Depression, rescue might be triggered by a finding – that is, by a visual perception -- that a poor neighborhood harbored filth and disease.[67] The courts affirming these sightings of "blight" wrote nightmarish descriptions of poor communities as sites of deviance and putrefaction.[68] This peering makes the poor into wretches and monsters who should be swept away to uncover a beautiful United States. If hedonism exists here – as Mulvey and others argue that the dominant gaze seeks and delivers pleasure[69] – it exists in the thrill of witnessing the grotesque and issues from courts' contrasting their milieu with abjection. Few judges dissent in these cases.

Later, the stakes changed. As the country prospered, legislative and some judicial eyes adjusted to gross poverty,[70] and now also balked at "unoptimized" land. Pleasure, too, perfumes these cases. Courts and lawmakers preened not as superiors to the wretched, but as peers of the rich, who promised to substitute dingy boroughs with affluent pavilions.[71] Dissenters cropped up here, and their pleasure issues from their satisfaction at looking at middle-class dwellings, and the proofs of petit bourgeoisies' humble lives and hard work.[72]

The development of vision in the takings jurisprudence shows courts peering first down, then up. With the advent of the escalating, aspirational gaze, poor people fade to black as courts and legislatures now gift legislative determinations of blight with maximal deference. The only argument

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[65] *Kelo* at 511-515 (Thomas, J., dissenting).
[66] *See* discussion beginning with *Muller*, note 97, *infra.*
[67] *See* Section III(a)(ii), *infra.*
[68] *Id*.
[69] *See* text accompanying notes 38-41, *supra.*
[70] *See* Section IV, *infra.*
[71] *See, e.g.,* Section IV (a) - (d), *infra* (Poletown, Hathcock, Kelo, Goldstein).
[72] *See, e.g.,* text accompanying note 183, *infra* (Ryan dissent).

left squabbles over whether states can take middle class properties so they fecundate money. Which form of peering will win out? That petit bourgeois gaze that admires middle or working class scruffiness, or the aspirational gaze? With the battle now narrowed between the middle and opulent classes, poor people's rights to stay in their home remains beyond debate.

a) Peering at the poor in blight cases: Monstrous, filthy, unspeakable

Takings cases from the 20s to the 50s and beyond buoyed their takings analyses with sensually gratifying and horrific descriptions of poor people. These contrivances resemble "art horror" described by visual and literary critics, and so I first describe horror conventions and then apply them to the cases.

i) Horror and pleasure and poverty

Noël Carroll and Tzvetan Todorov pioneered art and literary criticism that limns horror motifs. Carroll specifies "art-horror" as literature or film that terrorizes through images of "unclean and disgusting" beings[73] who hail from "oozing places."[74] The engine of fear is infestation: "Horrific beings are often associated with contamination – sickness, disease, and plague – and often accompanied by infectious vermin."[75]

Todorov allows that another feature of horror is the "monster's" ambiguous identity – natural, or supernatural?[76] This liminal space induces pleasure for several reasons: The audience revels in horror because it has endured the experience and come out the other side,[77] affirmed its ability to

[73] NOEL CARROLL, THE PHILOSOPHIES OF HORROR: OR, PARADOXES OF THE HEART 21 (1990).
[74] *Id.* at 23.
[75] *Id.* at 28.
[76] "[T]he text must oblige the reader to . . . hesitate between a natural and a supernatural explanation of the events described." TZVETAN TODOROV, THE FANTASTIC: A STRUCTURAL APPROACH TO A LITERARY GENRE 33 (1975).
[77] Carroll, *supra* note 73 at 193 (writing of "endurance tests").

resolve the puzzle of the monster's existence,[78] and indulged in the prohibited while participating in a process that restores the social order.[79]

Artists extended this brand of horror to poor people *avant la lettre*. For example, British painter and engraver William Hogarth invested his 1751 pro-temperance broadside *Gin Lane* with these whimsies. Hogarth illustrated Henry Fielding's contemporary attack on the "gin epidemic"[80] by depicting drunken poor people and poverty itself as spreading corruptions that leveled upright cities:

[81]

This gratifying concept of poverty resonates still. Yves Marchand and Romaine Meffre's recent controversial photographs of Detroit, described as "economic disaster porn,"[82] reveal modern reliance

[78] *See* MATT HILLS, THE PLEASURES OF HORROR 33 (2005) ("[A]udiences are presumed to derive pleasure from the resolution (or, indeed, non-resolution) of very specific narrative puzzles.")

[79] Julia Kristeva links the horrific with the engulfing mother, who is repulsed to patriarchy's satisfaction. *See, e.g.,* JULIA KRISTEVA, THE POWERS OF HORROR 64 (1982) (Describing maternal horror motifs).

[80] *See* THOMAS RAYMOND CLEARY, HENRY FIELDING: POLITICAL WRITER 280-281 (1984) (describing Fielding's and Hogarth's temperance work).

[81] William Hogarth, *Gin Lane* (1751). Reproduced by courtesy of the trustees of the British Museum.

on these horror conventions. Like the art-horror described by critics and given early life by Hogarth, Detroit's poverty spreads a mesmerizing disease. Another remarkable feature of the Marchand and Meffre photos are their lack of human beings. The artists represent a degraded people through the proxy of destroyed housing.[83] The poor exist off-screen, and are both magnified and disappeared by these images that allege their neglect:

[84]

Takings opinions dehumanize poor people through horror imagery that also treats middle or upper class audiences to the pleasures of horror and status assurances. Like Hogarth, Marchand, and

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[82] *See* Noreen Malone, *The Case Against Economic Disaster Porn*, THE NEW REPUBLIC, Jan. 22, 2011, *available at* http://www.newrepublic.com/article/metro-policy/81954/Detroit-economic-disaster-porn# ("By presenting Detroit, and other hurting cities like it, as places beyond repair, they in fact quash any such instinct."). *See also* John Patrick Leary, *Detroitism,* in GUERNICA: A MAGAZINE OF ART AND POLITICS, Jan. 15, 2011, *available at* http://www.guernicamag.com/features/leary_1_15_11/ ("So much ruin photography and ruin film . . . dramatizes spaces but never seeks out the people that inhabit and transform them.").

[83] *Id.* ("[T]he pictures of Detroit that tend to go viral on the Web are the ones utterly devoid of people.").

[84] THE RUINS OF DETROIT 77 (2010).

Meffre, they depict monstrosity, and justify takings as the clearance of disease and deviance, without attending to the problem of the people living in these communities.

ii) The cases

Takings cases hailing from the 1920s onward grew from the "slum clearance" efforts pioneered in fin de siècle New York.[85] While racism influenced these initial blight definitions,[86] progressives advocating blight cleansing sought poverty relief, and did not claim race and class prejudice, voyeurism, or self-aggrandizement as priorities.[87] In fact, since before *Berman* leftists convincingly argued for limited property rights in the name of poverty uplift.[88] This position finds its genesis in the early 20th century's Progressive Movement's belief in wealth redistribution, and some of its greatest expression in Roosevelt's New Deal.[89]

What is so chilling is that a perspective developed to fight poverty quickly deliquesced into devastating class and race peering. Blight-clearance cases predating the Depression and onward dramatize the tension between the natural and supernatural and describe spreading contagions, tropes

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[85] Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 YALE L. & POL'Y REV. 1, 8 (2005) ("[T]he first serious efforts at 'slum clearance' began in New York City at the end of the century.').

[86] *Id.* at 6 ("`Blight' was a facially neutral term infused with racial and ethnic prejudice."); *id.* at 16-17 (blight was a "medical term[]" that made "analysis appear objective and scientific, but it also reflected [] [racial] prejudices.").

[87] *See id.* at 23: "Many housing reformers . . . believ[ed] that [clearances] would improve the social conditions of the urban poor.").

[88] *See* Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law,* George Mason Law & Economics Research Paper No 8-53 at 3-26 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854 ("The desire to promote redistribution of wealth to the poor is a longstanding reason for opposition to judicial protection of property rights."); Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path,* 10 CHAP. L. REV. 1, 31 (2006) (Douglas – a Roosevelt appointee firmly in the grip of Progressive constitutionalism . . . . [deferred] to the legislature's authority to reshape the neighborhood [in *Berman'."*).

[89] Timothy Sandefur, *id.* at 20 (Progressives' skepticism about poverty rights); JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY 8, 125 (2007) (Progressive New Dealers retracted property rights).

that emerge as codes for class and race bias. And they thrill and disgust like Hogarth, Marchand and Meffre, while providing pleasurably status-affirming puzzles for readers to decipher.

New York Court of Appeals' 1936 *New York City Housing Authority v. Muller* hallmarked this practice: In the early 1930's, New York City's Housing Authority (NYCHA) embarked upon "slum-clearance projects."[90] It sought to purchase and condemn Lower East Side buildings owned by millionaire Vincent Astor.[91] Andrew Muller owned two buildings in the midst of Astor's tenements, and held out for a high payday.[92] NYCHA then sued Muller under the auspices of eminent domain.[93]

Who lived in the Muller and Astor buildings? I can find almost no accounts of the residents except to glimpse them in descriptions of Astor slums[94] and a NEW YORK TIMES notation that "Mr. Astor['s] employees are [working] to find new quarters for the tenants [or] . . . to arrange for the moving of their possessions."[95] For a better view, we must consult New York's Tenement Museum archive, which houses family portraits by photographer Arnold Eagle:

[90] The history of New York City Housing Authority v. Muller, 277 N.Y. 333 (1936) is given in A. SCOTT HENDERSON, HOUSING AND THE DEMOCRATIC IDEAL 64 (2000).
[91] *Id.* at 69-70 (2000).
[92] *Id.* at 72.
[93] *Id.*
[94] *See, e.g.,* MERYL GORDON, MRS. ASTOR REGRETS: THE HIDDEN BETRAYALS OF A FAMILY BEYOND REPROACH 68 (2008) (" 'Mr. Astor was shocked at the conditions he found in houses on Astor land and decided to get rid of slum properties.'"); ISABEL PATERSON, THE GOD OF THE MACHINE 231 (1943) ("Vincent Astor. . . sold slum property which had been exploited till there was no income left in it.").
[95] *Astor Tenements Ordered Vacated,* N.Y.T., Mar. 30, 1934, *available at* http://query.nytimes.com/mem/archive/pdf?res=9E00EFD71539E33ABC4850DFB566838F629EDE.

[96]

The New York decision upholding Muller's property condemnation declines to observe his renters with Eagle's empathy. Instead, *Muller* graphically depicts the Lower Eastside as a sewer, issuing a gross contrast to Eagle's thoughtful likeness:

> The public evils, social and economic of such conditions [in slum tenements], are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and State. Juvenile delinquency, crime and immorality are there born, find protection and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war against crime and immorality. Indirectly there is

[96] Arnold Eagle, *Untitled* (circa 1935-1937), *available at* http://photos.tenement.org/mwebcgi/mweb.exe?request=image;hex=PA 8803.14.JPG (last visited July 11, 2013).

an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. . . . [They are] an ancient evil . . . . The menace still exists.[97]

Is this the language of anti-poverty activism?[98] Human beings can be discerned here, but just barely – providing a stronger tie to the redacted Detroit "disaster porn" images than the Hogarth etching in its simultaneous giganticism and diminishment of people. Beneath decay, malice, and contagion we spy hyperphysical "juveniles" and "dwellers;" the court's affixation of "breed" (which humans do in our vernacular more than viruses) to "disease" conveys that people are the plague here, yet because they are not depicted as human the Court need not take responsibility for insulting them (and can even take credit for saving them). These hidden and spotlit monsters prove a spreading, encroaching epidemic threatening the "entire city and State." This scariness is pleasurable: The court gratifies its bourgeois audience by guiding them through this epic, which places the tenement residents in the extranatural camp and restores the social order through banishment. And even while the Court can style itself as a Samaritan to *les misérables*,[99] it admires itself in the mirror that it has erected, one in which it and its peers shine all the brighter off the foil of these degraded castaways.[100]

Such rhetoric inspirits cases debouching from the late 1920s forward, describing tenements as "bre[eding]" grounds of suspect citizens,[101] and "swamps"[102] that multiply political traitors,[103] contagious

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[97] *Muller* at 471-472.
[98] *See* text accompanying notes 88-89, *supra* (new deal, progressives)
[99] *Id*.
[100] Here, I recall Virginia Woolf's similar analysis of gender relations as exercises in looking and self-regard in A ROOM OF ONE'S OWN 38 (1929): "How is he to go on giving judgement, civilizing natives, making laws, writing books, dressing up and speechifying at banquets, unless he can see himself at breakfast and at dinner at least twice the size he really is? . . . The looking-glass vision is of supreme importance. . . . Take it away and the man may die."
[101] Adler v. Deegan, 167 N.E. 705, 711 (1929) ("The Multiple Dwelling Act is . . . . a measure to eradicate the slum. . . . Here is to be bred the citizenry . . . . The end to be achieved is more than the avoidance of pestilence or contagion."). (Cardozo, J., concurring.).
[102] Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 603-4 (1938)("[The word slum] has been doubtfully connected with a dialectal use of the word 'slump' in the sense of a swampy, marshy place.'") (citing ENCY. BR. 25, 246.).

disease and criminality,[104] and pestilential immorality.[105] Then, after 1936's *Muller,* came the above-cited high bench nadir that is *Berman v. Parker*, approving the condemnation of D.C.'s blighted properties. In *Berman,* Justice Douglas explained his deference to legislative will as a wise submission to statesmen's expertise on urban planning,[106] a pattern that activists like Jane Jacobs would later deride for cloaking blind elitism with class pretensions:[107] "Observe, observe, observe, and listen, Jacobs challenged the experts."[108] Jacobs' anxieties about blinkered vision find validation in *Berman's* use of peering, which combines class and race bias, along with the thrill of the horribly exotic:[109] The contagion motif proved so powerful that it attached to non-blighted properties, under the theory "if the community were to be healthy, it if were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole."[110] This metaphor deployed the Hogarthian and modern "disaster-porn"-like association of plague and horrific threat with poverty.

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[103] *Id.* at 605 ("[Just as the Supreme Court approved the Veterans' Welfare Act [because it might institute] . . . a sounder and saner patriotism . . . [slum clearance also]. . . tend[s] to ward off epidemics of disease and preserve the health of all of the inhabitants of a city, [so] is a public purpose."). I argue that "political traitors" are insinuated by the court through its contrast between sane patriots vs. diseased projects residents.

[104] Saphn v. Stewart, 268 Ky. 97, 109 (1938) ("[T]hose who live in sumptuous residences environed by the elite [will] account themselves still more blessed, if by improved conditions of housing in another section they are relieved from . . . an epidemic of smallpox, typhoid fever. . . [or] crime.")

[105] Chicago v. R. Zwick Co., 27 Ill. 2d 128, 134-135 (1963) ("[S]lum and blight walk hand in hand with juvenile delinquency, spread of contagious diseases, crime and immorality.").

[106] *Berman* at 36 ("If the Agency considers [condemnation] necessary . . . . [it] is not for the courts to determine [otherwise]."). *See also* CHRISTOPHER KELEMEK, THE TRANSATLANTIC COLLAPSE OF URBAN RENEWAL: POSTWAR URBANISM FROM NEW YORK TO BERLIN 244 (2012) ("[M]ost postwar liberals legitimized planning through an oligarchy of enlightened specialists."). The wisdom of deferring to the expertise of lawmakers has been challenged. *See, e.g.,* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo*,* 15 S. CT. ECON. REV. 183, 233 (2007); ("Deference to the political process . . . . . fail[s] to come to grips with [its] many defects[]."); Ilya Somin, *Federalism and Property Rights,* 2011 U. OF CHIC. LEG. Forum 53, 55 (2011) (the "deference to experts" rule would "justify underenforcement of numerous other constitutional rights.").

[107] *See, e.g.,* JANE JACOBS, THE LIFE AND DEATH OF GREAT AMERICAN CITIES 441 (1961) (deriding an autocratic and "nonsensical" Boston planner who has no "real life" understanding of neighborhoods).

[108] ROBERTA BRANDES GRATZ, THE BATTLE FOR GOTHAM: NEW YORK IN THE SHADOW OF ROBERT MOSES AND JANE JACOBS xxviii (2011).

[109] *See* note 7, *supra.* Douglas's deference to planning experts carried forward to *Kelo*, where the majority justified its deference on the "comprehensive character of the plan." *Kelo* at 484.

[110] 348 U.S. 26, 32-33 (1954). *See also id.* at 31 (petitioner's property not blighted).

This scandalous brand of peering persists in our case law. Federal courts have cited *Berman* 400 times, most recently by the high bench in 2010,[111] and district courts in 2012.[112] These opinions dispatch *Berman* to affirm the wide swath of police powers. In the 1981 decision *State v. Miami Redevelopment Agency*, the Florida Supreme Court considered a pledge of tax increment revenues as a source of debt service on bonds for slum redevelopment projects.[113] People of color occupied these areas.[114] The court found such financing a Fifth Amendment public purpose because it aided slum clearance,[115] taking care to replicate *Berman's* "open sewer" and "congenital disease" language.[116] *Miami Redevelopment* also enlarged on *Berman,* observing that project site inhabitants lived in "sub-human"[117] conditions, were "abject," as well as "plagued" by crime and fear,"[118] and "survive[d]" on "cat food."[119] Since the project would not relieve this abjection,[120] this panorama of horror only established the public benefit of sweeping off such a disgusting sight "outside the area."[121] Like in art-horror, Hogarth, and disaster porn, humans were exaggerated and vanished at the same time.

Troubling indulgences in this habit also maladjust 1985's *Post v. Dade County*,[122] where a Florida Court of Appeal approved Dade County's slum condemnations in a largely minority area.[123] The court

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[111] McDonald v. City of Chicago, 130 S. Ct. 3020, 3125 (2010) (*Berman* authorizes judicial deference).
[112] *See id.* and 49 SB, LLC, v. Village of Haverstraw, 2012 U.S. Dist. LEXIS 16518, *24 (2012).
[113] 392 So. 2d 875 (1981). *Miami* was overruled in Strand v. Escambia County, 32 Fla. L. Weekly S 587 (2007), though not because of its slurs. The court held that raising tax revenues needed approval by referendum.
[114] *Miami Redevelopment* was decided in 1981. For the rapid transformation of Miami in the early 1980s, *see* Michelle S. Viegas, *Community Development in the South Beach Success Story,* 12 GEO. J. POVERTY LAW & POL'Y 389, 393-394 (2005) (describing the sudden influx of Cubans in April 1980 because of the Mariel boatlife).
[115] *Miami Redevelopment* at 888 ("It was recognized very early then that slum clearance and public housing, when declared to be so by the legislature, were public purposes."). The court decided this question under Article VII of the Florida constitution.
[116] *Id.* at 890.
[117] *Id.* at 883.
[118] *Id.*
[119] *Id.*
[120] *Id*. at 893 ("the project guarantees no direct relief to the displaced poor").
[121] *Id.* at 893.
[122] 467 S. 2d 758 (1985).
[123] *See* JEFFREY S. LOWE, REBUILDING COMMUNITIES THE PUBLIC TRUST WAY: COMMUNITY FOUNDATION ASSISTANCE TO CDCS , 1980-2000 86 (2006) (describing white flight in Miami-Dade from the 1960s through 1990).

invoked horror imagery through a quotation of *Berman*'s "congenital disease" language,[124] importing horror's pleasurable puzzle of situating the reader in relation to the inhuman deliverers of contagion. This gratification grows all the more alarming upon consultation of contemporary news accounts of "black slum[s]" in Dade County, which in the early 1980s saw civil unrest because of police violence.[125] Recent scholars also document peering's grim effects in noting that gentrification exacerbated Miami-Dade homelessness.[126]

Horror retains its jurisprudential efficiency. In *Kelo v. City of New London,*[127] the Supreme Court upheld an eminent domain taking that would rejuvenate the "distressed" southeast Connecticut city of New London.[128] *Kelo* sanctioned the City's approval of the New London Development Corporation (NLDC)[129] municipal development plan,[130] which set events into motion.[131] Next, Pfizer announced its plans to build a $300,000,000 facility on the site.[132] The Court extended *Berman* logic to underutilized, not blighted properties.[133] The takings approved of in *Kelo* are known as economic development condemnations rather than slum clearances.

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[124] *Dade County* at **6.
[125] *Police Blockade Troubled Miami Slum,* SPOKANE CHRONICLE, Dec. 29, 1982, at 1, *available at* http://news.google.com/newspapers?nid=1345&dat=19821229&id=OVxOAAAAIBAJ&sjid=d_kDAAAAIBAJ&pg=5914,3434426 (describing race violence and discrimination in Overtown and Liberty City). As of 2012, Overtown remains described as a slum. *See* Michael E. Miller, *Occupy Miami Descends into Drugs and Chaos in an Overtown Apartment Building*, MIAMI NEW TIMES, Mar. 22, 2012, *available at* http://www.miaminewtimes.com/2012-03-22/news/occupy-miami-descends-into-drugs-and-chaos-in-an-overtown-apartment-building/.
[126] *See* Christina Ferrara, Gentrification and Homelessness in Miami Date County, Aug. 14, 2010. Unpublished dissertation on file with author.
[127] 545 U.S. 469 (2005).
[128] *Kelo* at 473 (describing New London); *id.* at 475 ("There is no allegation that any of these properties is blighted."); *id.* at 485 ("Petitioners [argue against the constitutionality of] . . . economic development . . . takings. Again, our cases foreclose this objection.").
[129] *Id.* at 473.
[130] *Id.* at 473-474.
[131] Kelo v. City of New London, 2002 Conn. Super. LEXIS 789 at *7 **("**The city council in approving the MDP authorized the NLDC to acquire properties within the development area.").
[132] *Id.* at 6; *see also* Eric Rutkow, *Kelo v. City of New London*, 30 HARV. ENVIRON. L. REV. 261, 262 (2006) (naming amount).
[133] *See* David Dana, supra note 57 at 10-11 ("Prior to the United States Supreme Court's 2005 decision in *Kelo,* it was not entirely clear whether . . . economic development was a public

While the court abstained from lengthy descriptions of New London, beyond a confirmation that the city council deemed it "distressed"[134] the majority's peering at New Londoners can be discerned in two optic gestures: First, like *Post* and *Miami,* it relied on *Berman* to introduce horrific imagery. It cited *Berman's* assessment that "the concept of the public welfare . . . . [encompasses values that are] spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean."[135] Even while the Court seems to celebrate anti-poverty impulses that supposedly drove the condemnation,[136] it insinuates that New London is spiritually decrepit, insalubrious, ugly, and poor by vaunting *Berman's* promotion of spiritual, physical, aesthetic, and financial values. These dispraisals are badges of encroaching monsters in horror, and of the Hogarth and disaster porn aesthetic. They also neatly contrast New London denizens from the city officials who would align themselves with Pfizer's promised wealth.[137]

Peering in *Kelo* can also be discerned in its reliance on the legislative gaze. The *Kelo* court allowed that the legislature's perceptions of New London controlled the case.[138] How *did* the City see this "distressed" area? New London, it seems, had a faulty sewage system, and Pfizer conditioned its business on New London's guarantee it would be fixed.[139] The NLDC described New London's distress in

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benefit."). Some state and federal cases permitted economic rejuvenation takings before *Kelo, see* text accompanying notes 170-173, *infra.*

[134] *Kelo* at 473.

[135] *Kelo* at 481 (citing *Berman* at 33.).

[136] *Kelo* at 473 ("In 1998, the city's unemployment rate was nearly double that of the State . . . [t]hese conditions promoted state and local officials to target New London."). In this way, we may see Progressive impulses swiftly degrading into class bias. *See* text accompanying notes 88-89, *supra*.

[137] New London officials' upward gaze is detailed in text accompanying notes 205-208, *infra*.

[138] *Kelo* at 483 ("[City leaders'] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.")

[139] Kelo v. City of New London, 2002 Conn. Super. LEXIS 789 at *111 (Pfizer demanded sewer renovation).

its Municipal Development Plan, which contains a lengthy section on its waste systems,[140] and in it we can find hints of the sewers, filth, stench and fecal-borne disease that possessed such dehumanizing powers in *Muller, Berman, Miami Redevelopment Agency,* and *Dade County*.[141]

Kelo does not stand alone in its millennial evocations of horror. In 2006's *City of Norwood v. Horney*, the Ohio Supreme Court invoked these specters when deciding that the majority-Anglo[142] city of Norwood was safe from eminent domain because it was a "modern urban environment."[143] Here peering at the poor emerged as a tactic to preserve a weedy, but still middle class and largely majority race business district from redevelopment. The court doomed the Ohio rejuvenation despite *Kelo*[144] because Ohio adopted "post-*Kelo*" legal reforms that prohibit economic development takings:[145] Ohio in 2005 banned takings unjustified by blight.[146] The *Norwood* court concluded that the project site was insufficiently dilapidated and housed modest yet productive franchises.[147]

Slum clearance, however, proved a justification for takings,[148] which is very much in line with post-*Kelo* reformations' primary concern for the middle class (or, really, no one at all).[149] Since the

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[140] NEW LONDON DEVELOPMENT COMMISSION, MUNICIPAL DEVELOPMENT PLAN 5-37-38 (2000) ("Sanitary sewers are located on almost all streets within the MDP area . . . It is anticipated that all discharges to the sewers will be domestic waste. . . . The existing sewers throughout the NUWC property will be removed. These sewers meander around the buildings that they serve, with numerous manholes and pipe segments that would require future maintenance efforts.").

[141] *Id.*

[142] *See Norwood, Ohio*, CITY DATA.COM, *available at* http://www.city-data.com/city/Norwood-Ohio.html. (last visited July 11, 2013).

[143] 110 Ohio St. 3d 353, 355 (2006).

[144] *Id.* at 377 ("[W]e have never found economic benefits alone to be a sufficient public use for a valid taking.").

[145] *See* Ilya Somin, *Assessing the Political Responses to Kelo*, 93 MINN. L. REV. 2100, 2125 (2009) (describing post-*Kelo* bans on economic development takings.).

[146] *See Norwood* at 355, citing 2005 AM. SUB. S.B. No. 167. This was one of the "post-*Kelo*" acts that forbade rejuvenation projects. *See* Ilya Somin, *Is Post*-Kelo *Eminent Domain Reform Bad for the Poor?* 101 NW. U. L. REV. 931, 1933 (2007) (describing post-*Kelo* reforms that contain "`blight'" exceptions "so broad that virtually any property can be [so] defined."). At page 1934, Somin cites Ohio's post-*Kelo* reform law. *See also* Somin, *Political Responses to* Kelo, supra note 145 at 2134, describing the development of this legislation.

[147] *Norwood* at 360 (noting a lower court's discovery of a "paucity of evidence supporting the necessary finding that a `majority of structures' in the neighborhood were conducive to ill health and crime, detrimental to the public's welfare, or otherwise satisfied the criteria of a slum, blighted, or deteriorated area.").

[148] *See* note 144, *supra* (citing p 377).

blight-vs.-non- blight distinction contains colossal ambiguities, [150] the court saved Norwood by peering at the poor, who were imagined as so wretched that they existed apart from Norwood denizens. The court both conjures poor people and distinguishes them from Norwoodians by citing *Muller's* description of slums as "breeding places" of "disease[s]" that "spread,"[151] and also *Berman's* "congenital disease" metaphor.[152] The court also replicated *Muller* and *Berman's* equation of disease, spread, and contagion – even cancer[153] -- with the buildings that house the poor.[154] Again, since buildings are not infectious, this account barely disguises a horrific visual assessment of low-income people. In any case, Norwood is not a site of such contagion, and may pride itself on the court's having designated its inhabitants peers of the worthy middle class.

Less startling but still visible peering energizes another "post-*Kelo* reform"[155] New Jersey case, *Gallenthin Realty Development, Inc. v. Borough of Paulsboro.*[156] *Gallenthin* prohibited a New Jersey borough from taking vacant wetlands because underutilization did not qualify as "blight," which remained the only trigger for takings under the New Jersey Constitution.[157] *Gallenthin*, like *Norwood,* curtailed the state's ability to grab land under a broad definition of blight by similarly elaborating on its notorious qualities. Again, "slums" emerge as "breeding grounds for crime, disease, and unhealthful living conditions."[158] *Gallenthin's* analysis also depended on Mabel L. Walker, whose 1938 book URBAN

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[149] *See* Somin, *Is Post*-Kelo *Reform Bad for the Poor?,* supra note 146, at 1935 (11 of these reform states only protect the middle class); *id.* at 1932 (criticizing reforms in 17 states for being ineffective).
[150] *See, e.g.,* Somin, *Assessing the Political Responses to* Kelo, supra note 146 at 2134-35 ("The definition of blight under Ohio law is broad enough to cover almost any area").
[151] *Norwood* at 369-70 (citing *Muller* at 339).
[152] *Id.* at 370 (citing *Berman* at 34).
[153] *Id.* (citing LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 169 (1986) (noting descriptions of blight as a cancer).
[154] *Id.* ("The term 'blight' itself, borrowed from science . . . became synonymous with urban decay, and courts were soon invoking the language of disease.").
[155] Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB'Y GOV. L. REV. 1, 13 (2011).
[156] 924 A.2d 447, 449 (2007).
[157] *Gallenthin* at 449.
[158] *Id.* at 457 (citing Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law,* 35 REAL PROP. PROB. & TR. J. 389, 393 (2000)).

BLIGHT AND SLUMS identified blight's signatures as "obviously reduced economic and social values."[159] It's worth noting that in URBAN BLIGHT Walker additionally argued that blight offends because it accelerates "[t]he exodus of the more prosperous groups. . . . Rents fall. Poorer classes move in. The poverty of the tenants contributes further to the general air of shabbiness. . . . At length the worst sections become slums with high disease and high crime rates."[160] Though the *Gallenthin* court avoids a high gothic about poverty, it saves a vacant lot by borrowing the gaze set by Walker, who knew enough about horror conventions to characterize the poor as shabby spreaders of disease and crime.

Finally, peering authorizes 2012's *City of Joliet v. Mid-City Nat'l Bank of Chicago,*[161] a takings case out of Illinois. Joliet initiated eminent domain proceedings against Evergreen Terrace, a complex close by a Harrah's casino.[162] Only blight could authorize condemnation under Illinois' own post-*Kelo* reform.[163] New Evergreen was dilapidated in early 2005, when the city declared it blighted and initiated eminent domain proceedings in October.[164] Later that month, the U.S. Housing and Urban Development [HUD] and Evergreen's owners began repairing Evergreen Terrace at an eventual cost of at least five million dollars.[165] Joliet still sought its blight condemnation; it worked to exclude evidence of repairs made after 2005, a move that the court rejected.[166]

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[159] *Id.* (citing Walker at 5).
[160] MABEL L. WALKER, URBAN BLIGHT AD SLUMS 17 (1938).
[161] 2012 U.S. Dist. LEXIS 160485.
[162] Kim Janssen, *Joliet Tenants Allegedly Called 'Rats and Whores From Chicago,'* CHIC. SUN-TIMES, Sept. 27, 2012, *available at* http://www.suntimes.com/news/metro/15420337-418/assistant-us-attorney-joliet-officials-called-section-8-residents-rats-and-whores-from-chicago.html (last visited July 11, 2013).
[163] *See Joliet*, supra note 161, at *5, citing the 2007 EQUITY IN EMINENT DOMAIN ACT; *see also* Somin, *Assessing the Political Responses to* Kelo, supra note 146 at 2125 (discussing the Illinois law and critiquing its blight exception as being "extremely broad").
[164] *Joliet* at *15.
[165] *Id.* at * 6.
[166] *Id.* at *19 ("Joliet argues that the public purpose determination must ignore all evidence that post-dates the 2005 Ordinance. The law of eminent domain, however, does not support this result.").

A judicial hearing proved newsworthy because Assistant U.S. Attorney Kate Elengold alleged that Joliet's councilmembers and Mayor called Evergreen's largely African-American[167] tenants "rats," "whores," and "prostitutes" who would "go back to Chicago" if ousted and given vouchers.[168] While the *Joliet* court did not denounce these insults, it preserved Evergreen from condemnation by allowing in post-2005 evidence of rehabilitation. It also, as in the *Norwood* and *Gallenthin* cases, trotted out imaginary poor people by comparing the new health of Evergreen to *Berman's* "congenital disease."[169]

These cases (and, in *Joliet's* instance, lawmakers), then, dehumanize and diminish poor people by invoking thrilling horror imagery that gratifies a middle-to-upper class audience with status assurances. Like the conventions described by art-horror critics, and similar in expression to the works of Hogarth and Marchand and Meffre, they justify takings as the clearance of monstrous deviance, without ever attending to the problem of the real people living in the communities.

Yet other cases reveal additional examples of lawmakers peering at social classes. The technologies of peering at the wealthy and the petit bourgeois prove just as complex and dangerous to the poor as does the gaze set by the likes of *Berman* and *Muller.*

IV. Aspirational peering and the combative middle class gaze

Justifications for eminent domain have evolved since *Muller. Muller* and *Berman* deemed slum control a public purpose within the meaning of the Fifth Amendment. But what about when cities or states wanted to prod economic life into sleepy, but unblighted properties? The permissive law birthed in 2005's *Kelo* had actually been germinating for more than a century. Starting in the late 1800s, the

[167] Kim Janssen, note 162, *supra* (citing "poor black residents" as residents of Evergreen).
[168] *Id.*
[169] *Joliet* at 24, citing *Berman* at 34-35, to distinguish Evergreen from "large-scale urban renewal" cases such as those identified by *Berman*.

Supreme Court issued opinions permitting takings to make real estate more "productive"[170] and "prosperous" [171] via irrigation of arid lands in California, exploitation of "the richest silver deposits" in Nevada[172] and a taking in Alabama to enable the building of a dam, whose energy represented "what, next to intellect, is the very foundation of all our achievements and all our welfare."[173] These cases' opulent and heroizing motifs indicates that even while grotesqueries fascinated the *Berman* and *Muller* courts, wealth aspirations also inspired findings of public use.

The aspirational gaze accrued greater vocabulary and energy, however, with 1981's *Poletown Neighborhood Council v. City of Detroit*, which approved the demolitions of working or middle class communities to facilitate legislatures' high-stakes gambling ventures. In this and related cases we spy the shifting bourgeois gaze: Whereas it once peered down, it now aspired upwards, towards promises of glamour and glory, creating new pleasures in tandem with new takings justifications. Simultaneously, we find emergent a dueling form of peering that levels itself with the beleaguered middle or working class. These eye-lines cross in *Poletown,* as well as Michigan's 2004 *County of Wayne v. Hathcock*, 2005's *Kelo*, and the New York cases *Goldstein* and *Kaur.*

a) *Poletown*

In *Poletown,* the Michigan Supreme Court upheld Detroit's transfer of private properties to General Motors, which promised to build new assembly plants to replace shuttered ones. These properties existed in Poletown, a historically Polish hub that at the time of the GM deal was between 40

[170] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 156 (1896).
[171] *See Fallbrook* at 161 and Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 402 (1876), where both opinions use this word.
[172] *Dayton* at 409 (1876). For similar mining cases, *see* Clark v. Nash, 198 U.S. 361, 370 (1905) and Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).
[173] Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916).

to 60 percent African-American.[174] No one ever alleged that Poletown was blighted.[175] The new GM plants, it was said, would preserve over 6,000 jobs and create fifteen million dollars in tax revenues.[176]

Peering does not seem much in evidence in the majority *Poletown* decision, particularly as the majority defers so greatly to legislature that it seems to engage in no scrutiny whatsoever.[177] However, the legislative gaze the Michigan Supreme Court submitted to focused intently on the specter of GM wealth. "[This] is] the biggest thing in history to happen to any U.S. urban area," Detroit Economic Growth Corporation vice president James Schafer said during the controversy.[178] Before the litigation, Detroit's Mayor Coleman Young grandiosely described how "GM would build a modern plant to produce new, lighter-weight Cadillacs . . . .[i]t's a precedent for older cities if we can accomplish it;"[179] "I'm attempting to do something that has not happened anywhere in this country, to rebuild an industrial city within the boundaries."[180]

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[174] John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit,* 41 WASH. & LEE LAW REV 49, 62 (1984) ("Of that population [affected by the taking], estimates indicate that forty- to sixty percent were black.").

[175] *Poletown* at n. 9 ("The city . . . has never sought to justify the taking or the land for this project on the ground that the area is a 'slum' or 'blighted' area.") (Fitzgerald, J., dissenting).

[176] *Id.* at 650 (Ryan, J., dissenting).

[177] *See id.* at 632 ("The Legislature has determined that governmental action of the type contemplated here meets a public need . . . . The Court's role after such a determination is limited. . . . [Legislative will] is 'well-night conclusive.'") (citing *Berman* at 32.)

Justice Ryan's dissent offers a contrasting gaze that rejects deference and looks approvingly at Poletown residents. *See* text accompanying note 183, *infra.*

[178] WILBUR C. RICH, COLEMAN YOUNG AND DETROIT POLITICS: FROM SOCIAL ACTIVIST TO POWER BROKER 185 (2000).

[179] Peter Behr, *Silence on the Line at Dodge Main (1915-1980); Chrysler Plant May Be Returned to Dust*, WASH. POST. July 13, 1980, at K1, *available at* http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&fpSetup=0&brand=ldc&dedupeOption=0&_m=276082992787fffbc285c02a0f1420d3&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzk-zSkAW&_md5=db76e426943073c60050835bc8bec235&focBudTerms=peter+behr+and+silence+and+dodge+and+main&focBudSel=all.

[180] ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 194 (1992).

Is this rhetoric akin to Progressive and New Deal-like dreams of wealth redistributions? If Detroit lawmakers did have poverty alleviation in mind, this aim (as we have seen before)[181] quickly submerged beneath a more troubling, albeit ecstatic, rhetoric: Schafer and Young's peering *at* the wealth, and *with* GM, emanates in their emphases on modernity, giganticism, leadership, a pioneering spirit, and heroism. Their language shrugs off dour references to poverty and instead parrots GM's own advertising pitches, which in the 1970s announced its heroic and rugged world-leadership in car technology.[182] In these speeches, Young and Schafer demonstrated that by 1980 they had aligned themselves with GM vision and ideology; that is, they saw things the way GM did.

Is this just the cost of doing business with a wealthy savior? Justice Ryan disagreed: In his *Poletown* dissent an aggressive gaze appears, one that struggled against aspirational peering and aligned with Poletown's beleaguered petit bourgeois residents: "[T]he city chose to march in fast lock-step with General Motors . . . [by] ultimately requir[ing] sweeping away a tightly-knit residential enclave of first-and-second-generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives."[183] Here, Ryan trailblazes middle class peering by sharing vision with "ethnic[s]" who cling to their homes, and do not share in Schafer's "biggest thing[s]." However, note that people living below

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[181] *See* text accompanying note 98, *supra.*

[182] *See, e.g., 1972 GM Christmas Ad, available at* http://www.youtube.com/watch?v=mS0wnKeJw4g (showing GM testing its cars in snowy Ontario; the ad emphasizes that GM vehicles built everywhere from Canada to the U.K. are so rigorously tested); Ron Scherer, *GM Chairman Says Autos to Lead US Industry from Slump,* CHRISTIAN SCIENCE MONITOR, Aug. 27, 1980 at F 11 ("[A]ccording to Thomas A. Murphy, chairman of the General Motors Corporation, 'We're going to lead the economy back.'").

[183] *Poletown* at 658 (Ryan, J., dissenting). In the end, Mayor Young's gamble failed. 3,000 residents were moved, 143 institutions "obliterated" and 1,000 buildings were demolished. HAROLD V. SAVITCH & PAUL KANTOR, CITIES IN THE INTERNATIONAL MARKETPLACE: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT IN NORTH AMERICA AND WESTERN EUROPE 258 (2002). Many of the jobs GM promised vanished. HEATHER ANN THOMPSON, WHOSE DETROIT? POLITICS, LABOR, AND RACE IN A MODERN AMERICAN CITY 208 (2004) ("Of the 6,000 jobs GM promised . . . only 3,700 materialized. . . . [and] after GM opened the Poletown facility, it [] close[d] two other local plants, thus throwing 'thousands of other workers' out of a job.").

the poverty line in Detroit also disappear from Ryan's gaze; he focuses on those who cherish their real estate assets.

b) *Hathcock*

Ryan's bumptious middle class perspective won the day in the Michigan Supreme Court's 2004 *County of Wayne v. Hathcock*,[184] which reversed *Poletown. Hathcock* addressed Wayne County's efforts to take nineteen parcels of private property[185] to support a "Pinnacle Project."[186] The County's description of this project reflects an even more grandiose form of peering than that fomenting the dreamy promises of Detroit's Mayor Young. Officials characterized the Pinnacle Project's pledged business and technology park as a "state-of-the-art" and "cutting edge" conglomeration that would "create thousands of jobs," "enhance the image of the County in the development community" and "aid[] its transformation . . . . to that of an arena ready to meet the needs of the 21st century."[187] In these testaments, officials again less vaunted poverty alleviation than mimicked the jargon of businesses that would invest in Romulus (a site of the Pinnacle Project),[188] such as Liberty Property Trust, a (as of 2013) 6.9 billion dollar real estate investment trust that advertises itself as state-of-the-art.[189]

In *Poletown,* official repetitions of corporate propaganda signaled a victorious aspirational gaze. But in *Hathcock,* this form of peering failed. Retreating from *Poletown,* the *Hathcock* court ascertained that economic rejuvenations did not mesh with Michigan Constitution's Article 10, section 2

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[184] 471 Mich. 445 (2004).
[185] *Id.* at 452.
[186] *Id.*
[187] *Id.*
[188] *See* Jenette Smith, *High Flier: Metro Airport Land Taking Off as the Region's Hot Spot*, CRAIN'S DETROIT BUS., JUNE 7, 1999, Special Section at S-1 ("The Pinnacle project is [big]. . . . Kevin Shea, regional vice president of Malvern, Pa.-based Liberty Property trust, said the company is bullish on its planned 1.2 million-square-foot industrial park in Romulus."); *Michigan Supreme Court to Revisit 1981 Poletown decision,* DETROIT FREE PRESS Apr. 2, 2004, *available at* http://www.ackerman-ackerman.com/DetroitFreepressApril02.pdf (identifying Romulus as a neighborhood affected by the Pinnacle Project).
[189] Liberty Property Trust, *About Us*, *available at* http://www.libertyproperty.com/about.asp.

requirement that takings satisfy public "use"[190] or "concern."[191] It embraced Justice Ryan's *Poletown* dissent,[192] though without gazing approvingly upon the hardworking specter of middle class housing.[193] The *Hathcock* court established a different style of middle-class peering by looking with *disdain* at wealthy developments, finding them parvenu incursions into local culture and rights, and trashy additions to Michigan's landscape: "The Pinnacle Project's business and technology park is certainly not [necessary to the public good.] . . . To the contrary, the landscape of our country is *flecked* with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce."[194] The court also engaged scare quotes to convey distaste: "[I]f one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, `megastore,' or the like."[195]

In the move from *Poletown* to *Hathcock* three forms of peering drive the fight over economic development: These gazes aspire to privilege (the *Poletown* majority), approve of the hardy working class (Justice Ryan's dissent), and regard wealth with suspicion and aesthetic scorn (*Hathcock*). The first gaze aligns with wealth, and supports economic redevelopment takings. The second and third gazes straddle the working and petit bourgeois classes – those "first-and-second-generation Americans, for many of whom their home [is] their single most valuable and cherished asset,"[196] and who do not "fleck"

[190] *Hathcock* at 480.
[191] *Id.* at 475.
[192] *Id.* ("Our eminent domain jurisprudence since Michigan's entry into the union amply supports Justice RYAN's assertion [that courts need do more than rubberstamp].").
[193] *See* text accompanying note 183, *supra* ("cherished")
[194] *Hathcock* at 477 (emphasis added).
[195] *Id.* at 481.
[196] *See* text accompanying note 183, *supra* ("cherished").

the heartland. This second school of peering sustains blight takings,[197] but fights economic redevelopment.

c) *Kelo*

A year after *Hathcock*, the U.S. Supreme Court in *Kelo* invested these three peering exercises with federal constitutional power. The aspirational gaze became enshrined by the majority's deference to legislative will. Justice Sandra Day O'Connor ennobled the latter two gazes in her famous dissent.

In his *Kelo* majority opinion, Justice Stevens' deference allowed aspirational gazes to determine takings law. It must be said that an initial review of his decision doesn't leave the reader suspicious that the majority wears gold-colored glasses: Stevens agnostically describes the proposed rejuvenation project,[198] cites New London unblighted "distress,"[199] and even compliments petitioner Susette Kelo on her housekeeping.[200] Yet the majority permits the legislative gaze to control by submitting to lawmakers' conceptions of public purpose.[201] If the legislature "sees" that Pfizer will substitute largesse for distress, those optics will rule.

What did the legislature see? The *Kelo* opinion does not delve into this in detail, but tantalizing glimpses appear in New London's Development Corporation's Municipal Development Plan (MDP).[202] As noted already,[203] the Plan authors devoted attention to sewage, bringing in *Muller* and *Berman*-like scatology references.[204] However, since New London was not blighted, the aspirational gaze that drove

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[197] Ryan's dissent in *Poletown* approves of blight condemnations as public uses as does *Hathcock*. *Poletown* at 680 (Ryan, J. dissenting); *Hathcock* at 475-76.
[198] *See, e.g., Kelo* at 474 ("The development plan's . . . Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping.")
[199] *Id.* at 472 and 475.
[200] *Id.* at 475 ("She has made extensive improvements to her house, which she prizes for its water view.").
[201] *Id.* at 480 ("The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." . . . [We have a] longstanding policy of deference to legislative judgments in this field.").
[202] *See* note 148, *supra* (hereinafter MDP).
[203] *See* text accompanying notes 139-140, *supra.*
[204] *Id*.

Poletown also inaugurated the MDP's assurances that Pfizer would rescue New London: "[Our] goals [are to] . . . create a world-class development that will complement the undertakings of Pfizer, Inc. . . . [and to] develop a project which will help build momentum for the revitalization of downtown."[205]

The *Poletown*-like[206] capitalist euphoria of the MDP also appears in statements made by New London's Mayor and lawmakers to the press when Pfizer broke ground. Mayor Lloyd Beachy enthused that "New London welcomes Pfizer as its newest corporate partner and is pleased that, with this investment**,** Pfizer has recognized the City's attractiveness for world-class development."[207] NLDC president Claire Gaudiani plagiarized this assessment: "The project is happening because we . . . understand[] how to move at the speed and quality of a world-class private enterprise."[208]

New Deal-like justifications for limited property rights here have, again, disappeared,[209] and, as in the case of Poletown,[210] been replaced by aspirations to grandeur: The insistent repetition of "world-class" in the MDP and by the Mayor and Gaudiani demonstrates that lawmakers peered up at and affiliated with Pfizer's promised land; Beachy and Gaudiani ape Pfizer's own publicity, as this Fortune 500 company[211] promotes itself as a "world-class" company.[212] Consider how the jargon of "world-class" connects with aspirational business-speak that enlivened other cases: In *Poletown* Detroit officials spoke in terms of modernity, pioneering, and magnitude that demonstrated their absorption of

[205] *See* MDP at 1-3.
[206] *See* text accompanying notes 178-180, *supra.*
[207] *Pfizer to Build New Drug Development Facility on New London Mills Site; Project Accelerates Momentum of New London Transformation,* P.R. NEWSWIRE Feb. 3, 1998.
[208] *Id.*
[209] *See* text accompanying notes 88-89, *supra.*
[210] *See* Section II(a), *supra.*
[211] *See Pfizer,* CNNMONEY.COM, *available at* http://money.cnn.com/magazines/fortune/fortune500/2012/snapshots/324.html.
[212] *See* Pfizer, *Worldwide Research and Development,* PFIZER.COM, *available at* http://www.pfizer.com/partnering/areas_of_interest/research_and_development.jsp.

GM ideology.[213] And in *Hathcock*, Wayne County officials mirrored Liberty Property Trust by emphasizing the Pinnacle Project's "state-of-the-art" and "cutting-edge" status.[214]

These phrases prove signatures of the aspirational gaze. "World-class," "state-of-the-art," and "cutting-edge" are well-worn business leadership and advertising clichés.[215] These slogans have grown threadbare because of their power to evoke ostentatious mental images in corporate troops and consumers,[216] bringing this rhetoric into the arena of visual culture – that is, making it a tool of peering. The visuals inspired by "world-class," etc. abound with sumptuous, heroic, scientific, and imperial tropes, promoting a sense of ecstatic arrival in followers of the leaders and customers of the merchants who speak these phrases. They trigger images akin to, say, Margaret Bourke-White's giddily priapic photos of the Chrysler Building made during the Great Depression, when Walter Chrysler commissioned her to document his literally world-class edifice[217] (temporarily, it was the world's tallest skyscraper[218]) in order to broadcast a "beacon of [Chrysler] success:"[219]

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[213] *See* Adam Sherk, *The Most Overused Buzzwords and Marketing Speak in Press Releases,* ADAM SHERK, June 29, 2010, *available at* http://www.adamsherk.com/public-relations/most-overused-press-release-buzzwords/ (world-class, cutting-edge, and state-of-the-art on a list of 100 abused marketing phrases).

[214] *See* text accompanying note 187, *supra.*

[215] *See* Sherk, supra note 213.

[216] *See, e.g.,* WALTER WEIR, HOW TO CREATE INTEREST-EVOKING, SALES-INDUCING, NON-IRRITATING ADVERTISING 79 (1993) ("Descriptions must be as vivid and pictorial as possible."); GEORGE BRYMER, VITAL INTEGRITIES: HOW VALUES-BASED LEADERS ACQUIRE AND PRESERVE THEIR CREDIBILITY 192-1 (2005) (advising corporate leaders to use symbolic words and metaphors to "create vivid image[s]"); EDWARD JAMES ROWSE & LOUIS J. FISH, FUNDAMENTALS OF ADVERTISING 101 (2005), (advertising should appeal to the emotions and contain "vivid text").

[217] EMILY KELLER & MARGARET BOURKE-WHITE: A PHOTOGRAPHER'S LIFE 52 (1996) ("During that winter of 1929-30, despite the troubled economy, the founder of Chrysler Corporation wanted to have the world's tallest building bear his name.").

[218] HAROLD M. COBB, DICTIONARY OF METALS 313 (2012)("[T]he building was briefly the tallest skyscraper in the world.")

[219] WILLIAM HENRY YOUNG & NANCY K. YOUNG, THE GREAT DEPRESSION IN AMERICA: A CULTURAL ENCYCLOPEDIA, VOL. 1 93 (2007) ("At night, strategically placed lighting illuminates the entire structure, a beacon of success. In all, it bespeaks an optimism about a modern, technological age.").

Margaret Bourke-White. *Chrysler Building Tower*, 1931.[220]

The chieftains and brokers of New London – as well as Detroit and Wayne County-- enlist two gestures via these platitudes: They announce themselves as representatives of wealth and progress, and then tantalize their audience with the possibility that they, too, could ascend these heights through following or consuming. In the takings cases, we see this rhetoric initiating with corporations, then filtering down to striving lawmakers who court their business through eminent domain powers; in the case of New London, these images then get reflected in the MDP, which doubles also as a sales pitch. Then the courts enshrined these gazes in the deferential *Poletown* and *Kelo.*

But a powerful counter-gaze existed that would challenge the opulent look. Justice O'Connor proved the highest-ranking celebrant of this vision, which she had begun to conceptualize nearly at the

[220] Margaret Bourke-White, *Chrysler Building: Tower* (1931), *available at* http://www.sfmoma.org/explore/collection/artwork/31924.

same time as *Poletown,* and far before *Hathcock* complained of "fleck[ing]" megastores: In her 1984 decision *Hawaii Housing Authority v. Midkiff,*[221] she had already showcased her distaste for abusive wealth, and her middle-class sympathies. In *Midkiff,* the Court upheld Hawaii's 1967 Land Reform Act, which took fee title from lessors and transferred it to lessees in order to demolish longstanding land oligopoly benefiting Hawaiian elites.[222] O'Connor's high-toned but still relatively compassionate regard of "the common people"[223] and squinting suspicion of nabobs enriches *Midkiff's* Balzacian introduction: She opens by describing Hawaii's initial settlement by Polynesian immigrants, their life under a feudal land tenure system, and unsuccessful early 19th century efforts to wrest the land from the "hands of a few."[224] She then contrasts the toiling commons with "monarchs" who engage in an "evil" oligopoly that prevented Hawaii's people from owning homes[225] -- a form of peering that showed her alliance with the middle class, but deployed clichés that obscured as much as they highlighted.[226] O'Connor also discloses her optics by deferring to legislative intent[227] and approvingly citing the Hou Hawaiian (a "spokesm[a]n['s]"[228] organization) amicus brief: She submits to legislative observations that landowners perpetuated an "oppressively" "hierarch[ical]" system "exact[ing] land, labor, and property" from

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[221] 467 U.S. 229.
[222] *Id.* at 235.
[223] *Id.* at 232 ("Beginning in the early 1800's, Hawaiian leaders and American settlers repeatedly attempted to divide the lands of the kingdom among the crown, the chiefs, and the common people.")
[224] *Id.*
[225] *Id.* at 241-242.
[226] The "few" assailed by O'Connor included the administrators of the Bishop Estate, who used some of their wealth to fund the educations of Native children. *See* Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to 'Fulfill their Unique Role?" A Response to Professor Dylal-Chand,* 31 HAW. L. REV. 423, 432 (2003) (describing Bishop's Kamehameha Schools); David Linhart, Note, *Eminent Domain Conversion of Vacant Luxury Condominiums Into Low Income-Housing,* 21 B.U. PUB. INT. L. J. 129, 135 (2011) ("Bishop Estate was a charity that held the land in trust to generate funds for the education of indigenous Hawaiian children. Tenants established long-term leases with the charity, and the charity held its tenants to below-market rate lease terms.")
[227] *Midkiff* at 239 ("`when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.'") (citing *Berman* at 23); *see also* 240 ("There is, of course, a role for courts to play. . . . [b]ut the Court in *Berman* made clear that it is an 'extremely narrow' one.") (quoting *Berman* at 23).
[228] See Brief for Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as Amicii Curiae at 3.

"multitude[s] of tenants," creating "social and economic ills."[229] And O'Connor's citation to Hou Hawaiians' brief discloses scathing illustrations of Hawaii's "absentee lords"[230] who are condemned through contrast to the Native "brothers and sisters" "deprived of their ancestral homelands."[231]

By 2005, O'Connor had honed her optics, and in *Kelo* intensified her regard of the "common people's" difference from "lords." O'Connor demonstrated the signal importance of this form of peering, since it proved supreme to the judicial deference she espoused in *Midkiff*: She now rebelled against the majority's deference, as it would turn the Fifth Amendment into so much "hortatory fluff,"[232] and replaced this submission with a longer look. While Stevens' opinion thumbnails Susette Kelo's situation,[233] O'Connor employed a *Midkiff*-like fisheye lens on petitioner Wilhelmina Dery: She observed that Dery's home has been in her family "her entire life," that her husband Charles "moved into the house when they married in 1946," and that "[t]heir [co-petitioner] son lives next door with his family in the house he received as a wedding gift."[234] She even names their street: "Walbach."[235] O'Connor's peering is cinematic, intimate, sentimental, and more elaborately detailed than *Midkiff's* opening epic.[236] We see this tightly-knit extended family moving through the ceremonies of middle class existence. Witnessing the century in which Wilhelmina's family passed their lives on Walbach, we

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[229] *See* Brief for Appellant, p. 11-13, & nns. 2-4 (citing Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 HAWAII SENATE JOURNAL 799, 800)).

[230] *Id.* at 232, citing Brief for the Hou Hawaiians and Maui Loa, Chief of the Hou Hawaiians, as Amicii Curiae at 3-2. At page 13 of this brief, Amici describe the Robinson family, owners of Niihau (a Hawaiian island) as "absentee lords of a feudal fiefdom." *See also id*. at 19 (describing the "sprawling 224,000-acre Parker Ranch at the base of Mauna Kea" as "so big its climate varies from desert to tropical rain forest."). *See also Midkiff*, *id.* citing the Amicus Brief of the Office of Hawaiian Affairs at 3-5.

[231] *See* Hou Hawaiian Amicus Brief at 3.

[232] *Kelo* at 462-463 (O'Connor, J., dissenting).

[233] *Kelo* at 475 ("Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago.").

[234] *Id.* at 494 (O'Connor, dissenting).

[235] *Id.*

[236] *See* text accompanying notes 224-225, *supra.*

glimpse when Charles carried his bride past the lintel of her ancestral home, their son's birth, his marriage, and the web-threads of love that bound Wilhelmina's and Charles' progeny to live next door.

Deeper into the dissent, O'Connor's affectionate perlustration of the middle class merges with a gaze wary at and even disgusted at wealth. In *Midkiff*, she compactly described elites as "the few" "large landowners" who denote "evil" and appeared all the worse when compared to "commoners."[237] In *Kelo* she works this method into a near-art, vividly describing how the majority will allow middle class lives to be supplanted by behemoths:

> New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.[238]

O'Connor fuses the middle-class-adoring and wealth-bashing gazes found in the *Poletown* dissent and *Hathcock,* and which she first essayed in *Midkiff.* She does so by deploying the visual tradition of *juxtaposition.* O'Connor sits the single-family home next to the apartment building, the church next to the retail store, and the small business next to the national franchise. Through these contrasts O'Connor characterizes the middle class as quaint, local, numinous, and personal, while wealthy corporatism comes across as faceless, bureaucratic, gigantic, and spirit-crushing. In so doing, she now surpasses her efforts in *Midkiff* to master visual contrasts.

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[237] *See* text accompanying note 223.
[238] *Kelo* at 500 (O'Connor, J., dissenting).

In a fascinating synchronicity, O'Connor's use of critical *chiaroscuro* resembles the light-and-dark 1939 documentary film *The City,* directed by Ralph Steiner and Willard Van Dyke, written by Lewis Mumford, and scored by Aaron Copland.[239] *The City* argues for planning promoting family values, closeness to the earth, health, and community by first romanticizing farm life.[240] Alongside depictions of grinding corn and country weddings, we see sunshine, trees, and white clapboard houses. This paradise quickly gets invaded by tenebrous trains, smoke, filthy forges, serried tenements, and inhumanly proportioned skyscrapers – all accompanied by a panicked Copland score.[241] The film concludes its anti-urban manifesto by showcasing the utopian suburbs, which host nature and the best technology of city living.[242]

Lewis Mumford was a heretical communist who hated poverty and private property,[243] but derided urban renewal projects such as Robert Moses'[244] because of its effects on low-income people. O'Connor is no Communist, but she echoed Mumford's battle against Moses and the aesthetics of *The City* in her antipodean critique of New London's taking, which depends on casting approving glances at the middle class and aspersions on the "U."[245] Big retail will kill the church! Slumlords will trash single family homes! However—and this is key -- O'Connor stops short of Mumford's vision, as she cares only for the middle class. A moment passed in *Midkiff* where her optics could have embraced low-income people: By borrowing part of the gaze set by Hou Hawaiians' brief,[246] she might be seen as also

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[239] *The City* (1939).
[240] *The City* opens with: "We built our church and marked the common out. We built our town hall next, so we could have our say about the taxes, or whether we need another teacher for the school. . . . In all that matters, we neighbors hold together.") *See* http://www.youtube.com/watch?v=cag7q8QlHY4.
[241] *Id.* around 7:30.
[242] *See, e.g., id.* at 22:30 (describing "new cities," and "green cities.").
[243] *See* DONALD L. MILLER, LEWIS MUMFORD: A LIFE 295 (1989) (describing Mumford's "so-called Communism," his belief in social welfare, and his disdain for private property).
[244] *Id.* at 492-3 (Mumford's anti-poverty criticism of Moses's urban renewal projects in New York).
[245] *See* text accompanying note 52, *supra.*
[246] *See* text accompanying note 230-231, *supra.*

sympathizing with its authors' advocacy for "bitter" Natives who are "reduced to poverty."[247] Yet the transfers allowed by *Midkiff* did not, in the end, aid the poor.[248] She continues this trajectory in *Kelo* by insisting on peering with the working or middle class, and not low-income people, by noting that removal of a *Berman*-like blight (that congenital disease) satisfies a public purpose.[249]

d) Recent New York Cases: *Goldstein* and *Kaur*

Judicial peering's upward trajectory, and middle or working class riposte, find expression in two other blight condemnation cases. In 2009's *Goldstein v. New York State Urban Dev. Corp.,*[250] the Court of Appeals of New York upheld the razing of twenty-two acres in Brooklyn in Bruce Ratner's controversial Atlantic Yards project.[251] Ratner sought to develop downtown Brooklyn, which reporters described as enjoying "low-roofed" and "historic" "charm," and that citizens worried would morph into a "mall" through Ratner's plan,[252] which provided for a basketball team.[253] And 2010's *Kaur v. New York State Urban Development Corp.,*[254] the Court of Appeals of New York blessed Columbia University's pitch

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[247] Hou Hawaiians brief, supra note 228 at 3.

[248] *See* Gideon Kanner, supra note 226, at 432 ("[W]hat happened on Oahu was not a land redistribution from the powerful haves to the downtrodden have-nots. . . but rather a political battle in which prosperous, influential suburbanites . . . prevailed over the legitimate interest of Bishop Estate, a charitable trust that had leased home sites to them at below-market rents, and used the proceeds to support the Kamehameha Schools which provide quality education to native Hawaiian children.")

[249] *See Kelo* at 498 ("Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.") (citing *Berman*) (O'Connor, J., dissenting). *See also id.* at 500 (noting that *Berman* found justification in alleviating the "affirmative harm" of "blight resulting from extreme poverty" but failing to recognize the harms suffered by the poor removed through condemnation). (O'Connor, J., dissenting).

[250] 13 N.Y. 3d 511 (2009).

[251] *Id.* at 517.

[252] Robert F. Worth, *Brooklynites Take In a Big Development Plan, and Speak Up,* N.Y.T., July 6, 2005, at B5. For a sense of community grief and dissent, *see also Candlelight Vigil at Barclay's Center,* Sept. 28, 2012, *available at* http://www.youtube.com/watch?v=b_8L489-wuk&feature=player_embedded#!. *See also generally Develop -- Don't Destroy Brooklyn, available at* http://www.developdontdestroy.org/php/latestnews_ArchiveDate.php.

[253] Nicholas Confessore, *Promises of Atlantic Yards Draw Thousands to Meeting,* N.Y.T., July 12, 2006, at B2 (describing the basketball team plans)

[254] 933 N.E.2d 721 (N.Y. 2010), *cert. denied sub nom*. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp., 131 S. Ct. 822 (2010).

to oust Manhattanville residents via eminent domain.[255] Copious problems presented themselves in this case, including charges of corruption, conflicts of interest, and pretextual takings.[256]

Both *Goldstein* and *Kaur* present the reader as astonishing assessments of blight and ignorance of personal greed, but the ease with which the New York Court of Appeals determined both that blight existed and that pretext did not makes more sense once we observe the elevated gaze's significance in Fifth Amendment Jurisprudence.

i) *Goldstein*

The aspirational peering first emergent in *Poletown* and the comments made by Mayor Young,[257] Wayne County officials in the *Hathcock* case,[258] and in the New London MDP[259] aids our understanding of *Goldstein* "blight." In *Goldstein*, evidence of blight seemed nonexistent, particularly when compared *Muller* and *Berman.* The *Goldstein* court acknowledged Atlantic Yards's blight only amounted to "mild dilapidation and inutility," and that it in no way compared to *Muller.*[260] The majority nevertheless determined that "underdevelopment and stagnation" could qualify as blight, statutorily defined as "substandard and unsanitary" properties, setting the bar far lower than previous cases.[261]
The evidence of blight proved paltry enough that dissenting Judge Smith regarded downtown Brooklyn as a "normal and pleasant residential community."[262]

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[255] *See, e.g., Kaur* at 255, reversing lower court's determination that Manhattanville was not blighted, and at 262, approving the taking.
[256] *See* Somin, *Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur,* 38 FORD. URB. L. J. 1193,1195 (2010), listing these issues. (Hereinafter *Let There Be Blight*). See *also id.* at 1196, studying pretextual takings.
[257] *See* text accompanying notes 179-180, *supra.*
[258] *See* text accompanying notes 187, *supra.*
[259] *See* text accompanying note 205, *supra.*
[260] *Goldstein* at 525.
[261] *See Let There Be Blight* at 1200. *See also Goldstein* at 518 and 525 (defining blight).
[262] *Goldstein* at 551 (Smith, J., dissenting).

Again, we see the struggle between the middle or working class gaze and aspirational optics.[263] Whereas Judge Smith tourneys for "normal[s]," the *Goldstein* majority deferred to the Empire State Development Corporation,[264] and its illustrated 377-page blight study."[265] AKRF, a nearly all-Anglo "team"[266] of "leaders in environmental, planning & engineering consulting"[267] produced this study, finding that the "unsanitary and substandard conditions" existed because lots were "vacant," "underutilized," "irregularly shaped," and because of "crumbling brickwork, graffiti, flaking paint," as well as "serious deterioration."[268] AKRF supported its findings with pictures that show, among other things, some trash on sidewalks,[269] chain link fences in some disrepair and a trash bag in the street.[270] Several photographs peer from the vantage of an observer looking through a chain link or barred fence, giving the audience a sense of being caged in.[271] Images of peeling paint abound.[272] And, as in other images of "blighted" areas, there are no people in these photographs, connecting the Atlantic Yards blight study to Detroit "disaster porn."[273]

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[263] Judge Smith reflects this tension in his dissent: Tackling "blight removal or slum clearance [was] . . . in vogue among the urban planners of several decades ago . . . [i]t is more popular today to speak of an 'urban landscape' – the words used by Bruce Ratner to describe his 'vision' of the Atlantic Yards development."). *Id.*

[264] *Id.* at 525 ("Whether a matter should be the subject of a public undertaking . . . is ordinarily the province of the Legislature, not the Judiciary.").

[265] This language comes from the lower court's description of the blight study. *See* Matter of Goldstein v. New York State Urban Dev. Corp., 64 A.D.3d 168, 182 (2009).

[266] See http://www.akrf.com/about/our-team. This page gives profiles of the twenty-two "leaders" of the firm. At least one of these consultants is non-white, being Linh Do, an AKRF Vice President.

[267] This is how AKRF describes itself. See http://www.akrf.com/.

[268] AKRF, ATLANTIC YARDS ARENA AND REDEVELOPMENT PROJECT BLIGHT STUDY ii (2006), http://www.scribd.com/doc/95310584/Atlantic-Yards-Blight-Study-7-11-06. (*Hereinafter* ATLANTIC YARDS BLIGHT STUDY).

[269] *See id.* at B-7, photographs C and D. *See also* B-8 ("Photograph C illustrates how the rail yard and the sidewalks around the rail yard have had a blighting influence.").

[270] *See* B-11, Photograph I. *See also* B-12 ("[A]s illustrated by photographs H and I . . . the blocks south of Atlantic Avenue host a combination of vacant, underutilized, and physically deteriorating structures and vacant lots, and are lined with cracked and crumbling sidewalks that are overgrown with weeds and strewn with trash.").

[271] *See id.* at C-8, C-22, C-28, C-33, C-34, C-41, C-55, C-56, C-86, C-87, C-150, C-171, C-174.

[272] *See, e.g,* C-241.

[273] *See* text accompanying notes 82-84, *supra*.

Though everyone agreed that Atlantic Yards was not a wasteland,[274] the area qualified as blighted because of peering's new set-point. A horrified regard of poverty no longer holds the attention of the observer as much as does wealth's allure. This perspective directed the gaze of AKRF consultants, as revealed by the January 2010 admission by ECSD representatives that AKRF "always produces studies that allow the agency to find blight,"[275] and fulminated against by scholars such as Ilya Somin who notes AKRF's significant conflict of interest.[276] The promise of opulence glistens in the blight report among the paint-peeling dross of the dissent's "norm[als]," particular in Section E's sales pitch, titled "Benefits of the Proposed Project:" The project would "provide . . . a first-class arena that would bring a major-league sports team back to Brooklyn,"[277] "[i]ntroduce a state-of-the-art arena that would generate additional jobs, visitor, and visibility for Brooklyn,"[278] and generate jobs and income veering over a billion dollars in value.[279] In this vivid project description, the phrase "state-of-the art" is used three times.[280] The report also vaguely predicts that a revitalized Atlantic Yards could aim for the luxury cachet of hipster burghs such as Greenpoint Williamsburgh, Park Slope, South Park Slope, and Hudson Yards.[281]

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[274] *Goldstein* at 527 ("[T]he bar has now been set too low – that what will now pass as 'blight,' as that expression has come to be understood . . . should not be permitted to constitute a predicate for . . . the razing of homes and businesses."); *id.* at 551 ("blight . . . was never the bona fide purpose of the development at issue in this case.") (Smith, J., dissenting).

[275] NORMAN ODER, ATLANTIC YARDS REPORT, (Jan. 7, 2010), *available at* http://atlanticyardsreport.blogspot.com/2010/01/at-hearing-esdc-representatives-defend.html.

[276] Somin notes that AKRF had originally been hired by Ratner himself. *See Let There Be Blight* at 1204.

[277] ATLANTIC YARDS BLIGHT STUDY at E-1.

[278] *Id*. at E-3.

[279] *Id.* at E-5.

[280] *See id.* at E-3-E-5.

[281] *See* ATLANTIC YARDS BLIGHT STUDY at E-2 (The City has "taken steps to address the housing problem through the private sector by undertaking number of major rezoning actions (e.g., Greenpoint Williamsburg rezoning, Park Slope rezoning, South Park Slope rezoning, Downtown Brooklyn rezoning, and Hudson Yards rezoning) to make available more floor area for residential development."). *See also* Marc Santora, *Brooklyn's Gold Rush*, N.Y.T., June 1, 2012, *available at* http://www.nytimes.com/2012/06/03/realestate/brooklyns-gold-rush.html?pagewanted=all&_r=0 (describing rush on brownstones in Fort Greene, Park Slope, Boerum Hill and Red Hook); Sara Gran, *Call it Brooklyn,* N.Y.T., Sept. 10, 2006, The City Weekly Desk at 1 (describing Park Slope gentrification in 2006); Damien Cave, *City Sees Growth; Residents Call it Out of Control*, N.Y.T. Nov. 6, 2006, Metropolitan Desk, at 1 (rezoning leads to gentrification and tenant displacement.); Sara Polsky, *Inside Downtown*

This kind of aspirational peering, where the gazer aligns herself with wealthy developers, was not initiated by AKRF. Rather, Ratner cultivated it when working to take over downtown Brooklyn. Ratner's company, Forest City, has long used the jargon of "world-class," "global," and "state-of-the-art" in its corporate propaganda.[282] Moreover, when pitching his plan, Ratner promoted grandiosity by enlisting New York Mayor Michael R. Bloomberg, "Nets and Knicks legend" Bernard King, and Jay-Z as supporters.[283] This magnificence inspired Brooklyn leaders to use the same clichés when plumping for the takeover: "Brooklyn is a world-class city, and it deserves a world-class team in a world-class arena designed by a world-class architect," exclaimed Borough president Marty Markowitz after Ratner's starry press conference.[284] And when Ratner floated the possibility that the Atlantic Yards project would be sweetened by a new building for Brooklyn Tech High School (a promise never fulfilled),[285] United Federation of Teachers President Randi Weingarten enthused it would be a "win-win situation. Brooklyn Tech. . . [could] become a world-class high school . . . .To accomplish that, it needs a state-of-the-art facility."[286]

Brooklyn's Accidental Residential Boom, CURBED NY, Feb. 28, 2011, *available at* http://ny.curbed.com/archives/2011/02/28/inside_downtown_brooklyns_accidental_residential_boom.php (linking a 2004 rezoning of downtown Brooklyn with gentrification); Julie Satow*, Development Thrives in The Hudson Rail Yards,* N.Y.T., Apr. 4, 2012, at B 7 (Since the rezoning more than "$5 billion in private development has poured into the area, according to the Hudson Yards Development Corporation.").

[282] *See, e.g.,* the web page for Forest City Real Estate Services, describing its "world-class results," http://www.forestcity.net/capabilities/Documents/RES-brochure.pdf; its Properties page, describing its "world-class apartment communities," http://www.forestcity.net/properties/stay/Pages/default.aspx; and its Science + Technology Group properties page, describing its "world-class science and technology properties," http://www.forestcity.net/properties/work/science_technology/properties/Pages/default.aspx. The Brooklyn Barclays Center, developed by Forest City as part of the Atlantic Yards deal, is described on its web page *twice* as "state-of-the-art," http://www.barclayscenter.com/arena/about-us; and a TIAFF Cref press release announcing its investment in a Ratner Gehry project has Ratner describing his high-rise unit as "world-class," and TIAFF-Cref head of real estate describing it as "state-of-the-art," https://www.tiaa-cref.org/public/about/press/about_us/releases/articles/pressrelease441.html.

[283] Charles V. Bagli, *A Grand Plan in Brooklyn For the Nets' Arena Complex*, N.Y.T. Dec. 11, 2003 at B2.

[284] *Id.*

[285] Rachel Monahan, *Brooklyn Tech Building Not Slated for Atlantic Yards*, NY. DAILY NEWS, May 19, 2008, *available at* http://www.nydailynews.com/new-york/brooklyn/brooklyn-tech-building-slated-atlantic-yards-article-1.330876.

[286] Tanyanika Samuels, DAILY NEWS (NEW YORK), Dec. 22, 2006 at 2.

We see here the same trajectory of the aspirational gaze that succeeded in *Poletown* and *Kelo* and failed in *Hathcock.* The "world-class" and "state of the art" gaze level is set by a wealthy developer, followed by aspiring lawmakers, enshrined in blight reports, and then sanctified (or, not, in *Hathcock)* by courts as the official story of a neighborhood that the wealthy seek to condemn for a "public purpose."

ii) *Kaur*

A nearly identical narrative arc shapes *Kaur*. The same pattern of a struggle between a middle class and aspirational gaze drove this litigation, which began when Columbia University sought to expand into West Harlem. Columbia approached New York's Economic Development Corporation in 2001, which then hired a firm called Urbitran to conduct a survey.[287] Columbia next hired AKRF to "assist Columbia in seeking the necessary agency approval for the Project,"[288] around the same time that it began talks with the Empire State Development Corporation (ESDC).[289] Urbitran determined that West Harlem was blighted, that is, substandard or unsanitary.[290] Columbia then contracted to pay for ESDC's cost associated with the project;[291] ESDC also hired AKRF to report on neighborhood conditions.[292] AKRF issued a study finding that the area was blighted.[293] New York City's Planning Commission approved of rezoning that allowed Columbia to construct in West Harlem, despite its occupation by small businesses.[294]

Parminder Kaur and Amanjit Kaur (owners of a gas station on West 125th Street), the unnamed owners of the West Harlem franchise of a storage outfit called Tuck-it-Away, and P.G. Singh Enterprises

[287] *Kaur II* at 245-6.
[288] *Kaur* II at 246.
[289] *Id.*
[290] *Id.* at 254 (citing UDCA SEC. 10 (c); *id.* at 246 (citing Urbitran's findings).
[291] *Id*. at 247-248.
[292] *Id.* at 247.
[293] *Id.*
[294] *Id.* at 248.

(another owner of a gas station on West 125th)[295] sued, in part for the ESDC's insufficient release of documents under the New York Freedom of Information Law.[296] New York's Supreme Court granted their petition, also calling into question AKRF's participation, since it was already aligned with Columbia.[297] The ESDC consequently hired another consulting firm, Earth Tech,[298] which conducted yet another blight study alleging that Manhattanville was deteriorated, covered with vermin and graffiti, and rife with building violations.[299] A blight finding unsurprisingly issued from these revelations.[300] The ESDC adopted a General Project Plan that trumpeted how the Columbia project would allow New York to remain a "global center for higher education and academic research,"[301] and reverse West Harlem's "bleak[ness.]"[302] The ESDC also prophesied a $122 million boon for the state and $87 million for the City.[303]

Petitioners petitioned the Appellate Court, landing a judge that saw Harlem much like they did. In *Matter of Kaur v. New York State Urban Dev. Corp. (Kaur I)*[304] the court employed a form of middle or working class peering reminiscent of Ryan's *Poletown* dissent, *Hathcock*, and O'Connor's *Kelo* dissent. Judge James Catterson denounced the project as the "taking of Manhattanville,"[305] trouncing AKRF and Earth Tech blight studies. Specifically, the form of peering evidenced in

> [t]his search for distinct "blight conditions" led to the preposterous summary of building and sidewalk defects compiled by AKRF, which was then accepted as a valid methodology and amplified by Earth Tech. Even a cursory examination of the study reveals the idiocy of

[295] *Id.* 244.
[296] *Id*. at 248.
[297] *Id*.
[298] *Id*. at 249.
[299] *Id*. at 249-50.
[300] *Id*. at 250.
[301] *Id*. at 251.
[302] *Id*.
[303] *Id*.
[304] 72 A.D. 3d 1 (2009).
[305] *Id.* at *3.

considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood.[306]

Along with *Kaur I's* ambition to look past surfaces (the "preposterous" focus on "unpainted" walls) into property's substance, the court objected to the study's use of "underutilization" as a blight measure. AKRF and Earth Tech both found blight in West Harlem "underutilization."[307] Whereas AKRF, Earth Tech, Columbia, and ESDC saw empty space and lost opportunity, the *Kaur I* court found Harlem's topography "perfectly appropriate"[308] – in a replay of the *Goldstein* dissent's regard of Atlantic Yards as "normal" – and expressed distaste for the ESDC's utilization mania, since it would require "the ultimate commercial development of all property regardless of the character of the community subject to such urban renewal."[309] This critique resembles *Hathcock*'s aesthetic and communitarian repugnance for the "'megastores'" that would "'fleck'" Michigan.[310] *Kaur I* also juxtaposes "community" property with "commercial development[s]," echoing O'Connor's use of contrasts in *Kelo.*

But *Kaur II*, the Court of Appeals that reversed *Kaur I*, saw West Harlem through another lens. It deferentially[311] leveled its optics with ESDC's, Columbia's, AKRF's, and Earth Tech's. The court described the Project with the old corporate-speak clichés – "[t]he Project contemplates the construction of a new urban campus that would consist of 16 new state-of-the-art buildings" – and rejoiced in Columbia's promise to sink $6.28 billion dollars into the project.[312] *Kaur II* also approved of the blight reports, and their "photographs of property conditions."[313]

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[306] *Id*. at *17.
[307] *Id.* at *18.
[308] *Id*. at *19.
[309] *Id*.
[310] *See* text accompanying note 194, *supra.*
[311] *Kaur II* at 244: "(ESDC) findings of blight . . . .were rationally based and entitled to deference."
[312] *Id*. at 245 and at n. 2
[313] *Id*. at 253.

The ESDC General Project Plan and the Earth Tech blight study reveals yet again how aspirational peering translates a "normal" working class neighborhood into blight. The General Project Plan deploys the hoary "world-class" and "state-of-the-art" saws,[314] revealing how the ESDC adopted the University's nonpareil perspective since Columbia describes itself as world class and cutting edge.[315] The ESDC's Project Plan also assures readers that educational institutions spend billions in New York,[316] describes glorious Columbia,[317]and characterizes the Project as an expedient in Columbia's arms race with Harvard, the University of Pennsylvania, and Yale.[318] The Project Plan also lauds "the world-renowned architects overseeing the Project's design;" the NEW YORK TIMES MAGAZINE reported that architectural superstar Renzo Piano's had proposed for the site "float[ing]"glass buildings and "transparent skyscrapers lining ample boulevards with ethereal-looking pedestrians ambling along them."[319]

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[314] ESDC, LAND USE IMPROVEMENT AND CIVIC PROJECT AND MODIFIED GENERAL PROJECT PLAN, Dec. 18, 2008, *available at* http://esd.ny.gov/Subsidiaries_Projects/Data/Columbia/AdditionalResources/ModifiedGPP/ColumbiaExpansionModifiedGPP121808.pdf at 1 and 2 (the project will allow New York to retain its status as "one of the foremost educational and cultural institutions in the world," and would erect "state of the art" facilities.). *See* this jargon also repeated on pps 4 and 8. (*Hereinafter* GENERAL PROJECT PLAN).

[315] Columbia's summer school page describes the university as state of the art. *See* COLUMBIA SUMMER, *The Campus and the City,* http://ce.columbia.edu/summer; its medical school describes itself as world class, *see* COLUMBIA UNIVERSITY, *World-Class Medical Education,* http://giving.cumc.columbia.edu/giving-opportunities/educating-future-physicians-and-scientists; a 2012 press release from its School of Continuing Education page repeats this language, *see* COLUMBIA UNIVERSITY SCHOOL OF CONTINUING EDUCATION, *100 Years of Excellence,* http://ce.columbia.edu/100-Years-of-Excellence-Columbia-University-American-Language-Program-Marks-Anniversary-in-2012; Columbia University's President Lee Bollinger's web page talks about its world status as an educational leader, *see* Lee C. Bollinger, OFFICE OF THE PRESIDENT, http://www.columbia.edu/content/office-president-1.html; a COLUMBIA MAGAZINE article about fund raising promises future state-of-the-art buildings for the University, *see* COLUMBIA MAGAZINE, *Columbia Campaign Expands to Earn $5 Billion by 2013* (2010), http://magazine.columbia.edu/news/winter-2010-11/columbia-campaign-expands-raise-5-billion-end-2013.

[316] *See* GENERAL PROJECT PLAN, *supra* note 314, at 6.

[317] *Id*. ("Founded in 1754, Columbia is the oldest institution of higher education in New York State and the fifth oldest in the nation."). This page also notes Columbia's financial aid programs.

[318] *Id*. at 7, 10.

[319] GENERAL PROJECT PLAN at 11; Daphne Eviatar, *The Manhattanville Project,* N.Y.T. MAGAZINE, May 21, 2006 at 32.

But Columbia's consultants didn't just look up; they also peered down. The May, 2008 Earth Tech *Manhattanville Neighborhood Conditions Study*[320] describes Manhattanville collapsing beneath the standards set by the Project Plan, Columbia's elegance, and Renzo Piano's ethereality. Here readers discover predictable use of juxtaposition and disaster-porn-like photographs. Earth Tech's first salvo features a picture of beautifully manicured Morningside Heights, a site occupied by Columbia in the 60s, "displacing thousands of poor, mostly black and Puerto Rican residents;"[321] the NYC CITY GUIDE helpfully calls this area "white Harlem."[322] Earth Tech (acquired in 2008 by a fortune 500 firm called AECOM in a merger of two "world-class professional technical services companies")[323] negatively compares Morningside to Manhattanville: "The Morningside Heights neighborhood presents a distinctly different character than the study area."[324] Photo 1[325] of the study shows gracious Morningside Park, which report authors quickly contrast with Manhattanville's traffic, graffiti, and peeling paint.[326] Other West Harlem images reveal oddly evacuated businesses slightly strafed with graffiti that Earth Tech says proves "decades of neglect and a casual attitude towards appearance as an unnecessary business expense."[327] When commenting on petitioner's business, Tuck-it-Away, the report says: "Many businesses appear to be marginal enterprises that place little emphasis on appearance, other than advertising to speeding vehicles."[328] Images of a somewhat cracked sidewalk on West 125th street also festoon the report; this, of course, is where petitioners Kaur and Singh own their gas stations.

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[320] EARTH TECH, MANHATTANVILLE NEIGHBORHOOD CONDITIONS STUDY, May 2, 2008 at 2-7, http://esd.ny.gov/Subsidiaries_Projects/Data/Columbia/AdditionalResources/NeighborhoodConditions-EarthTech/Manhattanville1-76.pdf. (*Hereinafter* MANHATTANVILLE NEIGHBORHOOD CONDITIONS STUDY.)
[321] Eviatar, supra note 319.
[322] *Morningside Heights, Manhattan, New York City,* NYCTOURISTGUIDE.COM, *available at* HTTP://WWW.NYCTOURISTGUIDE.COM/MORNINGSIDE-HEIGHTS-MANHATTAN.PHP.
[323] *AECOM to Acquire Earth Tech from Tyco,* BUSINESSWIRE, Feb. 12, 2008, *available at* http://investors.aecom.com/phoenix.zhtml?c=131318&p=NewsArticle&id=1107196.
[324] MANHATTANVILLE NEIGHBORHOOD CONDITIONS STUDY, at 2-7,
[325] *Id*.
[326] *Id*. at 2-9.
[327] *Id*. at 2-11.
[328] *Id*.

[329]

In addition, the Earth Tech study complains of the "eyesore" of the "frequent evidence of vermin, including rats," which it establishes with the picture of one dead mouse or rat.

[329] *Id*. at 2-13.

Photo 46: Dead rat on sidewalk of Broadway [330]

All of the pictures used by Earth Tech appear to be straightforward products of a digital camera, revealing no particular artistry.

In comparison to floating glass palaces, willowy renters, and mighty Columbia, what once was "normal" now seems embarrassingly substandard for "world class" New York. Once again, the gaze is first set by a wealthy developer, reflected in official verbiage, employed in a blight study, and then enshrined by the courts.

This pattern, as it happens, both raises and answers a further dilemma embroiling the cases: That of pretext.

e) Peering and pretext

Peering in *Goldstein, Kelo,* and *Kaur* guarantees discovery of a public purpose through a reversal of O'Connor's use of juxtaposition in *Kelo*: In the *Kelo* dissent franchises killed the church, but here

[330] *Id.* at 2-19.

Tuck-it-Away kills progress. But peering also permits takings because it helps answer whether blight findings were pretextual, which would kill the taking's legality.[331]

In all three cases, judges confronted allegations that takings gratified only Pfizer, Ratner, and Columbia's interests. Kennedy, in a *Kelo* concurrence, found the trial court dispatched pretext questions, since it had reviewed witness testimony, communications between parties, the timing of funding commitments, and the process that selected Pfizer. [332] In *Goldstein,* dissenting Judge Smith frets that pretext evidence *does* exist because officials first described the Atlantic Yards project as economic development, switching to a blight justification only in 2005.[333] And in *Kaur*, petitioners alleged pretext by citing AKRF's conflict of interest (it represented Columbia and ESDC); *Kaur II*, however, found that ESDC cured any bad faith problem by hiring Earth Tech.[334]

Were these takings pretextual? I think not, but this conclusion only further evidences the troubles with aspirational peering. If legislatures and courts align their gazes with those of wealthy corporations, then their motives are pure. That is, they honestly see blight, or economic redevelopment opportunities – and a public purpose. If pretext means a lie, no mendacity exists here; the constant recycling of corporate-speak indicates that community leaders, lawmakers, and the bench honestly believe they discern blight and public purpose.

This proves a case of the "eye adjust[ing],"[335] but also something worse. This shift in focus signifies a lawmakers' bedazzlement that vanishes and predates upon the middle class as well as my main focus: low-income people. Peering at the poor, which we find in cases like *Berman*, *Muller*, *Miami*

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[331] *Kelo* at 491 ("pretextual public benefits" eradicate public purpose) (Kennedy, J., concurring).
[332] *Id.* at 491-492.
[333] *Goldstein* at 551 (Smith, J., dissenting).
[334] *Kaur* at 255.
[335] This term comes from fashion writing. *See* Amy Spindler, *Is it New and Fresh or Merely Strange?* N.Y.T. (Oct. 10, 1996), *available at* http://www.nytimes.com/1996/10/10/garden/is-it-new-and-fresh-or-merely-strange.html?n=Top%2fReference%2fTimes%20Topics%2fPeople%2fK%2fKawakubo%2c%20Rei ("It sometimes takes two or three years after an idea appears in fashion before the eye adjusts.").

Redevelopment, Post v. Dade County, and, to a certain degree, *Kelo*, remains a good legal method despite its perilous dehumanization of the very vulnerable. *Muller, Berman, Miami Redevelopment Agency,* and *Post v. Dade County, Norwood,* and *City of Joliet* (through a judicial citation to *Berman* and the rhetoric of politicians)[336] all stigmatize low-income and minority persons.

So what? This dehumanizing gaze has detrimental "expressive meaning," as professor David Dana has noted.[337] But not only that: It creates a culture of blindness. Within this blind spot poor people suffer from restrained choice and dignity, as well as other harms. As I will argue next, this culture and this harm both qualify as forms of violence.

V. Violence and Peering

The takings cases impose violence upon the poor in two ways related to peering: Courts' horrific descriptions of the poor contribute to a culture of violence, and this culture makes it easy to harm poor people.

a) The poor as monstrous

As noted, courts in blight cases peer at the poor and see them as monstrous. The judicial narratives adhere to horror conventions, wherein the hero regards an infectious, virulent force. This threat creates a fabulist dilemma – is it natural? or supernatural? – resolved by the protagonist and audience. In *Berman, Muller,* and *Miami Redevelopment Agency,* and even *Joliet*, we find courts studying the poor to determine their humanity, or whether their monstrosity authorizes cleansing slum clearances. Courts usually resolve this puzzle by banishing the poor from the social order, a deduction that also gratifies the bench and its readers with the certainty that *they* belong in the "Heights."[338] Such

[336] *See* text accompanying note 168, *supra* (slurs).
[337] *See* text accompanying note 57, *supra.*
[338] *See* text accompanying notes 288-290 (Morningside H).

is the power of peering, which triggers disgust as well as vanity, and makes the poor's dispersal a *fait accompli*.

b) The monstrous poor, and the culture of violence

The rhetoric of horror participates in a *culture of violence*, which leads to *structural violence*. In making this argument, I depend on the anti-violence scholars Johann Galtung and Paul Farmer, and my own work on jurisprudential nonviolence. Galtung, author PEACE BY PEACEFUL MEANS (1996), and ACHIEVING PEACE (1975), described cultural violence as "those aspects of culture . . . . that can be used to justify or legitimize direct or structural violence."[339] Violence qualifies as direct if it constitutes "direct cruelty perpetrated by human beings against each other."[340] Galtung teaches us that *structural* violence exists where social structures distribute injury, sickness, death, inequality, and humiliation to the disadvantaged.[341] Paul Farmer, a Harvard Medical School professor and founder of Partners in Health, adds that structural violence may exist where suffering, like that induced by "grinding poverty," spreads through historical and economic processes "constrain[ing] agency."[342] In my own work on violence and law I observe that violence issues from fractures of care, and counsel special caution where state acts deny care to people with intersectional identities – that is, people whose vulnerabilities flow from race,

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[339] *Cultural Violence,* 27 JOURNAL OF PEACE RESEARCH 291, 291 (1990), *available at* http://www.okan.edu.tr/UserFiles/File/galtung.pdf.

[340] JOHAN GALTUNG, PEACE BY PEACEFUL MEANS : PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION 200 (1996).

[341] My paraphrase of Galtung borrows from Cynthia Cockburn. *See* CYNTHIA COCKBURN, ANTIMILITARISM: POLITICAL AND GENDER DYNAMICS OF PEACE MOVEMENTS 242, 255 (2012). *See also* Johan Galtung, *Violence, Peace, and Peace Research,* 1 PEACE STUDIES, 175 (1969) ("structural violence is inequality, above all in the distribution of power."). Nancy Scheper-Hughes and Philippe Bourgois also include "humiliation" as a product of structural violence. *See* NANCY SCHEPER-HUGHES & PHILIPPE BOURGOIS, VIOLENCE IN WAR AND PEACE 1 (2004) ("Structural violence – the violence of poverty, hunger, social exclusion and humiliation – inevitably translates into intimate and domestic violence.") *See* Johan Galtung, *Cultural Violence,* 27 J. OF PEACE RESEARCH 291, 294 (1990) (structural violence's effect on the spirit and the environment) (*hereinafter Cultural Violence)*.

[342] PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS AND THE NEW WAR ON THE POOR 40 (2005).

gender, sexual orientation, class, disability, or other personal features.[343] Thus, structural violence bursts forth from systems that fracture care and impose harms on particularly at-risk people.

Galtung and Farmer note that structural violence proves recondite because we are inured to it.[344] Cultural violence aids this subterfuge, because it "makes direct and structural violence look, even feel right – or at least not wrong."[345] It "mak[es] reality opaque, so that we do not see the violent act or fact, or at least not as violent."[346] Mulvey and Fanon also illuminates this problem, since the male and raced gaze that forms part of cultural violence creates pleasure,[347] making it all the more intractable.

Descriptions of diseased and monstrous housing units create cultural violence in two ways. First, this rhetoric found in cases,[348] political speech,[349] and blight reports[350] claims that blighted buildings are vectors of disease, waste, sloth, and epidemic immorality. But everyone knows that buildings do not host "congenital diseases;" people do. Sewers exist because people use them. And people, not buildings, are immoral. Everyone understands "blight" exists because of human usage. Even the very word "blight" excommunicates scapegraces: Its obscure origins come from root words indicating "spot," "stain," and a crop-destroying mildew,[351] but since 1896 the word "blighter" branded

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[343] Yxta Maya Murray, *A Jurisprudence of Nonviolence,* 9 CONN. PUB. INT. L.J. 65 (2009) (violent "fracturing" can be caused by ignorance of intersectionality).
[344] *See* Johan Galtung, *Violence, Peace, and Peace Research,* 1 PEACE STUDIES 167, 173 (1969) ("Structural violence is silent, it does not show."); FARMER, supra note 342 at 40 ("structural violence all too often defeats those who would describe it.").
[345] *See* Galtung, *Cultural Violence*, at 291.
[346] *Id.* at 292.
[347] *See* text accompanying notes 39-41, *supra.* For more on pleasure and the racial gaze, *see* Jennifer C. Nash, *Bearing Witness to Ghosts: Notes on Theorizing Pornography, Race, and Law,* 21 WIS. WOMEN'S L.J. 47, 68 (2006) ("white subjects garner pleasure from race").

[348] *See* Section III(a)(ii), *supra.*
[349] *See* text accompanying note 168, *supra* (Joliet).
[350] *See* text accompanying 328, *supra* (Tuck it away critique, etc.).
[351] Walter W. Skeat, *Blight,* AN ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 63 (1997). *See also* George LefCoe, *Redevelopment after Kelo: What's Blight Got to Do With It?,* 17 S. CAL. REV. L. & SOCIAL JUSTICE 803, 817 (2009). ("`Blight' . . . referr[ed] to a small, nearly microscopic insect that attacked plants. In the seventeenth century, the word had entered common speech as a more general term that meant a 'baleful influence of mysterious or invisible origin.'")

contemptible, perhaps homosexual, people.[352] These insinuations ease the cleansing of "contemptibles" through eminent domain, yet their personal accusations hide behind complaints about sick architecture.

Second, the redaction of people in blight rhetoric and disaster porn only emphasizes this connection. It also adds a discomfiting racial gloss to blight imagery. From *Berman* to *Norwood* and *Joliet* courts blame buildings for disease and social ills. But people – apart from those eating cat food in *Miami Beach Redevelopment Agency*[353] -- vanish from these frames. Nor do they appear in the blight report pictures that drove the takings in *Goldstein* and *Kaur*. Why not?

A disturbing answer exists in the film criticism of anthropologist James A. Snead, who studies the racial meanings of movies like *King Kong*, and notes that racist visual culture creatives have long used omission to signal the presence of Black people:

> Omission and exclusion are perhaps the most widespread tactics of racial stereotyping but are also the most difficult to prove because their manifestation is precisely absence itself. . . . . From the earliest days of film, omission was the method of choice in designing mass images of blacks . . . . Even within the individual frame, we often (though not always) find the black excluded. . . . But since "framing," "editing," and "cutting out" are indeed the exigencies of filmic and aesthetic practice, it was possible to hide ideologically motivated distortions under the masks of artistic economy or exigency.[354]

In the case of disaster porn, case law, and blight reports, what are these "distortions?" Omitting people from the images or visual descriptions of place immunizes racist readings that fault people of color living in Detroit, Harlem, or Atlantic Yards. If people of color *were* represented, then easier

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[352] Eric Partridge, *Blighter,* ROUTLEDGE DICTIONARY OF HISTORICAL SLANG 414 (6th ed. 2006).
[353] *See* text accompanying note 119, *supra.*
[354] James A. Snead, *Spectatorship and Capture in* King Kong*: The Guilty Look,* in REPRESENTING BLACKNESS: ISSUES IN FILM AND VIDEO 29 (2003).

accusations of racism, objectification, and exploitation might be made, since they would evidence how the White bourgeois gaze peered at minorities and found *them* – and not buildings – vectors of disease and immorality. Empty streetscapes, however, shield courts and legislatures from complaints, and racial insinuations remain silently understood. Indictments of minorities' laziness and dishevelment are, for example, only barely detectable in the *Kaur* blight report's assessment that Harlem reflected "decades of neglect and a casual attitude towards appearance as an unnecessary business expense,"[355] and harbored "marginal enterprises that place little emphasis on appearance."[356]

The visuals manufactured in blight cases, then, obliquely depict human beings as wastrels and locations of disease, which makes their elimination through condemnation "look, even feel right – or at least not wrong."[357] It also "mak[es] reality opaque, so that we do not see the violent act or fact, or at least not as violent."[358] That is, it creates cultural violence, which makes structural violence seem all the more justified or natural.

c) Structural violence

But what is this violence? Structural violence may proceed from what Professor David Dana calls "exclusionary eminent domain," which banishes people through eminent domain condemnations that price them out of the neighborhood. [359] Psychiatrist Mindy Fullilove studies this dislocation in her 2009 book ROOT SHOCK: HOW TEARING UP City NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT. She notes that all people dislocated through condemnation may suffer from "root shock," which is "the traumatic stress reaction to the destruction of all of part of one's emotional ecosystem. . . . Such a

[355] *Id*. at 2-11.
[356] *Id*.
[357] *Cultural Violence* at 291.
[358] *Id.* at 292.
[359] David A. Dana, *Exclusionary Eminent Domain*, 17 S. C. ECON. REV. 7, 7 (2009) ("Exercises of what I am calling 'exclusionary eminent domain' are *doubly* exclusive because the displaced residents are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes.").

blow threatens the whole body's ability to function. . . . . Shock is the fight for survival after a life-threatening blow to the body's internal balance.[360] She describes this condition as potentially permanent[361] and personally catastrophic.[362]

While all outcasts suffer greater risk for emotional pain and even heart attacks,[363] poor people uprooted through condemnations confront higher risks for disease, joblessness, and incarceration;[364] also, dislocated people may sink into poverty.[365]

In 2011, Edward Goetz observed these effects, noting "[th]he current campaign to demolish and transform public housing will primarily affect low-income black families."[366] Goetz focuses on HUD's HOPE VI program,[367] which aims to "transform" "distressed housing."[368] Like Fullilove, he gleans that dislocation destroys social networks.[369] In 2009, Alexandra Curley also noted that HOPE VI and HUD's Moving to Opportunity relocations of the poor "often break[] up strong social networks and result[] in less social support for residents."[370] In a study of relocated resident women of an East Boston public housing development, Curley determined that fifty percent suffered social fractures that, at least in one

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[360] Mindy Fullilove, ROOT SHOCK: HOW TEARING UP City NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 11 (2009).
[361] *Id.* at 12 ("[it will] stay with the individual for a lifetime.").
[362] *Id.* at 14 (dislocation "destabilizes relationships, destroys social, emotional, and financial resources, and increases the risk for every kind of stress-related disease, from depression to heart attack.")
[363] *Id.*
[364] *Id.* at 229 ("This structural disconnection has led to many problems, among them: an increase in joblessness, a decline in marriage, an acceleration of out-of-wedlock births, a widening disparity in rates of disease, rising rates of incarceration, and a greater proportion of African Americans living in poverty.").
[365] *See, e.g.,* note 375, *infra* (Dana), text accompanying note 387, *infra* (Desmond), and text accompanying notes 405-408, *infra* (story of "W").
[366] Edward Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American* Cities, 48 URBAN. STUD. 1581, 1583 (2011).
[367] *See id.* at 1582 (focusing on HOPE VI).
[368] Housing and Urban Development, ABOUT HOPE VI, *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/hope6/about
[369] Goetz, supra note 366, at 1583 ("Movers report difficulty in establishing new social ties, they miss their social milieu from the old neighbourhood and worry about isolation in their new places.").
[370] Alexandra M. Curley, *Draining or Gaining? The Social Networks of Public Housing Movers in Boston,* 26 J. OF SOCIAL AND PERSONAL RELATIONSHIPS 227, 229 (2009).

case, catalyzed a "downward spiral" that included job loss and escalated mental distress.[371] Curley also found reduced "emotional support," "increased feelings of isolation" and problems with accessing "supportive services" like food pantries.[372] Some women, however, also reported auspicious liberations from "draining" social networks along with nourishing ones.[373] Yet even when these women moved to areas offering "leveraging" networks, few could take advantage of these opportunities.[374]

With exclusionary eminent domain, however, even the illusory prospects of leveraging contacts disappear: Professor Dana discerns that exclusionary condemnations "foster[] concentrated poverty[:] When low-income people are displaced from non-low income areas, they typically can only afford to re-locate in low-income areas, areas that already have significant poverty."[375]

The Columbia expansion into Manhattanville offers data confirming Fullilove's, Dana's, Curley's, and Goetz's warnings that state dislocations of poor people fracture care and distribute injury to vulnerable people: That is, they create structural violence.

i) Manhattanville: A case study in structural violence

The testimonies of people affected by blight condemnations verify that their dislocations cause emotional and physical harm. My findings relate to the *Kaur* case affecting Manhattanville, and concern working-class individuals who own small businesses, as well as people suffering from more intense forms of poverty.

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[371] *Id.* at 234-35.
[372] *Id.* at 235.
[373] *Id.* at 237-38.
[374] *Id.* at 241 ("It was expected that relocation out of Maverick might put the women in this study in a better position . . . However, even those who relocated to lower-poverty neighborhoods did not have access to more leveraging ties or better job networks, at least in the two years following relocation.").
[375] *Exclusionary Eminent Domain,* supra note 359, at 33. Goetz also noted that some subjects reported satisfaction with the qualities of their new neighborhoods in Hope VI contexts, but, again, Dana's work indicates that Fifth Amendment takings of poor people's properties lead to less happiness, health, and positive prospects. *Id.* at 7 ("exclusive").

Gurnam Singh, a small-business owner plaintiff in *Kaur*, told a NEW YORK TIMES reporter that he suffered "relentless[] pressure[]"[376] from Columbia to sell his property, and that "the realization that he might lose his gas stations had prompted him to go to the hospital in [for 18 days] . . . for exhaustion."[377] His wife, Parminder Kaur, also presented stress symptoms of blisters on her face and scalp diagnosed as "stress-related shingles."[378]

Nellie Hester Bailey, the head of the Harlem Tenant's Council, also conveys the dispersal, rage, and alienation caused by the Columbia expansion. When fighting the Columbia proposal at a public hearing, she said "[t]his plan, and this proposal and this decision by ESCD in support of Columbia University . . . is to our demise; it is indeed racism, because the message is very clear. Columbia University and the Bloomberg administration and the developers are driving out working class poor Blacks, Latinos, and other people of color who have populated Manhattan. They want to drive us to the outer boroughs. It is indeed the Parisian model."[379] When Ms. Hester Bailey mentions the "Parisian model," she speaks of Baron Haussman's 19th century slum clearances, which demolished neighborhoods so that the "problem[s]" of poverty could be "displaced . . . to the industrial areas."[380] Ms. Hester Bailey evokes not only the plight of the working class, such as Mr. Singh and Mr. Kaur, but also of the very poor, since Haussman's slum clearance cleansed *fin de siècle* Paris of starvelings. Moreover, her complaints of "our demise" and of being "drive[n out]" evidences psychological suffering.

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[376] Timothy Williams, *2 Gas Stations, and a Family's Resolve, Confront Columbia Expansion Plan*, N.Y.T., Sept. 20, 2008, *available at* http://www.nytimes.com/2008/09/21/nyregion/21gas.html?pagewanted=all&_r=0.
[377] *Id*.
[378] *Id*.
[379] *See Eminent Domain-Columbia University Expansion ESCD Hearing,* Sept. 3, 2008, *available at* http://www.youtube.com/watch?v=H55lnjfqd44&NR=1&feature=endscreen.
[380] ANDREW AYERS, THE ARCHITECTURE OF PARIS: AN ARCHITECTURAL GUIDE 14 (2004).

Poor people's torment, however, was not foretold by Columbia's efforts at damage control in West Harlem. While Columbia enthusiastically took over business properties,[381] its officials appear to have assiduously worked to prevent resident dislocation by building housing units or relocating folks to apartments that are "at least as good as their existing dwellings . . . and have generally equal or better access to their jobs, public facilities and commercial amenities."[382] Moreover, Columbia has negotiated to provide $76 million in grants to address neighborhood needs in West Harlem.[383]

If Columbia and the state made such labors to accommodate residents, then is the fall-out really that bad? Sadly, yes: My research reveals that these resolutions did not ward off trauma. Columbia's presence in Manhattanville resulted in mass evictions, tenant harassment, alterations to apartment culture that isolate elderly tenants, and other changes that deteriorate community networks and flourishing. Interviews I conducted with Harlem residents also indicate that these forces – particularly evictions -- ousted people into serious poverty.[384]

Evictions prove one of the most devastating side effects of urban renewal, and deserve more attention in the legal literature on takings. Eminent domain evictions follow what Kathe Newman and Elin Wylie call "state-driven" gentrification;[385] these scholars observe that "rapid gentrification" can "put tremendous pressure on low-income residents."[386] Sociologist Matthew Desmond lists the numerous

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[381] *See* GENERAL PROJECT PLAN at 32 ("Approximately 85 known private businesses would be displaced by the Project.").
[382] *Id. See also* Thea Raymond-Sidel, *Construction for Displaced Manhattanville Resident to Begin,* COLUM. DAILY SPEC., Dec. 7, 2012.
[383] Kia Gregory, *An Evolving West Harlem, Portrayed in a First Wave of Grant Requests,* N.Y.T., Feb. 5, 2013, *available at* http://www.nytimes.com/2013/02/06/nyregion/an-evolving-west-harlem-is-portrayed-in-grant-requests.html.
[384] *See, e.g.,* text accompanying notes 405-408 ("W").
[385] *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City,* 43 URB. STUDIES 23, 27 (2006), *available at* http://www4.uwsp.edu/geo/faculty/ltheo/homepage/geog393_2008/gentrificationinnyc.pdf ("Residential displacement is one of the primary dangers . . . [of] gentrification. Residents may be displaced as a result of housing demolition, ownership conversion of rental units, increased housing costs (rent, taxes), landlord harassment and evictions.").
[386] *Id*. at 45.

personal disasters that accompany evictions, including material hardship, decreased residential security, homelessness, family disintegration, depression, and even suicide.[387]

Evictions and other calamities followed Columbia's takeover of Manhattanville. One of the most flagitious of these expulsions occurred on 3333 Broadway, a residential building situated on the north perimeter of the Columbia expansion.[388] Until 2005, the building was rent-controlled under the Mitchell-Lama state housing subsidy,[389] but its owners, now the Urban American Management Corporation, abandoned its participation in that program.[390] While the U.A.M.C. and even the Legal Aid Society (which had filed a lawsuit against the U.A.M.C.) denies any connection between Columbia's expansion and 3333 Broadway's deregulated rents,[391] Columbia graduate and member of the Student Coalition on Expansion and Gentrification Andrew Lyubarsky calls 3333 Broadway "the biggest single tragedy of the expansion on the issue of secondary displacement. . . . the building will essentially be a thousand-plus units apartment complex across the street from the Manhattanville campus[, which] played a role in the decision of the landlords to exit the Mitchell-Lama program."[392]

The federal government had, back in 2005, attempted to alleviate dislocation harms by issuing residents Section 8 vouchers, which pay landlords the difference between Mitchell-Lama and market

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[387] *Eviction and the Reproduction of Urban Poverty,* 118 A.J.S. 88, 91 (2012), *available at* http://scholar.harvard.edu/files/mdesmond/files/desmond.evictionpoverty.ajs2012.pdf.
[388] Katherine Meduski, *Questions Linger for Tenants Near M'ville Campus,* COLUM. SPEC. Nov. 2, 2012, *available at* http://www.columbiaspectator.com/printer/view?nid=26351 ("3333 Broadway is a colossal 1,190-unit building stretching from 133rd to 135th streets, located just north of Columbia's expansion.")
[389] *Id*.
[390] *Id.* ("Until 2005, 3333 was part of the Mitchell-Lama state housing subsidy program, which provided affordable housing for the neighborhood's low- to middle-income residents.").
[391] *Id.* ("3333's owner, the Urban American Management Corporation, sees no relationship between its property and the campus expansion. 'We have nothing to do with Columbia University,' Douglas Eisenberg, the corporation's chief operating officer, said."); *id.* ("Ellen Davidson, an attorney at the Legal Aid Society, said. 'I don't think that Columbia and its expansion has anything to do with 3333 Broadway.'").
[392] *Id.*

rents as long as tenants' incomes do not exceed limitations.[393] Yet this did not keep the landlord from allegedly harassing tenants to leave the apartment,[394] or to find ways to disqualify tenants from Section 8 benefits: When Mildred Branch, 79, left her apartment to get surgery, she received an eviction notice,[395] and disabled veteran James Russell Outlaw faced eviction because of a vermin problem and his confused handling of paperwork, which disqualified him from Section 8 benefits.[396] Root shock may be also discerned in some tenants' explosive reactions to evictions.[397]

Alicia Barksdale, a one-time candidate for District 7's City Council,[398] has served as 3333 Broadway Tenants Association's president since 2009.[399] She described the effects of the Columbia expansion to me:

> We've always thought Columbia had something to do with the building's [rental increases] because of the buyout. After we were in Mitchell-Lama the building was sold two or three times

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[393] Lore Croghan, *Affordable Housing Disappearing,* NYDAILYNEWS.CO, AUG. 2, 2005, *available at* http://www.nydailynews.com/archives/money/affordable-housing-disappearing-mitchell-lama-woes-article-1.605999 ("At 3333 Broadway, Stubbs and almost all the other tenants applied for Section 8 vouchers - which would deliver money from the federal government to pay the difference between their rents under Mitchell-Lama and the new, higher rents their landlord has set."). *See also* New York Housing Authority, *Section 8 Assistance: Applying for Section 8,* available at http://www.nyc.gov/html/nycha/html/section8/section8-eligibility.shtml.

[394] Croghan, *id.* ("[The] new owner is systematically harassing [tenants] in hopes of replacing them with higher-paying tenants.")

[395] *Id.*

[396] Timothy Williams, *Eviction Anxiety Rattles a Formerly Subsidized Upper Manhattan Building,* N.Y.T., Oct. 15, 2008, *available at* http://www.nytimes.com/2008/10/16/nyregion/16building.html?pagewanted=all&_r=0 ("Though his landlord had failed to carry out the needed work, it became Mr. Outlaw's problem when eviction proceedings began. He was required to report to Housing Court in Lower Manhattan, but Mr. Outlaw — who uses a walker and says he did not fully understand the paperwork — missed each date.")

[397] Kevin Shin, *Tensions Mount as Evictions Go Forward at 3333 Broadway,* COLUM. D. SPEC., May 7, 2007, *available at* http://www.columbiaspectator.com/2007/05/07/tensions-mount-evictions-go-forward-3333-broadway ("While the building's management and other tenants have accused some evicted tenants of tearing the carpets and smashing the windows of their old apartments, some of the evicted have accused city marshals of taking away their belongings without their knowledge."); Ed Kent, *Columbia's Move on Manhattanville Sets of Massive Evictions Nearby,* BLOGGER NEWS NETWORK, Mar. 2, 2007, *available at* http://www.bloggernews.net/14954. *See also Lore Croghan,* supra note 393 ("`The building is almost like the Alamo,' said Keith L. T. Wright, who represents the area in the State Assembly.").

[398] *See Alicia Barksdale for New York City Council District 7, http://www.aliciaforcouncil.com/.*

[399] Interview with Yxta Maya Murray, March 29, 2013.

> and each buyer sold it for twice as much as they purchased it. The last purchaser bought it [and some other buildings] for almost a billion dollars.[400] So this started happening. . . . People . . . get[] evicted . . . because the[] [landlords] have different ways of finding out that you don't qualify for Section 8 . . . . If you're making too much money for Section 8 but not enough for the rent, [then you're out.] [Also,] landlord harassment and intimidation [exists] in all the buildings . . . it's like a dormitory at this point and they're treating us like a dormitory or prison.[401]

Ms. Barksdale explained that tenants were not just evicted for forfeiture, but also for their status:

> [They're especially trying to] evict older tenants and [disabled] tenants . . . such as this one case of this woman who has lived here for twelve years and has a child with autism, but a student moved next door to her and suddenly they wanted her [and her child] out. . . . You know, [they use] little tactics . . . to discourage people that have been here for 40 years, [but] . . . if we have Section 8, money is money if – so if you're getting your market rate, what is the problem? Is it that you're trying to do gentrification because of Columbia and a lot of people of the Caucasian cultures are coming from downtown?[402]

Ms. Barksdale noted other corrosions of 3333 Broadway's family atmosphere. While 3333 Broadway once had courtyard benches where families and the elderly could socialize, the benches have been "ripped out:" "Now we can't use [the courtyard.] [Also,] we used to have a library -- they got rid of it . . . . Kids were tutored there, and Boy Scouts and Girl Scouts had their meetings there, and we had

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[400] *See also Urban America Charging Eastwood/Roosevelt Landings Residents Up To $1000 in Monthly Submetered Electric Bills – Can that be Right?*, ROOS. ISLANDER, Feb. 6, 2009, *available at* http://rooseveltislander.blogspot.com/2009/02/urban-america-charging.html ("In 2007, during the height of the commercial real estate bubble, the NY Observer reported that Urban America, together with the Fisher Brothers and the City Investment Fund, purchased a portfolio of formerly Mitchell-Lama subsidized building for $940 million dollars.").

[401] Interview, supra note 399. The COLUMBIA SPECTATOR also reported in 2009 of Ms. Barksdale and others' protests of landlord discrimination against Section 8 tenants. *See* Maggie Astor, *Residents Protest Affordable Housing Discrimination,* COLUM. SPECT., Sept. 28, 2009, *available at* http://www.columbiaspectator.com/2009/09/28/residents-protest-affordable-housing-discrimination.

[402] *Id*.

a drycleaners. I mean, it was a city within a city and they stripped everything from there -- they stripped us from everything. And now we have nothing here, nothing, nothing, nothing."

These dilemmas do not just affect a limited blast zone hemming the Columbia expansion, but roil East Harlem as well. Mr. Hilary Saunders, the former president of the tenants association of Schomburg Plaza,[403] another former Mitchell-Lama building owned by Urban America, responded to my query about whether he knew of important stories related to Columbia expansion: "There are several stories. It's not isolated. It just repeats and repeats."[404] When pressed, he described one female tenant whose name he kept confidential out of privacy concerns. This tenant, whom I will call W, lived in Schomburg for thirty years, and raised her only son there. However, after Schomburg exited Mitchell- Lama,[405] W sought Section 8 aid. When her son grew old enough to work, his income disqualified them from Section 8,[406] but did not allow the family to pay market rates.[407] W attempted to get her son to leave, but he remained for at least two months. Mr. Saudners said, "the landlord got wind of it and then she was charged with back rent . . . it wasn't even much but what happened is that she couldn't pay the back rent and was evicted. . . . [W]e understand she went back to try to South Carolina to her family, but we don't know. . . . It was a really bad situation."

Mr. Saudners explained that the worst part was W's emotional suffering:

> It was painful, not only the financial portion of it. That was her only son, and they had little or no other family in the city and just a few in the south so they were really tied to each

[403] *See* Jeff Mays, *Harlem Apartment Complex Violates Privacy with ID Plan, Residents Say,* DNAINFO.COM.NEW YORK NEIGHBORHOOD NWEWS, Feb. 28, 2012, *available at* http://www.dnainfo.com/new-york/20120228/harlem/harlem-apartment-complex-violates-privacy-with-id-plan- residents-say.

[404] Hilary Saunders interview with Yxta Maya Murray, March 29, 2013.

[405] *See* Juan Gonzales, *East Harlem Residents Claim 'Predator Investor' is Trying to Drive Up Rent and Expel Them,* DAILY NEWS, May 20, 2010, *available at* http://www.nydailynews.com/life-style/real-estate/east-harlem-residents-claim-predator-investor-drive-rent-expel-article-1.448344 (describing Schomburg's former Mitchell-Lama participation).

[406] *See* Section 8 qualifications at note 393, *supra.*

[407] *See* Saunders interview, note 404, *supra.*

other and it was just a heartbreak story. . . . She was obviously depressed by the whole affair. You live in a development, you get to know your neighbors -- we have 600 units so it's a city in itself, and you share stories about how the families are doing. [But once she started having problems with her Section 8 eligibility], she got reclusive . . . she could have been losing weight. She just, you know, some people you're used to talking to and they don't make eye contact, and they have a stooped posture? I've known her for 20 years so I knew that this eviction did affect her like that. Her only option was to go to South Carolina or to a shelter – which is a horror scene.[408]

When Ms. Barksdale and Mr. Saunders describe these events, we glimpse destroyed social networks, despair, confusion, rage, physical decline, and dispossession. Mr. Saunders also observes that the evictions triggered by Columbia can plummet some residents into "horr[ible]" poverty that sends them to shelters.[409] None of these details, however, emerge in blight reports or propaganda about Columbia's expansion. These proofs of human cost will only be discerned by *looking*, and by asking.

Agreeing that peering in eminent domain cases has blinded the powerful to the plight of the poor, Ms. Barksdale believes that the rush to upscale Manhattanville led New York lawmakers to see only "valuable property, they see a lot of original brownstones that are worth money with a lot of history -- and there's a lot of history in Harlem and a lot of struggles that Blacks went through, so it's something that they see they can benefit off."[410]

"But what do they see when they see you?" I asked her.

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[408] *Id*.
[409] *Id.*
[410] *See* Barksdale interview, supra note 399.

"They see money," Ms. Barksdale answered. "They see *ching ching."*

VI. Violence, peering, and "public purpose"

This review of eminent domain's effects demonstrates that peering proves an instrument of cultural violence that obscures structural violence in West Harlem. Galtung and Farmer define difficult-to-detect structural violence as the spread of suffering through economic or historical processes. The events cited here teach us that eminent domain in Harlem led to emotional and physical suffering, which the cases ignore (indicating their obscurity in jurisprudential optics). Singh and Kaur's stress of losing their business to led to physical illness, which parallels with Galtung's description of violence flowing from social systems that distribute suffering.[411] Nellie Hester Bailey's parallel between the Columbia expansion and the "Parisian model" evokes Paul Farmer's description of structural violence budding from historical processes that constrain agency.[412] Alicia Barksdale's account of disappeared social networks at 3333 Broadway describes violence if we believe, along with Martin Luther King and Carole Gilligan, that violence follows fractures of care.[413] Hilary Saunders' account of W's depression, weight loss, eye-contact avoidance, shelter "horror," and expulsion also tells of betrayed agency, suffering, and frayed care. And all of these people did not enjoy wealth or racial privilege, which triggers findings of violence in my own work.[414]

So, eminent domain exacts violence upon low-income people and people of color. Does this matter in the 5th Amendment jurisprudence? Might these side effects of eminent domain and peering simply be the price of progress? That is, is this suffering is justified by a "public purpose?"

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[411] *See* text accompanying note 341, *supra.*
[412] *See* text accompanying notes 342 and 379, *supra.*
[413] *See A Jurisprudence of Nonviolence*, supra note 343, at 78-80.
[414] *See* text accompanying note 343, *supra.*

No. First, if we require that eminent domain satisfy a public purpose, that objective vanishes in the face the poor's suffering and the wealthy's advantage. But what – some may ask – of the trickledown effect, which distributes wealth to larger numbers of people than those minimal populations that are sacrificed? Perhaps we might find public use in the balance?

But can we? Blight condemnations still occur apace in the United States[415] despite their grievous record. For example, Poletown's promised wealth eluded Detroit's poor. While scholar Reynolds Farley notes that as of 1990 Detroit poverty declined, he observes racial disparity in the enjoyment of these gains.[416] Further, currently Detroit is bankrupt and a tale of "two cities:" "a mostly black city with an influx of young, sometimes white artists and entrepreneurs; a revived downtown but hollowed-out neighborhoods beyond."[417] Children are particularly hard-hit by poverty in

[415] *See, e.g.,* Timothy Williams, *Blighted Cities Prefer Razing to Rebuilding,* N.Y.T., Nov. 12, 2103.
[416] REYNOLDS FARLEY, SHELDON DANZIGER & HARRY J. HOLZER , DETROIT DIVIDED 51 (2000) ("The African American poverty rate in 1990 (33 percent) was just a bit lower than in 1950 (35 percent). But among whites, the poverty rate was cut in half.").
[417] Monica Davey, *A Private Boom Amid Detroit's Public Blight,* N.Y.T., Mar. 4, 2013, *available at* http://www.nytimes.com/2013/03/05/us/a-private-boom-amid-detroits-public-blight.html?pagewanted=all. Detroit declared its bankruptcy during the writing of this article. *See* Michael A. Fletcher, *Detroit Goes Bankrupt, Largest Municipal Filing in U.S. History,* WASH. POST, July 18, 2013, *available at http://www.washingtonpost.com/business/economy/2013/07/18/a8db3f0e-efe6-11e2-bed3-b9b6fe264871_story.html.*

the city.[418] Things are so bad in Detroit that social service workers have come up with a new term to describe the level of want of its citizens: "Deep poverty."[419] And today, Professor Farley notes:

> The [Chrysler] plant was built but the economic benefits to the city were much less than Mayor Young promised. . . . GM designed the new Hamtramck or Poletown plant to extensively use robots so employment was much very lower than expected. Mayor Coleman Young also anticipated that a dozen or more parts suppliers would built new plants in Detroit near the Hamtramck Assembly plant. That never happened. . . . The only structure built new . . . was a modest sized county prison.[420]

Also, while *Kelo* did not involve a blight condemnation, it's worth observing that Pfizer abandoned New London in 2009[421] and Connecticut poverty levels skyrocketed.[422] As of 2011, Pfizer had downsized its employee base regionally to 5000 in 2011 (it retains a Groton plant),[423] and announced the relocation or laying off of 1100 more New London employees.[424] Reports claim that in 2011 the area had degraded into a dump filled with feral cats.[425]

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[418] Serena Maria Daniels, *Childhood Poverty Rates Shoot Up in Area,* THE DETROIT NEWS, JAN. 31, 2013, *available at* http://www.detroitnews.com/article/20130131/METRO/301310377.

[419] Debra Watson, *"Deep Poverty" Growing in Detroit, Nationally as Benefits Are Cut,* VOICE OF DETROIT, JUL. 15, 2011, *available at* http://voiceofdetroit.net/2011/07/15/deep-poverty-growing-in-detroit-nationally-as-benefits-are-cut/ ("Even the term 'poor' is no longer adequate to describe the desperate conditions in Detroit.").

[420] Memo from Professor Ren Farley to Yxta Maya Murray, March 30, 2013.

[421] Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case,* N.Y.T., Nov. 12, 2009, *available at* http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html.

[422] Lee Howard, *Connecticut Income Level Down as Poverty Ranks Grow,* THE DAY CONNECTICUT Sept. 23, 2011, *available at http://www.theday.com/article/20110923/BIZ02/309239931/-1/BIZ.*

[423] Southeastern Connecticut Enterprise Region, Southeastern Connecticut Council of Governments, COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY iv (2011), *available at* http://www.secter.org/LinkClick.aspx?fileticket=AnYXcb%2Fqddw%3D&tabid=89.

[424] *Id.*

[425] Kerry Picket, *'05 Kelo decision a failure; CT Site Remains a Dump,* WASH. TIMES, Sept. 3, 2011, *available at* http://www.washingtontimes.com/blog/watercooler/2011/sep/3/picket-05-kelo-decision-failure-ct-site-remains-du/. However, the Southeastern Connecticut Council's Comprehensive Development Strategy noted that a company called Electric Boat had purchased the land to "to accommodate its needs for state-of-the-art space to house [its] skilled engineering, planning and design staff." *See* COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY, supra note 423, at iv.

In the Atlantic Yards case, jobs creation has not tracked the "world-class" promises that spurred the condemnation.[426] Moreover, the plentiful affordable housing units Forest City Ratner promised to build never materialized.[427]

Cultural and structural violence imposed by blight and economic rejuvenation takings, then, dethrone their public purposes. As I have shown, however, it can be difficult for legal actors to discern the damage done by takings sanctioned in *Muller, Berman, Miami Redevelopment, Kelo, Goldstein* and *Kaur.* The problem is one of vision, of clarity of sight.

Fifth Amendment jurisprudence needs clearer optics. Judges and lawmakers must develop new habits of seeing neighborhoods and the human costs of takings. This will require these legal actors to accept challenges to their own gazes.

VII. Learning how to see

Since eminent domain takings are a social and visual project, courts and lawmakers should learn from those who work to preserve their sight against corrupting influences. NEW YORK TIMES' society and fashion photographer Bill Cunningham famously cautioned other artists not to "get stuck in the traps of the rich," and labors to see clearly by "barricading himself behind a working method that is

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[426] Garth Johnson, *Atlantic Yards Not Nearly As Brooklyn Job-Friendly As Claimed,* THE GOTHAMIST, Jan. 23,2012, *available at* http://gothamist.com/2012/01/23/atlantic_yards_not_nearly_as_brookl.php.

[427] Norman Oder, *Agency, Developer Wrestle Over Atlantic Yards Affordability,* BROOKLYN BUREAU, Aug. 26, 2012, *available at* http://www.bkbureau.org/agency-developer-wrestle-over-atlantic-yards-affordability ("Forest City initially . . . promised 900 low-income units (30-50 percent of AMI), 900 moderate-income units (60-100 percent of AMI), and 450 middle-income units (100-140 percent of AMI). . . . But Forest City soon dropped that scenario for . . . one [that] included only 450 moderate-income units, plus 900 middle-income units."); Lee Zimmerman, *Jobs, Housing and Urban Development in Brooklyn The Atlantic Yards Controversy*, REG. LAB. REV., Fall 2009, at 4, *available at* http://www.hofstra.edu/pdf/academics/colleges/hclas/cld/cld_rlr_fall09_brooklyn_zimmerman.pdf (Ratner had not provided plans for housing in the project area that would satisfy the needs of those with incomes below $ 21,270)

stringent and distanced and scrupulous."[428] Photographer Carrie Mae Weems also struggles with the illusion of objectivity. She situates herself in works such as *The Louisiana Project* (2003),[429] which depicts her visits to plantations and other locations, and 1997's *Not Manet's Type,*[430] where her nude self-portraits riff off of Manet's *Olympia.* As Weems explained to photographer Dawoud Bey: "I attempt to create in the work the simultaneous feeling of being in it and of it. I try to use the tension created between these different positions – I am both subject and object . . . . [The figure represents someone] [c]arrying a tremendous burden, she is a black woman leading me through the trauma of history."[431] In these and other cases, makers of visual culture grapple with the dynamics described by Susan Sontag in *Regarding the Pain of Others:* "Those who stress the evidentiary punch of image-making by cameras have to finesse the question of the subjectivity of the image-maker."[432] For the purposes of our discussion, and the images in the blight reports, Sontag also provides useful insights:

> Pictures of hellish events seem more authentic when they don't have the look that comes from being 'properly' lighted and composed, because the photographer either is an amateur or – just as serviceable – has adopted one of the several familiar anti-art styles. By flying low, artistically speaking, such pictures are thought to be less manipulative . . . and less likely to arouse facile compassion or identification.[433]

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[428] Guy Trebay, *Style Hound: On the Street with Bill Cunningham,* 34 ARTFORUM INTERNATIONAL 82 (MAR. 1996) (quoting Visionaire editor Stephen Gan).
[429] Weems' work is available at http://carriemaeweems.net/galleries/louisiana.html (last visited July 11, 2013).
[430] *See Not Manet's Type, available at* http://carriemaeweems.net/galleries/not-manet.html (last visited July 11, 2013).
[431] Dawoud Bey & Carrie Mae Weems, *Carrie Mae Weems*, 108 BOMBSITE (2009), *available at* http://bombsite.com/issues/108/articles/3307.
[432] REGARDING THE PAIN OF OTHERS 26 (2004).
[433] *Id*. at 26-27.

With regard to Manhattanville, we can use Cunningham's, Weems' and Sontag's teachings to challenge the objectivity of the visuals in the *Manhattanville Neighborhood Conditions Report.*[434] We can remain conscious of the "traps of the rich," of how the Earth Tech photographer was both "in and of" the images he or she took, and how Earth Tech's grainy, seemingly artless disaster-porn depictions of the neighborhood cannot conceal the subjectivity of the image-maker – particularly when there is evidence that its ilk always finds blight when asked to do so by their employers.[435]

I bring these thoughts together my work on *artifacts,* which are art forms produced by legal subjects. In past articles, I considered artwork to reveal women's responses to sexual violation[436] and Latinos' experience of subjugation in anti-immigrant regimes;[437] I also considered Carrie Mae Weems' oeuvre when analyzing how the U.S.'s racist past should influence contemporary legal discourse.[438]

Here, I offer artifacts as counter-images to those used to establish blight in Manhattanville, critiquing how eminent domain proceedings turn on supposedly objective images, but are always subject to peering.

In the spirit of Arnold Eagle's portraiture,[439] I offer two sets of counter-images, one compiled by a group of activists working with the New York City Housing Authority and the other by the residents of 3333 Broadway.

The first set of images come from pictures taken and developed in NYCHA *participatory photography* program developed in the Fall of 2010 by Mr. George Carrano, Mr. Jonathan Mark Fisher,

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[434] *See* images accompanying notes 329-330, *supra.*
[435] *See* text accompanying note 275, *supra.*
[436] *See* Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, supra note 20.
[437] *See* Murray, *Inflammatory Statehood, id*.
[438] *See* Murray, *From Here I Saw What Happened and I Cried, id.*
[439] *See* image accompanying note 96, *supra.*

and Ms. Chelsea Davis.[440] Caroline Wang and Mary Ann Burris originated participatory photography as a community development tool in the 1990s.[441] Otherwise known as "photo novella," Wang and Burris describe "a participatory process that integrates empowerment education, feminist theory, and documentary photography."[442] It places cameras in the hands of people who would otherwise be documentary subjects in order to combat the "unfairness" of even liberal documentary photography, which can sometimes devolve into "trophy hunting" and "careerism."[443]

Mr. Carrano, Mr. Fisher, and Ms. Davies introduced participatory photography to the world of public housing in an effort to "influenc[e] social policy" and to counteract "one-dimensional" images of low-income tenants in the media.[444] The resulting project, called *Developing Lives,* involved training two dozen apartment dwellers of New York City housing in photography; these participants were also given simple cameras. NYCHA published the photographs on the *Developing Lives Blog*.[445] As a sampling of these documents shows, NYCHA's participatory photography limns tenant life in ways far different than those found in blight reports. Here are two examples of images produced by Harlem-area public housing tenants[446] sent to me by NYCHA employee Ms. Chelsea Davis:

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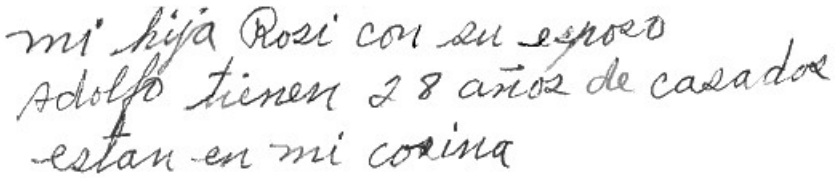
[440] Phone interview with Jonathan Fisher and Chelsea Davis, April 10, 2013.
[441] *See PhotoVoice: What We Do*; *Background to the field; PhotoVoice, photovoice methodology and participatory photography,* PHOTOVOICE.ORG, available at http://www.photovoice.org/whatwedo/info/background-to-the-field.
[442] *Empowerment Through Photo Novella: Portraits of Participation,* 21 HEALTH EDUC. BEHAV. 171, (1994).
[443] *Id*. at 175.
[444] Email from George Carrano to Yxta Maya Murray, April 6, 2013.
[445] *See* Studio NYHCA, *Photography, available at* http://studionycha.org/developinglives/, for a description of the project, and *Developing Lives Archives* for the images, *available at* http://studionycha.org/developinglives/developing-lives-gallery-archive/.
[446] Email from Chelsea Davis to Yxta Murray, April 11, 2013 ("Attached is a sampling of 15 photographs from the Developing Lives program. I selected images that are relevant to the Harlem neighborhood, Columbia expansion, and include personal moments of life in public housing.").

This photo was taken because I noticed how important family is and how you should always put your family first. I took this photo because my baby sister was mad and I tried to make her happy by taken a picture of her, something she loves to do. She still didn't smile (as you can see) but after I took the picture she said "if you take another picture of me I will smile". I thought that was so funny. I also love this picture because my favorite person in the world is in it "My Mom" I love my mother so much because she is a very strong women and a Great Mother to me, my 2 Sisters and my brother. We all admire her and respect her.[447]

[447] *Id.*



[My daughter Rosi with her husband Adolfo, they have been married for 28 years; they are in my kitchen][448]

The *Developing Lives'* use of text magnifies these documents. They provide a much needed perspective on life inside of neighborhoods that economic elites today dismiss as sites of disease, miscreancy, and underutilization during blight investigations and legal proceedings.

Inspired by the work of NYCHA activists, I sought other handmade Harlem images that might give additional representations of the area New York officials now describe as blighted. In my conversations with Alicia Barksdale, she noted that several members of 3333 Broadway had taken photographs of the community in the years before and during the condemnation proceedings. She asked these residents to share these images with the readers of this article and with me; like the *Developing Lives* pictures, and this small arsenal of photographs presents a sharp riposte to Earth Tech's dossier:

[448] *Id.*

[449]

[449] Photo sent from Alicia Barksdale to Yxta Maya Murray, April, 2013.

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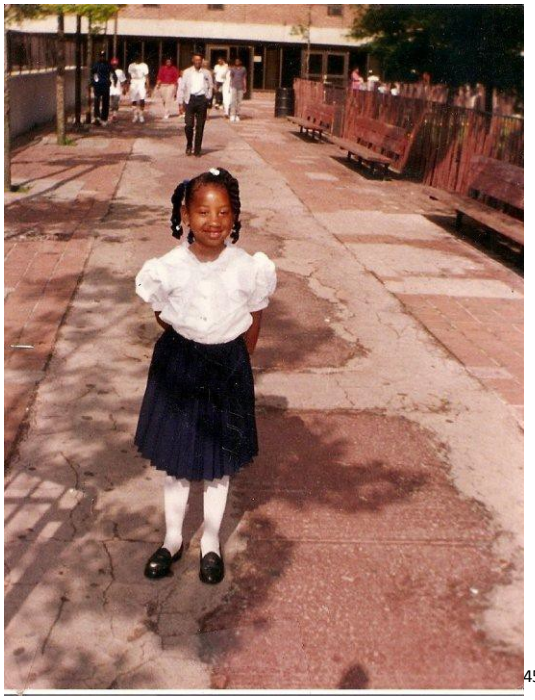
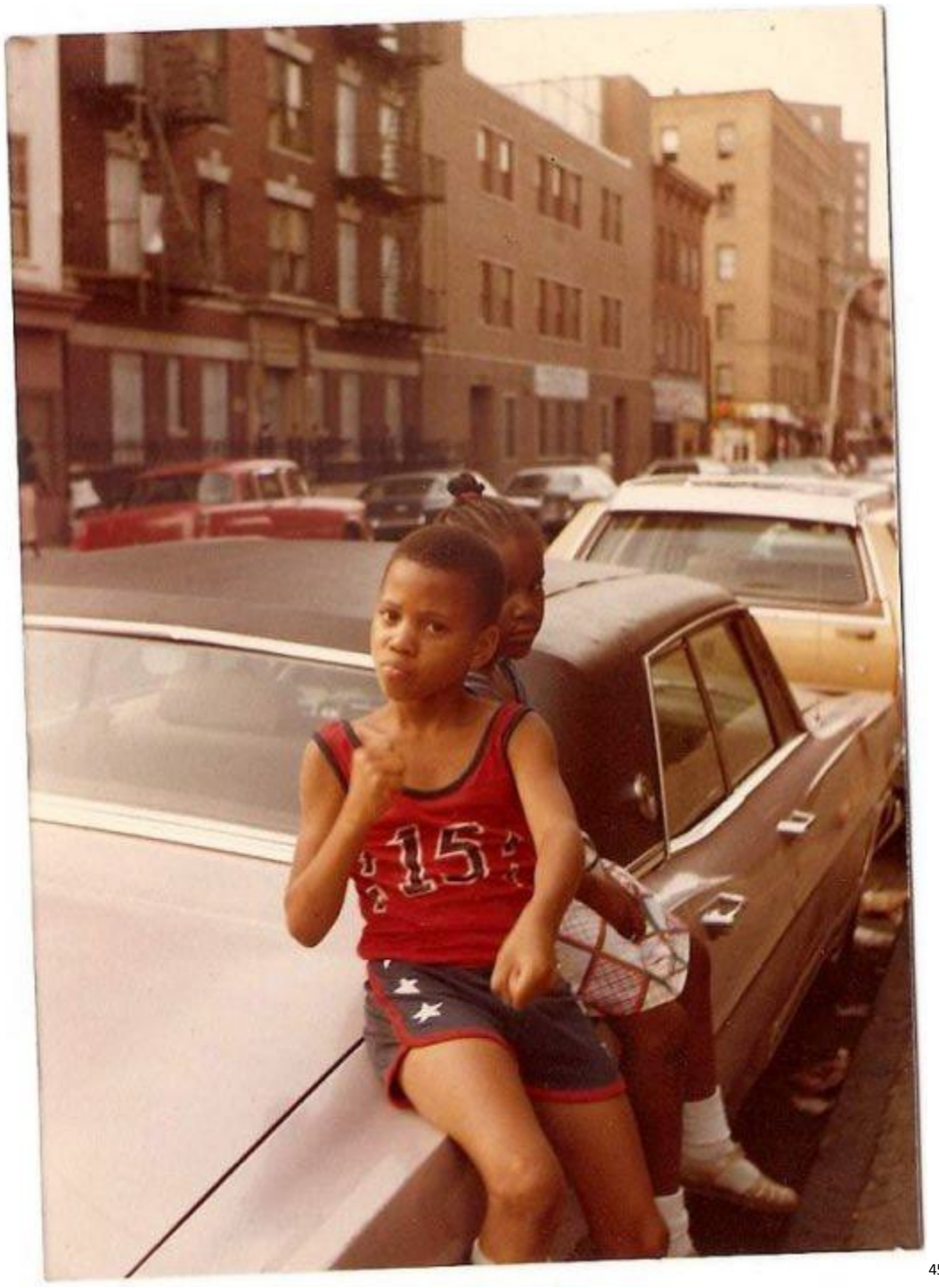
4>0 *!d.*

 [451]

[451] *Id.*

452

452/d.



[453]

These images show the community and its relations with great intensity. Not all of these pictures are perfectly on the nose for the purposes of my analysis since they come from a variety of time points,

[453] *Id.*

most of them before Columbia took over the site. Moreover, 3333 Broadway only fronts the project area, and there is not a perfect overlap between the Earth Tech documents and its community photos. Yet they and the *Developing Lives* images certainly offer us a path forward. NYCHA's and 3333 Broadway's images are amateur candids – grainy, imperfectly framed – but these disclose the subjectivity of the photographer, unlike the supposedly Platonic visuals supplied by Earth Tech. Moreover, in contrast to the depopulated Earth Tech pictures, these project a sense of Harlem community, care, and history, making observers conscious of the social erosion threatened by the Columbia expansion. The *Developing Lives* and 3333 Broadway pictures also caution us that the blight report manufactures an exaggerated atmosphere of vagrancy. When people appear in the photographs, we see that the wear and tear comes from ordinary human use. Perhaps our more intense reaction to these counter-images emanates from a sense of being defrauded: Earth Tech redacted race, love, history, and family from the official Harlem record, and supplanted it with pictures of dead mice and blistered paint. This editing allowed decision makers to declare the area blighted without facing the emotive, historical and justice costs of that determination.

VII) So what now?

I have traced peering's manifold influence in blight and economic revitalization proceedings. For the sake of space, I will focus here on addressing the justice questions raised by blight condemnations, and offering a sketch of the counsel I will provide in *Seeing Not Peering.*

As we have seen, participatory photography supplies critical information about Harlem "blight" that *Kaur* ignored. But once we absorb these images' testimony, what should we do with their disclosures? Two options manifest: One is to argue for the inclusion of participatory photography images in the visual records consulted by lawmakers and courts when considering whether a

neighborhood proves blighted. The other option requires us to bring an end to all blight condemnations, upon recognizing the concept of blight as itself a manufacture of the racist and classist gaze. This latter choice, however, only raises more questions.

i) Including participatory photography in blight proceedings

Since at least one reporter warns that blight consultants compulsively discover the obsolescence sought by developers,[454] the inclusion of participatory photography into blight dossiers promises to challenge the peering of legislators and courts: Faced with people, and not just things, they would have to confront the racial, familial, historical, justice, and emotive consequences of declaring communities of color "blighted." We may hope that lawmakers who regard these counter images might adjust their eye to see past the motes of race and class privilege. This would involve a difficult process of alerting to the "traps of the rich," (as Cunningham teaches us), understanding the complexities of subject and object positions (as Weems instructs us) and to perform the nuanced optics of regarding the suffering of others (a la Sontag).

In the case of New York, the site of both the Columbia expansion and the Atlantic Yards imbroglio, blight determinations are regulated by New York Urban Development Corporation Act Section 10, which provides that the ESDC is empowered to acquire "substandard or insanitary" property for rejuvenation projects.[455] There are no specific mechanisms identified by the UDCA for making such findings of blight or distress.[456]

In pertinent part, UDCA currently reads as follows: "[T]he corporation shall not be empowered to undertake the acquisition, construction, reconstruction, rehabilitation or improvement of a project

[454] *See* text accompanying 275, *supra.*
[455] *Kaur* at 62 A.D. 3d at 15 (citing UNCONS LAWS § 6260 [c] [1] [UDCA § 10 (c) (1)]), *available at* http://law.onecle.com/new-york/urban-development-corporation-act-174.68/.
[456] *Id*. This is not specified in *Kaur*; a review of UCSD simply shows no suggested or mandated mechanisms.

unless the corporation finds . . . . [t]hat the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area, wherein there exists a condition of substantial and persistent unemployment or underemployment."[457]

At the very least, this provision should be amended to include the following language, which I italicize here:

"[t]he corporation shall not be empowered to undertake the acquisition, construction, reconstruction, rehabilitation or improvement of a project unless the corporation finds, *through an investigation process that considers not only consultant reports but also participatory visual and literary reports made by members of an affected community* . . ."

Such a recension requires that lawmakers face the humanity that gets "condemned" along with buildings in eminent domain decisions. Again, however, we could only hope that lawmakers would unlearn their own peering habits by training their eyes in the traditions of Cunningham, Weems, and Sontag.

Is this enough? We might fear that this requirement would only constitute another bureaucratic speed-bump on the road to condemnation, and leave aspirational optics untouched. The pleasures of peering may assert themselves so powerfully that quaint photos of boys playing chess and girls proudly modeling their Sunday best cannot compete with state-of-the-art world-classiness. In the end, "blight" itself is a loser: The history I recount in this article shows that peering, racism, and classism helped build the very concept of blight, [458] and so working within blight's structures seems a doomed project.

[457] UCSD § 10 (a)-(b)(1).
[458] *See* text accompanying note 86, *supra.*

ii) "Blight" probably can't be redeemed as a legal concept, a conclusion that raises yet another dilemma

"Blight" formed as a symbol of race and class dominance. Predictably, its dangers are also real: Many have despaired of blight condemnations' continued harm of low-income people. *Kelo, Goldstein,* and *Kaur* inspired a wide range of scholars to argue either for a severe restriction of "blight's" definition,[459] or that condemnations must accompany low-income housing provisions.[460] Others reject blight removal as qualifying as a "public use" under the 5th amendment in most or all situations.[461] For

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[459] Kaitlyn Piper, *Note: New York's Fight Over Blight: The Role of Economic Underutilization in Kaur*, 37 FORD. URB. L. J.1149, 1154 (2010 ("[New York should] restrict[] the statutory definitions of blight."); Matthew J. Kokot, *Balancing Blight: Using the Rules Versus Standards Debate to Construct a Workable Definition of Blight,* 45 COLUM. J. L. & SOC. PROBS, 45, 46 (check, the pagination here is strange) (2011)("blight should be defined in a context of a complex rule.'"); James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?* 17 S. CT. ECON. REV. 127, 136 (2011) ("`blight' should be defined . . . [as] threat[s] [to] health and safety."); Michael Rikon, *Moving the Cat Into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?",* 4 ALB. GOV'T L. REV. 154, 185 (2011) (calling for New York to develop a Commission to study the definition of blight); Martin E. Gold & Lynn B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORD. URB. L. J. 1119, 1169 (2011) (calling for a finely crafted definition of blight). *See also c.f.* David Dana, *Exclusionary Eminent Domain,* 17 S. CT. ECON. REV. 7, 9 (2009) ("An exclusionary eminent domain doctrine would not absolutely bar condemnation of low-income housing . . . but . . . would result in the application of heightened review."); Robert C. Bird, *Reviving Necessity in Eminent Domain,* 33 HARV. J. L. & PUB. POL'Y 239, 266 (also calling for heightened review in blight cases). *See also* Michael Heller and Rick Hills*, Land Assembly Districts,* 121 HARV. L. REV. 1465, 1469 (2008) (describing LADs); *see also id.* at 1470 (only "extraordinary external costs on outsiders" should trigger blight condemnations); *id*. at 1508 (describing the problems with extraordinary blight, a narrow definition).

[460] *See, e.g.,* Audrey G. McFarlane, *The New Inner City*: *Class Transformation, Concentrated Affluence and the Obligations of the Police Power,* 8 U. PA. J. CONST. L. 1, 58 (2006) ("the eminent domain power must . . . [include considerations] of race and class"); Ronald K. Chen, *Gallenthin v. Kaur: A Comparative Analysis of How the New Jersey and New York Courts Approach Judicial Review of the Exercise of Eminent Domain for Redevelopment,* 38 FORD. URB. L. J. 897, 1020 (2011)(low-income people should be treated "fair[ly]" in eminent domain decisions); Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment,* 35 B.C. ENVTL. AFF. L. REV. 1, 5 (2008) ("public purpose" requires nondisplacement of poor residents.")

[461] Amanda W. Goodin, Note: *Rejecting the Return to Blight in Post*-Kelo *State Legislation,* 82 N.Y.U. L. REV. 177, 207 (2007) ("[T]he best solution is for states to avoid using 'blight' entirely."); George LefCoe, *What's Blight Got to Do With It?,* supra note 351 at 832 ("To some, allowing cities to condemn property because it is blighted is questionable."); Ilya Somin, *Blight, Pretext, and Eminent Domain in New York*, 39 FORD. URB. L.J. CITY SQUARE 57, 62 (2012), *available at* http://urbanlawjournal.com/?p=757 ("I am skeptical of

the reasons described above, I also reject blight as a legal concept. Allowing it to endure as a public purpose in takings law permits peering's hazards to persist.

Yet eliminating blight condemnations raises other problems, which only manifest if we remain keen to do the difficult work of seeing and not peering. I have offered the NYCHA and 3333 Broadway images to contradict the blight determination, and they do offer us a vision of humanity that the blight reports deny. But in this argument, I may be interpreted as offering a portrayal of West Harlem as a bucolic homestead whose residents should be left alone by the state. Indeed, I might even be seen as romanticizing Harlem just as Lewis Mumford idealized the farmland in *The City.*[462] In other words, even in my effort to alleviate poverty and decrease violence, I find myself seduced by the pleasures of a certain kind of potentially condescending peering.

If we say West Harlem was a paradise of chess-players and pretty girls, what does that get us? For one thing, its suggested rejection of blight condemnations and limitation of "public use's" parameters may only exacerbate poverty and violence in the name of supposedly fair optics. David Dana has already cautioned that rejection of blight does not go far enough to improve the public good. He notes that jurisdictions like Florida, which eliminated blight condemnations post-*Kelo*, have not addressed the poverty and housing issues that blight condemnations supposedly addressed.[463] Restraining the definition of "public purpose" in 5th Amendment law, then, will not support communities now vulnerable to blight takings because of their want. Nor will flat reliance on cherry-picked images

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blight condemnations . . . because [they] often . . . victimi[ze] the poor and politically weak.").

[462] *See* text accompanying note 240-242, *supra.*

[463] See Dana, *Expressive Meaning*, supra note 57 at 379 ("[W]here (as in Florida) the reform appears to bar all condemnations for land assembly purposes, including blight condemnations, there has been no accompanying debate about improving the quality of housing and other conditions in poor neighborhoods.").

made via participatory photography, as we have seen that these visuals may also be subject to a romanticized and harmful form of peering.

What *will* help? We should here recall Jane Jacobs' counsel that neighborhood reformation experts must "[o]bserve, observe, observe, and listen."[464] Thus we have to again ask: How *were* the people in Harlem doing? Do the 3333 Broadway and *Developing Lives* pictures show us everything we need to know? I will admit here: I am no expert on this, or any part of New York. However, in our correspondence, I asked Alicia Barksdale what had become of the people in the pictures that she sent me. She answered that they were "most if [not] all . . . gone[.] Jail, moved down south, away from here or around but busy working to keep their apartment and to live a decent life!"[465]

Seeing without peering is difficult but worthy work. People of color and low income do not exist to satisfy the pleasures of elites (or legal scholars) either by being condemned as "blighters" or through idealization. Excluding blight as a public purpose would avoid the problem of evictions caused by takings, and also avoid the dehumanizing tropes that energize decisions from *Muller* onward -- but that move still would not solve the issue of people struggling to live a "decent life." The Fifth Amendment concerns property and the public good – surely this powerful tool can be harnessed to increase opportunity for low-income folks. So, can taking ever exist for the purpose of truly benefiting low-income people? And how would optics influence this project?

iii) Vision, housing equality, and *Midkiff:* Sketching the arguments made in my follow-up article, *Seeing Not Peering*

[464] *See* text accompanying note 108, *supra.*
[465] Email from Alicia Barksdale to Yxta Murray, June 24, 2013.

We have already spied progressive possibility in O'Connor's *Hawaii Housing Authority v. Midkiff*,[466] which came to the aid of the common people,[467] or "normals"[468] and also offered a complex vision of how optics could drive anti-poverty takings. Again, in *Midkiff*, O'Connor rejected judicial deference with the aggressive middle class gaze: She vividly contrasted commoners and the "few"[469] indulged by "evil" "monarchs,"[470] a *mise-en-scène* that verified oligopoly's "inflict[ion of] affirmative harm on society"[471] and inspirited eminent domain's discovered power to answer social inequality. Hou Hawaiians' amicus brief enclosed tantalizing encouragements to look even deeper -- that is, at the "bitter"[472] folk falling into deep poverty. O'Connor's ruling did offer native people the supposed opportunity to purchase real estate at potentially low prices,[473] but she did not put poverty at the center of her analysis, and if anything, looked away from its republic except to insult it through her *Berman* quotation.[474] She also, as we have already studied, veered toward occlusive and clichéd visual tropes when describing the privileged.[475]

Yet, we can fail better than O'Connor, by trying to see instead of peer. *Midkiff*, together with thoughtful watching and listening, could mother expansive opportunities for low-income people to live a decent life.

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[466] 467 U.S. 229 (1984).
[467] *See* text accompanying note 223, *supra.*
[468] *See* text accompanying note 262, *supra.*
[469] *Midkiff* at 231.
[470] *Midkiff* at 242.

[471] O'Connor explained *Midkiff* (and *Berman)* in these terms in her *Kelo* dissent. *Kelo* at 500 (O'Connor, J., dissenting). There, she also sought to dial back *Midkiff's* seemingly wide permission of takings by restricting them to cases where there is "harmful property use," and characterizing *Kelo's* exacerbation of its holding as a manipulation of its "errant language." *Id.* at 501.
[472] *See* text accompanying note 247, *supra.*
[473] *See* text accompanying note 222, *supra.*
[474] *See also* supra note 471, noting how O'Connor in *Kelo* writes of the "affirmative harm" of "blight" caused by "severe poverty" but failing to address the root shock *Berman* imposed on poor people.
[475] *See* note 226, *supra.*

Others before me (particularly Cornell's Robert Hockett) have imagined *Midkiff's* transformative possibilities,[476] even while recognizing that *Midkiff* was a complex case that ultimately benefited people on the higher economic stratas.[477] If that decision finds the Fifth Amendment untrammeled where states engage in extraordinary reorganizations to heal the "harm"[478] and "suffering"[479] lawmakers perceive (that is, see), then why not apply its toolkit to the housing inequalities of West Harlem, the Mississippi Delta,[480] or South Los Angeles, with its crushed housing market and growing homelessness problem?[481] Such a project requires observation, care, listening, research that would involve innovations such as participatory photography, visual ethics modeled after Bill Cunningham's, Carrie Mae Weems', and Susan Sontag's, and – most importantly – political will.

Peering is a vast legal practice,[482] but I will continue to go deep instead of wide, again focusing on optics in property law. In my follow-up article, *Seeing Instead of Peering*, I will essay a program of

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[476] *See, e.g.,* Victor B. Flatt, *A Brazen Proposal: Increasingly Affordable Housing Through Zoning and the Eminent Domain Powers*, 5 STAN. L. & POL'Y REV. 115, 116 (1994) ("[L]ocal municipalities [should] offer to buy or perhaps condemn land in single-family zones bordering multi-family zones, then upzone this land."); *id.* a 122-123 (citing *Midkiff);* David Linhart, Note, *Eminent Domain Conversion of Vacant Luxury Condominiums Into Low Income-Housing,* 21 B.U. Pub. Int. L. J. 129, 132 (2011) ("Eminent domain conversion of entirely vacant luxury condominium buildings into low-income housing is constitutionally permitted under the public purpose rationales in Midkiff and Kelo.") ;Stacey Earnest, *Developing a Housing Plan for Mississippi: Some Program and Funding Alternatives,* 61 MISS. L. J. 605, 621 (1991) (offering a *Midkiff*-inspired proposal for low-income housing solutions in Mississippi). For other anti-subordination interpretations of eminent domain, *see, e.g.,* Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment,* 42 IND. L. REV. 97, 163 (2009) ("The Court has a responsibility to ensure that the eminent domain doctrine . . . secures the interests of [those affected].") Robert C. Hockett, in particular, has innovated *Midkiff* to extend to underwater mortgage owners. *See It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery,* 18 STAN. J. L. BUS. & FIN. 121 (2012); *see also* Shaila Dewan, *A City Invokes Seizure Laws to Save Homes*, N.Y.T., July 31, 2013 at A1.

[477] *See* note 248, *supra.*

[478] *Kelo* at 500 (O'Connor, J., dissenting).

[479] *Id.* at 504.

[480] *See* Earnest, *supra* note 476.

[481] *See, e.g., Deutsche Bank Settles L.A. Claims on Foreclosure Blight,* REUTERS, June 29, 2013, *available at* http://www.reuters.com/article/2013/06/29/deutschebank-foreclosure-idUSL5N0F506B20130629; Times Editorial Board, *Fresh Ideas to Help the Homeless,* L.A.T., July 5, 2013 (spike in L.A. homelessness from 2011 to 2013), *available at* http://articles.latimes.com/2013/jul/05/opinion/la-ed-homeless-los-angeles-county-20130705.

[482] *See* text accompanying notes 12-17, *supra.*

thoughtful looking at poverty, wealth, suffering, harm, the prospect of equality, and of limning a public use doctrine that reflects the vision revealed. I hope to resist peering and its effects by setting forth an approach to property law and urban restoration that will combine socially conscious visual studies and *Midkiff's* potential.

VIII. Conclusion

We peer at others and see not just them but also ourselves – or, rather, our own desires. I have described the dilemma of poverty and housing as one linked to visual culture. Vision and blindness's influences on the Fifth Amendment encourage status-grabbing, thrill-seeking, arch sentimentalism, and the seemingly inescapable human drive to follow leaders. This makes peering a problem buoyed by aerial optics and also anchored in the deep, fertile ground of the emotions. The complexities of peering make it difficult to dismantle, since so many of the observer's private longings work together to ensure that it "feel[s] right."[483] However, its dissipation also gives its challengers many opportunities, since the same tool – visual culture – that created a jurisprudential market for monsters and world-class glamour can also school legal actors in the racial significance of disaster porn and remind them of the human beings who suffer their condemnations. The next step is for lawmakers to examine a large gallery of images and stories that cohere and conflict and confuse and in the end build together a fuller picture of place than the fantasy now erected in blight reports. My biggest hope is that lawmakers' gazes will critique not abject "others" who live in "slums" than the well-lit mirror that the Fifth Amendment has become, one that reflects back to statesmen their best images of themselves. Let us snuff the flattering candlelight that now blurs takings law and do the hard work of educating what Ellison described as our "inner eyes," the ones that shape the pictures and glimmerings of this harsh world into what we call

[483] *See* text accompanying note 345, *supra.*

reality. This difficult project of seeing, I hope, can transform legal approaches to poverty, and enrich our understanding of the public use clause of the Fifth Amendment.