
DIALOGUE, PERSPECTIVE AND POINT OF
VIEW AS LAWYERING METHOD: A NEW
APPROACH TO EVALUATING ANTI-CRIME
MEASURES IN SUBSIDIZED HOUSING

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I. INTRODUCTION

During the past decade, this country's subsidized housing residents have seen incidents of violent crime increase dramatically in their communities.¹ Across the country, local law enforcement and housing authorities have joined together to develop a variety of anti-crime measures. At the federal level, the Department of Housing and Urban Development (HUD) has assisted local efforts to combat violent crime.²

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1. For a compelling chronicle of life in a large urban housing project during the late 1980s, see ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* (1991).
2. For a discussion of federal government's analysis of the extent and nature of crime in subsidized housing, see TERENCE DUNWORTH & AARON SAIGER, U.S. DEP'T OF

Many of these measures have been linked to the so-called "War on Drugs."³

Some groups and individuals have challenged several of the public housing anti-crime measures created in the past decade.⁴ For the most part, such challenges have focused on whether these programs violate the constitutional rights of subsidized housing residents and their visitors.⁵ Attorneys representing clients who live in or near subsidized housing should consider whether constitutional litigation is the best or only method for protecting their clients' liberty and safety interests. Constitutional remedies offer limited assistance to those adversely affected by poorly conceived or unfairly implemented policies.⁶ To prove constitutional violations, the public interest attorney must focus all efforts on narrowly constructed elements that derive from deliberately ambiguous doctrines. Time, money and imagination that attorneys might dedicate

JUSTICE, DRUGS AND CRIME IN PUBLIC HOUSING: A THREE-CITY ANALYSIS (1994).

3. See Public Housing Drug Elimination Act, 42 U.S.C. §§ 11901-09 (Supp. IV 1992) and corresponding HUD regulations, 24 C.F.R. §§ 961.1-961.29 (1995).

4. See, e.g., Don Terry, *Chicago Project in Furor About Guns and the Law*, N.Y. TIMES, Apr. 8, 1994, at A12; see also *Campbell v. Plymouth Hous. Auth.*, No. 94-1175NG (D. Mass. filed Aug. 17, 1994); *Brown v. Dayton Metro Hous. Auth.*, No. C-3-93-037 (S.D. Ohio filed Jan. 26, 1993) (alleging violations of constitutional rights to due process, equal protection and the First Amendment right to travel, associate, and assemble); *Miller v. St. Michaels Hous. Auth.*, No. Y-91-2412 (D. Md. filed Aug. 26, 1991); Guy Gughotta, *Clinton Lets Police Raid Projects*, WASH. POST, Apr. 17, 1994, at A1 (summarizing President's radio speech and warrant-less searches to protect tenant safety).

5. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993) (discussing how the war on drugs erodes our fundamental liberties); John B. Mitchell, *What Went Wrong with the Warren Court's Conception of the Fourth Amendment?*, 27 NEW ENG. L. REV. 35 (1992) (discussing the Fourth Amendment and police activities); John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991) (examining a number of issues in addition to constitutional law); Adrienne L. Meiring, Note, *Walking the Constitutional Beat: Fourth Amendment Implications of Police Use of Saturation Patrols and Roadblocks*, 54 OHIO ST. L.J. 497 (1993) (discussing the constitutional implications of policing programs); David E.B. Smith, Note, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI.-KENT L. REV. 505 (1993) (discussing the constitutionality of sweeps); Jason S. Thaler, Note, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777 (1995) (addressing the constitutionality of sweeps).

6. See William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1995) (discussing the pitfalls experienced by groups who become too dependent upon litigation).

to bringing the parties to a mutual understanding of complex needs is spent instead on the litigation process. Regardless of whether the courts uphold a particular policy, the results are likely to offer little help to the clients and it often takes years of litigation.

Rather, public interest attorneys should find ways to seek, stimulate, and assist dialogue between people and groups with different perspectives and points of view. Attorneys should vigorously solicit dialogue and carefully consider all relevant perspectives.⁷ If the attorneys do not attend to this need, state actors will continue to write policies that tread upon the rights and needs of poor citizens. Those with the power and ability to control state policy should learn that unless state actors make a continuous and serious effort to solicit input from a much larger group of affected parties, their policies and programs will continue to fail to garner the full support that they should warrant.⁸

7. Many scholars have approved analyses which look at the law from perspectives other than that of the dominant group. This approach is a common element in feminist jurisprudence, critical legal studies, and critical race theory. For a discussion of the role of perspective in legal scholarship, see Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (responding to the Farber and Sherry critique of narrative as scholarly method); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741 (1993) (discussing two scholarship methods); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (critiquing narrative as a scholarly method). See also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992) (providing an insightful description of critical jurisprudential thought); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (calling for understanding the experiences of oppressed people as a source of understanding in creating law).

Not all scholars who advocate looking at multiple perspectives come from critical scholarship traditions. One scholar, describing a problem-solving approach based in pragmatism, said:

[I]ncluding the perspectives of all groups in a society, even those whose life experience does not cohere with officially sanctioned versions of reality, provides a standpoint from which to critique the practices, values, institutions, beliefs, and concepts of the dominant culture. . . . [S]uch perspectives are a rich source of positive content. . . . This is so because they provide affirmative counter-conceptions of reality—they yield different contentful notions of the good, the right, and the true; . . . they declare different human situations and experiences to be problematic—and, in so doing, they generate numerous contexts of inquiry with determinate substance that can then be addressed in the pragmatic search for resolutions.

JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1305 (1993).

8. This Article accepts the premises of “dialogic” theories, which state that dialog is a key component of the process of problem solving. Specific methods for building and

This Article will explore an anti-crime policy that several subsidized housing communities have implemented. Under this policy, police give people whom they find “suspicious” notices of trespass and ban them from subsidized housing premises. This exploration will begin by modeling how an attorney can uncover a variety of perspectives to better understand potential problems with a policy.⁹ Next, this Article will discuss how an understanding of these perspectives can inform the content of problem-solving dialogue. It will then analyze two constitutional doctrines to determine what constitutional litigation might add to the problem solving process. Finally, this Article will conclude with a discussion of how lawyers might assist residents and members of surrounding poor communities in the crime-fighting effort.

II. “THE FACTS”: EXAMINING VARIOUS PERSPECTIVES ON THE PROBLEM

A. *Overview of the Criminal Trespass Policy*

In the mid 1980s, HUD began to address the problems it associated with drug-related violence.¹⁰ Simultaneously, communities began to design various police/housing authority programs to address the drug-related problems. These programs included the following: increasing the police presence on public housing sites, designing barriers to access, encouraging community patrols, and initiating massive “sweeps.”¹¹

maintaining such dialog vary among dialogic theorists. *See generally* PAULO FRIERE, *PEDAGOGY OF THE OPPRESSED* (The Seabury Press; trans. original Portuguese manuscript 1968) (1970); WILLIAM REHG, *INSIGHT AND SOLIDARITY: A STUDY IN THE DISCOURSE ETHICS OF JURGEN HABERMAS* (1994).

9. An attorney can develop a talent for uncovering different perspectives that are relevant to helping the client solve his or her problem. Some have criticized the presentation of narratives in scholarship because those narratives are not scientifically representative of like points of view. *See, e.g.,* Farber & Sherry, *supra* note 7. In my view, however, most attorneys do not have the luxury of conducting social scientific surveys each time they assist a client or client group. In this Article, I present the stories of some people affected by the policy I am studying. I do not present these stories as representative of other people, but I do believe that affected peoples’ experiences are important and relevant to understanding some of the concerns raised by the policy.

10. DUNWORTH & SAIGER, *supra* note 2, at iii.

11. A sweep occurs when the police or the housing authority personnel enter an area controlled by drug dealing gangs. *See id.* at 7-8.

Congress passed the Public Housing Drug Elimination Act in 1988, and amended it in 1990.¹² Pursuant to the Act, local housing authorities, resident management corporations, or federally assisted low income owners received funds to reduce drug-related crime on subsidized housing sites.¹³ Pursuant to this Act, HUD created the "Public and Indian Housing Drug Elimination Program," in order to:

- (a) Eliminate drug-related crime and the problems associated with it in and around the premises of public and Indian housing developments;
- (b) Encourage HAs [housing authorities] and RMCs [resident management councils] to develop a plan that includes initiatives that can be sustained over a period of several years for addressing drug-related crime and/or the problems associated with it in and around the premises of public and Indian housing developments proposed for funding under this part; and
- (c) Make available Federal grants to help HAs and RMCs carry out their plans.¹⁴

Since passing the Act, Congress has awarded millions of dollars in funds. In 1993, it appropriated \$175,000,000 in drug elimination grants for low-income housing to housing authorities, resident management councils, and owners across the nation.¹⁵ In 1993, there were 1.4 million units of public housing; the largest two percent of public housing authorities owned almost half of these units.¹⁶ These large housing projects were the site of eighty-five percent of the violent crime that led to the creation of anti-crime programs and they received sixty-three percent of the federal funds allocated to those programs.¹⁷

Because subsidized housing laws limit access to the poorest of American people, residents live in highly concentrated poverty. In fact, "[t]he median income of families living in public housing is extremely low—less than \$6,500. Roughly three-quarters of all non-elderly families

12. Pub. L. No. 100-690, 102 Stat. 4301 (codified as amended at 42 U.S.C. §§ 11901-08 (1994)).

13. 42 U.S.C. § 11902.

14. Public Housing Drug Elimination Program, 24 C.F.R. § 961.1 (1995).

15. H.R. REP. NO. 607, 103d Cong., 2d Sess. 448 (1994).

16. Michael H. Schill, *Distressed Public Housing: Where do we go From Here?*, 60 U. CHI. L. REV. 497, 500-01 (1993).

17. H.R. REP. NO. 607, *supra* note 15, at 448.

living in public housing have incomes below the poverty level.”¹⁸ Moreover,

Well over half of all families receive public assistance; in some large PHAs [public housing authorities] the proportion of households on welfare exceeds ninety percent. Longitudinal data show the dramatic concentration of poverty in public housing. In 1974, about one percent of all households living in non-elderly public housing developments earned less than ten percent of the area’s median income; this proportion has now swelled to twenty percent.¹⁹

This concentrated poverty affects black households more than white households. Most public housing residents are non-white: “roughly two-thirds of all non-elderly families are black and nearly one-fifth are Hispanic. Minority public housing tenants are more likely than white tenants to earn extremely low incomes.”²⁰

In some parts of the country, police and housing authority personnel have devised an anti-crime policy known as the “criminal trespass” policy. Police officers, who use state criminal trespass statutes²¹ as a

18. Schill, *supra* note 16, at 517-18 (citations omitted).

19. *Id.* at 518.

20. *Id.* Nearly half of the housing residents have not graduated from high school. *Id.* (citing *Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations: Hearings on H.R. 5679 Before the Comm. on Appropriations*, 102d Cong., 2d Sess. 334-35 (1993)).

21. For example, Ohio’s criminal trespass statute reads:

(A) No person, without privilege to do so, shall do any of the following:

- (1) Knowingly enter or remain on the land or premises of another;
- (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows he is in violation of any such restriction or is reckless in that regard;
- (3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;
- (4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either.

(B) It is no defense to a charge under this section that the land or premises involved was owned, controlled, or in custody of a public agency.

device to rid public parks of “undesirable” people, suggested that the housing authorities use these statutes to rid its sites of undesirable drug dealers.²² The housing authorities appear to have given permission to

(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.

(D) Whoever violates this section is guilty of criminal trespass, a misdemeanor of the fourth degree.

(E) As used in this section, “land or premises” includes any land, building, structure, or place belonging to, controlled by, or in custody of another, and any separate enclosure or room, or portion thereof.

OHIO REV. CODE ANN. § 2911.21 (Baldwin 1994).

22. In Dayton, Ohio, a group of men who were listed and arrested pursuant to a criminal trespass policy filed a federal lawsuit against the enforcement of that policy. *Brown v. Dayton Metro. Hous. Auth.*, No. C-3-93-037 (S.D. Ohio filed Jan. 26, 1993). The court held a hearing on a request for an injunction to prohibit the use of a trespass list. This author has a copy of the four volume transcript of that hearing. This Article will cite to that transcript as “*Brown* Transcript, Vol. X, at x.” This Article will refer to the Dayton Municipal Housing Authority as “DMHA.” Exhibits from the January 26 hearing will be referred to as “*Brown* Plaintiff’s Exhibit x” or “DMHA Exhibit x.” The *Brown* case provides a detailed description of the criminal trespass policy. After reviewing other state appellate cases, other complaints, and HUD documents, it appears that the Dayton policy is similar to policies in other cities nationwide. For a description of the genesis of the Dayton policy, see *Brown* Transcript, Vol. 2, at 93.

Although there is no centralized way to learn exactly how many communities have implemented similar policies, evidence suggests such policies exist in Florida, Illinois, Maryland, Massachusetts, Texas, Washington, and other parts of Ohio. See *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994) (holding enforcement of trespass after warning did not violate First or Fourteenth Amendments when applied to a leafleteer who was not invited by a resident, following F.S.A. § 810.09); *Fox v. Florida*, 580 So. 2d 313 (Fla. Dist. Ct. App. 1991) (discussing FLA. STAT. ANN. § 810.09(2)(b) (West 1994)); *L.D.L. v. Florida*, 569 So. 2d 1310 (Fla. Dist. Ct. App. 1990) (explaining FLA. STAT. ANN. § 810.09(1) (West 1994)); *Williams v. Nagel*, 143 N.E.2d 542 (Ill. 1994) (dismissing case brought by invited guests who were banned from privately-owned, subsidized housing); *Illinois v. Russell*, 604 N.E.2d 420 (Ill. App. Ct. 1992) (discussing defendant’s prior conviction of ILL. REV. STAT. ch. 38, para. 21-3 (1991) in criminal contempt case); *Miller v. St. Michaels Hous. Auth.*, No. Y-91-2412 (D. Md. filed Aug. 26, 1991); *Campbell v. Plymouth Hous. Auth.*, No. 94-1175NG (D. Mass. filed Oct. 5, 1994); *State v. Jackson*, 849 S.W.2d 444 (Tex. Ct. App. 1993) (holding public housing manager can authorize security officers to issue trespass notices but not when the person is on a public street); *Washington v. Little*, 806 P.2d 749 (Wash. 1991) (using WASH. REV. CODE ANN. § 9A.52.070 (1988)); *Washington v. Thompson*, 848 P.2d 1317 (Wash. Ct. App. 1993) (reviewing WASH. REV. CODE ANN. § 9A.52.080 (1988)); *Washington v. Blair*, 827 P.2d 356 (Wash. Ct. App. 1992) (discussing SEATTLE, WA., REV. CODE § 12A.08.040); *Ohio v. Newell*, 639 N.E.2d 513 (Ohio Ct. App. 1994) (reviewing OHIO REV. CODE ANN. § 2911.21 (Baldwin 1994)); *City of Dayton v. Moore*, No. 13369, 1993 WL 81966 (Ohio

local police to notify certain persons that they are not permitted to come onto housing authority property. When such persons reappear without privilege, they can arguably be arrested pursuant to a state criminal trespass statute.

In July, 1987, the City of Dayton, Ohio, began to compile a list of people given a "notice of trespass" or who were "trespassed off"²³ the property.²⁴ The Dayton Municipal Housing Authority (DMHA) issued these notices to persons it did not want on its property. DMHA would record that person's name, birthdate, and Social Security number into a computer database, and if that person reappeared on DMHA property, the police could arrest him.²⁵ By January, 1992, there were 2,310 individuals who had been trespassed off DMHA property,²⁶ eighty-nine percent of whom were male,²⁷ and most, if not all, were black.²⁸ In May, 1992 DMHA started a new list.²⁹ By January 16, 1993, the new list had 175 names, a fifty percent reduction in the rate of people trespassed off DMHA property.³⁰ While the City of Dayton, the police, and DMHA indicated the new list harkened a new incarnation of the trespass

Ct. App. Mar. 25, 1993) (interpreting DAYTON, OH. REV. CODE § 133.05(A)(3) consistent with OHIO REV. CODE ANN. § 2911.21(A)(3) (Baldwin 1994)).

23. "Trespassed off" is the phrase DMHA and the Public Defender office used to describe this practice. *Brown Transcript*, Vol. I, at 97.

24. *Id.* at 37.

25. Because most of the people trespassed off DMHA property were male (and most references to people trespassed off property elsewhere indicated they too were predominantly male), I will refer to these people with a male pronoun. A copy of DMHA's initial and revised Notice of Trespass are on file with the author.

26. DMHA Exhibit "I." See Dayton Metro. Hous. Auth., *Cumulative List of Trespasses Served*, Jan. 17, 1992 [hereinafter *Cumulative List*].

27. I counted 249 apparently female names on the list. Certainly names I thought were female could be male and vice-versa, but the vast majority appear to be male.

28. *Brown Transcript*, Vol. 1, at 10, 29 (describing those listed as "typically young black males"). Public Defender Theresa Haire testified that she had never represented a white client charged with a DMHA trespass. *Id.* at 62.

29. *Id.* at 16.

30. Two thousand three hundred and ten people were trespassed off DMHA property over approximately 54 months, a rate of about 43 per month. See *Cumulative List*, *supra* note 26. One hundred seventy-five people were subsequently trespassed off DMHA property over approximately eight months, a rate of about 22 per month. Both the 2,310 and 175 figures are low in that both fail to account for any person trespassed off DMHA property who succeeded in getting his or her name off the list before the print date of the list.

policy, many men who were trespassed off or arrested after May, 1992, found little difference in the policy's implementation. In Dayton, housing authority personnel, accompanied by local police who could make arrests and provide security, initially enforced the program. However, after DMHA began receiving federal grant money, the police became the primary distributors of the notices, as well as making arrests.

There have been several challenges to criminal trespass policies in federal courts alleging multiple violations of the Bill of Rights.³¹ Individuals have also challenged the policies on Fourth Amendment grounds and on the sufficiency of proof under state trespass laws.³² In addition, civil attorneys have challenged the procedural provisions in these policies and have raised these challenges in individual eviction cases.³³

B. *Perspectives: Subsidized Housing Residents*

"[T]wo things will not change anytime soon: Life at Robert Taylor will still be hard and dying from a stray bullet or an overdose of poverty will still be easy—too easy." Daisy Bradford, thirty-two year old resident of Robert Taylor Homes in Chicago, who supports the sweeps "even though 'they make you feel like a criminal.' She said: 'Sometimes you got to sacrifice your rights to save your life.'"³⁴

31. For cases involving such challenges, see generally *supra* note 4.

32. For cases involving such challenges, see generally *supra* note 22.

33. The University of Dayton Law Clinic has represented several clients in eviction or eviction-related proceedings that involved visitors whose names appeared on a criminal trespass list. Moreover, caselaw indicates that subsidized housing residents possess the right to have visitors of their own choosing, thus challenging the right of either the housing authority or law enforcement to give people trespass notices. *See, e.g.,* *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985) (holding that a requirement that a tenant obtain permission for overnight guests was not "necessary or reasonable" nor did it "provide for the reasonable accommodation of a tenant's guests or visitors" as required by HUD regulations); *McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332, 335 (2d Cir. 1981) (holding that a rule which required residents to register and obtain permission for overnight visitors impinged upon "freedom to have whomever they wanted visit their homes" where state failed to show policy is "least restrictive in light of the interests served"). The *Lancor* case made reference to the then-current federal regulations, which read that the "lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors." *Lease and Grievance Procedures*, 24 C.F.R. § 966.4(d) (1984).

34. Terry, *supra* note 4.

We aren't all hardened criminals. . . . The law is not supposed to be for just the rich. . . . They want to tear up the Constitution. I guess today they going to have to find something else to mess up.—Mrs. Ethel Washington, one of four named plaintiffs in lawsuit against the sweeps in Chicago.³⁵

Subsidized housing residents cannot agree about drug elimination policies. In Chicago, for example, 5,000 public housing residents signed a statement in favor of warrantless searches of their apartments for weapons.³⁶ However, four tenants pursued a lawsuit against the Chicago Housing Authority that resulted in a preliminary injunction prohibiting these sweeps.³⁷ Despite different methods for eliminating violence, the residents revealed unity in their desire to eliminate violence and return to a time when they and their guests could walk and live freely without fear. The tenants who supported the criminal trespass policy in Dayton believed that they had to choose between their own personal liberty or police protection but that they could not have both. Judge Wayne R. Andersen recognized the extent of the tenants' concern in the Chicago case: "Many tenants within C.H.A. housing, . . . apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional rights."³⁸ Residents who supported these policies also made clear their desire for privacy: "[one resident who]

35. *Id.* Instead of reporting this story as one of conflict between residents, the reporter could have chosen to report the similarities in residents' desires and needs and he could have pointed out how inadequate the offered solutions were. For an analysis of how the media constructs conflict, see Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African/American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993).

36. A district court eventually decertified the class as a result of this overwhelming resident support for the sweeps. *Pratt v. Chicago Hous. Auth.*, 155 F.R.D. 177, 180 (N.D. Ill. 1994). The Chicago Housing Authority paid for a professional survey of resident attitudes about the sweeps in 1993. The report revealed disagreement among tenants about the efficacy of the sweeps. Tenants were not asked any questions about their liberty. Susan J. Popkin et al., *Sweeping Out Drugs and Crime: Residents' Views of the Chicago Housing Authority's Public Housing Drug Elimination Program*, 41 CRIME & DELINQUENCY 73 (1995).

37. *Pratt v. Chicago Hous. Auth.*, 848 F. Supp 792, 797 (N.D. Ill. 1994). For an analysis of the *Pratt* decision, see Erika R. George, Recent Development, *The Fourth Amendment's Forcing of Flawed Choices: Giving Content to Freedom for Residents of Public Housing*, 30 HARV. C.R.-C.L. L. REV. 577 (1995).

38. Terry, *supra* note 4.

says it would be the least of her problems to sign a lease with a clause allowing unconditional sweeps” also stated: “I want my privacy. I don’t want my rights taken away from me, don’t get me wrong, but we need somebody to come in and do this to us.”³⁹ Although a diligent attorney can uncover many resident perspectives, fear of housing authority retaliation or loss of the tenuous security undoubtedly silenced other residents.⁴⁰

Prior to initiating the criminal trespass policy, DMHA assured residents that their friends and families would not be harassed. However in 1991, tenants began to complain that friends and family were being trespassed off DMHA property for no legitimate reason. The residents’ only recourse was to ask their managers to delete the names of their friends and family from the list, however, if the manager refused, residents had no appeal.⁴¹ Still, a number of resident council members supported the policy. Resident Council Vice-President Annie Pearl Gee, a young, African-American mother living in the DMHA DeSoto Bass project, described life before the drug elimination policies were put into effect:

It was terrible. You could not sit outside. Your kids could not go outside and play. The drug dealers were standing out front your door selling drugs. You would open your door to let them know that you see them. It didn’t bother them. . . .⁴²

Before the policy began, police and DMHA management described to the resident council the goal of the trespassing policy. Ms. Gee testified:

We were advised if we wanted the sites cleared to cooperate with the police department, which I was willing to do . . . to get the drug dealers off the site that didn’t

39. *Morning Edition: President Pushes Plan for Gun Sweeps in Chicago* (NPR radio broadcast, Apr. 18, 1994). Another resident, who identified himself as “Dwayne,” said “he’s against the sweeps . . . his mother’s apartment was swept twice, but he says everybody in the building knows his folks aren’t dealing drugs.” *Id.*

40. Bernard Faison, a tenant organizer whom DMHA employed to train, educate, and organize DMHA tenants into functioning resident councils, indicated in a private interview with the author that he believes that the residents who testified for DMHA at the *Brown* preliminary injunction hearing may fear losing the progress they have made since 1987 if they speak out against any DMHA policy.

41. Testimony of DMHA’s former Associate Director of Management and Human Services, *Brown* Transcript, Vol. 1, at 173-75.

42. *Id.* at 67.

live there, that did not belong there, and make the site better for our children.⁴³

Ms. Gee believes the program has created significant improvements in her life:

Now I can sit outside and watch my daughter play. . . . Before, back in '87, I could not. Now I can have friends . . . come to my house in their cars or walk without being attacked by drug dealers. . . . Now I feel more comfortable, not as comfortable as I would like to be, but I do feel more comfortable now.⁴⁴

If the criminal trespass policy ended, Ms. Gee testified that she would move:

[I]f they threw out the law, I know that I would move immediately because . . . it would be a New Jack City. . . . Instead of being community-based police on DMHA site, it would be drug based on DMHA site.⁴⁵

Ms. Gee attributes positive changes to the trespass policy to the presence of police,⁴⁶ though she doesn't "think it's right to criminally charge someone that's not conducting bad business on the site."⁴⁷

Annette Scandrick, a twenty-two year resident of Parkside and acting treasurer of the resident council, agrees: "[M]ost of our problems was coming from the people that did not live in Parkside."⁴⁸ Ms. Scandrick understood the criminal trespass policy to be one that offered safety and respect for residents:

My understanding was, it was like we was homeowners and we had a fence around our home or our property and we had signs on our fence stating no trespassing but your relatives, mailmen, milkmen, service people could enter.

43. *Id.*

44. *Id.* at 75.

45. *Brown* Transcript, Vol. 2, at 68. NEW JACK CITY is a movie made in 1991. It depicts a poor residential neighborhood in New York City which has been taken over by drug dealing and violence. See Joe Baltake, *New Jack City: A Brutal, But Starkly Real, Inner City Film*, SACRAMENTO BEE, Mar. 8, 1991, at TK20.

46. *Brown* Transcript, Vol. 2, at 80.

47. *Brown* Transcript, Vol. 3, at 20.

48. *Brown* Transcript, Vol. 4, at 119.

The no trespassing was basically for people that came in, created a problem.⁴⁹

Although Ms. Scandrick does not believe a person innocently cutting across DMHA property should be prohibited from coming on DMHA property again, she does believe that without the trespass policy, the police will not promptly respond to calls or have a presence at Parkside.⁵⁰ Prior to the trespass policy, the police did not consider a drug dealer an emergency.⁵¹

Charles Oglesby, president of Hilltop Homes' resident council, moved there in 1989 when "there was a lot of drug trafficking."⁵² The resident council instituted the Hilltop resident community police and informed the residents how to report trespassers to the police.⁵³ Mr. Oglesby attributed much success to the criminal trespass policy—the community based police and the new speed bumps—as part of the solution to the drug problem.⁵⁴

Some residents at another subsidized housing community are unhappy with its criminal trespass policy. Kenya Burrell, a twenty-one year old African-American, lives in a private subsidized housing community in a north Dayton suburb with her two small children.⁵⁵ The children's father, Gerald Kelly, helps raise their children and often cares for them at Ms. Burrell's apartment.⁵⁶ In the spring of 1994, Mr. Kelly received a notice of trespass,⁵⁷ thus interfering with Ms. Burrell's ability to relate to her children's father. Ms. Burrell is unhappy that management never explained the policy to her:

I never really had a clear understanding. It's just all the guys out here that I know . . . they all got [a notice of

49. *Id.* at 121.

50. *Id.* at 128, 141.

51. *Id.* at 135.

52. *Brown Transcript*, Vol. 4, at 150-51, 153.

53. *Id.* at 154.

54. *Id.* at 156. Other residents have positive impressions of the program. *Id.* at 157.

55. Interview with Kenya Burrell and Gerald Kelly in Dayton, Ohio (June 10, 1994) (on file with the author) at 1, 20 [hereinafter *Burrell Interview*]. At the time of this interview, Ms. Burrell's children were both under the age of three. *Id.* at 20.

56. *Id.* at 1.

57. *Id.* at 1, 2.

criminal trespass] . . . almost all of the guys that have kids out here have one.⁵⁸

The sheriff trespassed off Mr. Kelly after Ms. Burrell called the sheriff during an argument in which Mr. Kelly struck her.⁵⁹ When the deputy arrived, he asked Ms. Burrell if she wanted a protection order:

I asked them what was it, you know, what was it about and they said, well, he won't be able to see you or the kids or none of that and I told them no, don't worry about that. But they still gave him, you know, the criminal trespass.⁶⁰

Ms. Burrell feels her rights as a tenant have been violated by the notice:

I feel that . . . me living here, me paying my rent on time, I should be able to have who I want over to visit me, and at any given time he should be allowed to come over and see his kids, whether it's two in the morning or, you know, whatever time it may be. . . .⁶¹

When Ms. Burrell asked the housing manager about this policy, he said that only drug dealers were on the list, and this would not affect Mr. Kelly's right to visit her or watch the children.⁶² However, Mr. Kelly's name is still on the list.⁶³ In addition, Ms. Burrell doesn't think management "worr[ies] about nor care[s] about what goes on as far as [harassment by sheriffs] because they feel like we have no choice but to follow . . . their policies or, you know, move; that's how they feel about it."⁶⁴ She angrily recalled one encounter with a sheriff's deputy:

She harasses everybody, she takes guys at random. . . . I thought, you know, sheriffs had to have a reason to pull you over, . . . but the sheriff that was with her that day, he said "She can pull you over at any given time and ask for your ID, she doesn't have to have a reason". . . .

58. *Id.* at 2.

59. *Burrell Interview*, *supra* note 55, at 4.

60. *Id.* at 4-5.

61. *Id.* at 5.

62. *Id.* at 13.

63. *Id.* at 1. In 1994, the landlord sued to evict Ms. Burrell, claiming Mr. Kelly lived in her apartment. After she obtained legal representation, the landlord dismissed the eviction action and acknowledged in writing that Mr. Kelly visited frequently with his children. *Northland Village Apartments v. Burrell*, No. 94-CVG-388 (Ohio Mun. Ct.) (order entered Apr. 19, 1994).

64. *Burrell Interview*, *supra* note 55, at 14-15.

[S]he was telling me she was going to take *me* to jail for disorderly conduct because I was questioning her. . . .⁶⁵

While Ms. Burrell is pleased that the sheriff has helped clean up the open sale of drugs and is in favor of continuing the sheriff's presence, she feels that her rights as a tenant are being infringed.⁶⁶ She said:

I guess if you want to call that a good thing, that's the only thing good that came of it, you know, that my kids don't have to live around drug infested neighborhoods. . . . I don't have a problem with the sheriffs being out here, just as long as they leave us alone. . . . [T]hey know who's out here selling drugs . . . trust me, they know.⁶⁷

In 1991, the residents at St. Michaels Housing Authority (SMHA) in St. Michaels, Maryland, joined to challenge several management policies, including the maintenance of a criminal trespass (banning) list.⁶⁸ In their class action complaint, the plaintiffs alleged, *inter alia*, racial disparity.⁶⁹ Of the forty people banned from the property, at least thirty-eight were black.⁷⁰ Only about sixty-four percent of the residents living at SMHA were minorities, but approximately eighty-five percent of the residents whose families were affected by the list were black.⁷¹

According to the plaintiffs, SMHA banned people for a variety of reasons, including domestic violence, money owed to SMHA, a single violent incident, or preventing someone not on the lease from living in a unit.⁷² According to the plaintiffs, SMHA arbitrarily banned their families and friends.⁷³ The complaint chronicles a number of incidents

65. *Id.* at 11 (emphasis added).

66. *Id.* at 16-17. When asked why she thought the drug problem was better, she replied "the sheriffs." Mr. Kelly noted, "the criminal trespass policy eliminated the drug problem." *Id.*

67. *Id.*

68. *Miller v. St. Michaels Hous. Auth.*, No. Y-91-2412 (D. Md. filed Aug. 26, 1991). The SMHA has about 300 residents. *Id.* ¶ 13. A group of "bannees"—persons banned from the SMHA properties pursuant to a criminal trespass policy—intervened in the case.

69. *Id.* ¶ 34.

70. *Id.*

71. *Id.*

72. Plaintiff Tenants' Memorandum in Support of Motion for Summary Judgment at 5, *Miller v. St. Michael's Hous. Auth.* (No. Y-91-2412) (filed Aug. 24, 1992).

73. Plaintiff's Complaint at ¶ 15, *Miller* (No. Y-91-2412).

in which families were unable to visit with one another on housing property because of the policy.⁷⁴

CONCLUSION—TENANTS' PERSPECTIVES

Although public housing tenants speak with many different voices,⁷⁵ there are elements in common among them. These include the following: horror at the violence that surrounds them, fear for their children's physical and emotional well being, anger at the government's control over their lives, frustration by the government's inability to either protect them or allow them to be free, and respect for friends and family. Finally, perhaps, is a skepticism by many residents that the housing authority will protect them without interfering in their relationships with loved ones. These common beliefs lead to different positions about which limited options will offer the most protection of life and liberty.

C. *Perspectives: Visitors and Banned Persons*

[Thirteen year old] Lafayette helped a parking lot attendant wave in cars [arriving for the nearby Bulls game]. . . . A policeman approached and told Lafayette and a few of his friends, who were waiting for cars to pull into the side streets, to go home. Lafayette may have talked back to him or he may have been slow in moving, but two other boys have separately recounted what happened next. The policeman grabbed Lafayette by the collar of his jacket and heaved him into a puddle of water. He then

74. *Id.* ¶¶ 41-96.

75. Residents and legal scholars have different opinions about how to best achieve common goals, and about the problem of crime in inner-cities. Consider, for example, Randall Kennedy's view of the relationship between race and crime. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994). Professor Kennedy argues that emphasizing the unfairness of criminal punishment to black defendants lessens consideration of the unfairness of crime upon the black population. *Id.* at 1267. He points out that black people are more likely to be victimized by crime than white people. *Id.* at 1259. Contrast this approach with that of Richard Delgado. Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994). Professor Delgado's emphasis is on the absence of fear of corporate "white-collar" crime which accounts for between \$300 and \$500 billion in losses each year and often results in violence to people and property. *Id.* at 521, 529. His analysis suggests, among other things, that it is highly unlikely that white Americans would allow a sort of criminal trespass policy aimed at stopping white collar criminals. *Id.* at 539.

kicked Lafayette in the rear. "What you doing here?" the officer demanded of the boy. "Little punk, you ain't supposed to be working here. These white people don't have no money to give no niggers. . . ." That night ushered in a period of confusion for Lafayette as he began to question his relationship with the police.—Alex Kotlowitz⁷⁶

If a person's name is on a trespass list, then that person has had some encounter with law enforcement officers. This section gives the perspectives of several men who have experienced these encounters. Their stories are similar to accounts by other black men who feel that they have been unjustly stopped by police officers.⁷⁷

Mark Brown, a twenty-three-year-old African-American man living with his family in the Dayton project, Hilltop Homes,⁷⁸ is listed on the lease as a resident.⁷⁹ Although Mr. Brown has had several encounters with police on or near his residence as well as at other DMHA proper-

76. KOTLOWITZ, *supra* note 1, at 160-61.

77. See, e.g., David Ray Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645 (1994) (relating accounts by the young, black men who became leaders of the Black Panther Party in the 1960's). Eldridge Cleaver recounted in a 1968 interview:

We'd just be walking down the street and the pigs would stop us and call in to see if we were wanted—all of which would serve to amass a file on us at headquarters. It's a general practice in this country that a young black gets put through this demeaning routine.

Id. at 671 (citing Nat Hentoff, *Playboy Interview: Eldridge Cleaver*, PLAYBOY, Dec. 1968, at 89, 108). Papke includes other examples from leaders such as Huey Newton and Malcolm X. *Id.* The case of *Terry v. Ohio* itself contained some discussion of the reality of such problems. That court noted the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain." 392 U.S. 1, 14 (1967).

The court in *Terry v. Ohio* substantiated this perception in footnote 11, which reads, in part, "The President's Commission on Law Enforcement and Administration of Justice found that '[i]n many communities, field interrogations are a major source of friction between the police and minority groups.'" *Id.* at 14 n.11 (citations omitted).

78. *Brown* Transcript, Vol. 1, at 136. Although I use the present tense, all of the information about Mark Brown, Brett Williams, and Alon Russell comes from their testimonies in the case of *Brown v. Dayton Metro. Hous. Auth.* Mr. Brown's account could also be a part of the section on residents' perspectives. I chose to relate his account to this section because it describes encounters with the police that are similar to non-resident persons who have been arrested under the policy.

79. *Brown* Transcript, Vol. 1, at 140.

ties, he had never been arrested, charged, or convicted of any criminal activity other than the criminal trespass itself.⁸⁰

The first time the police stopped Mr. Brown, he was on his way to the grocery store, a few blocks from the project.⁸¹ The second time the police stopped Mr. Brown was in December of 1991.⁸² Mr. Brown testified:

I was getting ready to slip my key in the door. That's when they [the police] came up, asked me my name. I told them my name. They told me to come out . . . to the van. I said, "For what?" That's when the man told me not to stick my key in the door. I said, "Why?" . . . [H]e said, "Well, do you live there?" I said, "Yeah, I live there." He said: "That don't mean you live there just because you got a key." I said, "Well, I do live here."

My brother, Mike, was coming up. He had just come from work. He was coming up. He asked him what was the problem. Then they asked him did I live there. He told them yeah. And they went on back and got in the van and let me go.⁸³

The next time the police stopped Mr. Brown, he was on his way back from the store, but not yet on DMHA property.⁸⁴ Mr. Brown relates:

[The police] stopped me, put me up against the van, patted me down, went into my pockets again, asked me did I have any weapons on me. I said no sir. They put me in the van, rolled off, went somewhere else. That's when they took me downtown . . . to jail.⁸⁵

Although Mr. Brown spent that night in jail, the court released him and dismissed the case the next day after his mother showed the prosecutor the lease.⁸⁶

80. *Id.* at 139-41, 143. Although the police charged Mr. Brown with criminal trespass, he does not recall signing a written notice of trespass.

81. *Id.* at 137.

82. *Id.* at 138.

83. *Id.* at 137-38.

84. *Brown Transcript*, Vol. 1, at 137-38.

85. *Id.* at 139.

86. *Id.* at 140.

Mr. Brown's mother recalled a 1988 incident in their front yard. She related:

All of us was in the front yard, in my front yard, where I live at. And task force drove up. And they grabbed my son, Mark, and put him up against the van and searched him down and went through his pockets. And they put handcuffs on him and put him in the van. And I went up to them and I asked them, I said, "Why do you all have my son?" And they said, "He is trespassing." I said, "My son is not trespassing. This is my son. He lives here, and he is on my lease." [The police] told me that Mark was on the trespass list. And I said, "Well, how could he be on the trespass list, you know, and his name is on my lease?"⁸⁷

Mr. Brown cannot read and he had not understood he was on the list from the 1988 encounter and, thus, had apparently made no effort to remove his name from the list.⁸⁸ In addition, Mr. Brown appeared to have difficulty understanding the opposing attorneys' questions at the hearing.⁸⁹ By January, 1993, DMHA removed his name from the list.⁹⁰

Brett Williams is a twenty-six-year-old, African-American man.⁹¹ His son's mother lives in a DMHA property called Parkside.⁹² Mr. Williams had been on the "old list" (pre-May, 1992),⁹³ and had tried to get his name off that list, but the manager at Parkside, Ed Hines, would not cooperate.⁹⁴ Although at first he had concerns about visiting Parkside with his name on the list, Mr. Williams continued to visit his

87. *Id.* at 111. Apparently, the police did not take Mr. Brown to jail.

88. *Id.* at 140-41.

89. During cross examination, opposing counsel asked 28 questions, in which Mr. Brown replied that he did not understand seven times and that he did not recall five times. He appeared to have a difficult time with the chronology. *Brown Transcript*, Vol. 1, at 141-46.

90. *Id.* at 126-27.

91. *Id.* at 147.

92. *Id.* at 148-50.

93. *Id.* at 157. *See supra* text accompanying notes 29-30.

94. *Brown Transcript*, Vol. 1, at 159. Mr. Williams tried appealing to Mr. Marker at DMHA, "but I could never get an appointment with him. And so I just never paid any attention. I just kept doing what I was doing." *Id.*

son.⁹⁵ In the summer of 1992, Mr. Hines informed Mr. Williams that the program had been discontinued and that he removed his name from the list.⁹⁶

On January 19, 1993, after visiting with his son, Mr. Williams went to a neighbor's apartment to call his girlfriend to pick him up.⁹⁷ Mr. Williams testified what happened next:

Well, when I got in the car, there was a police officer, a patrol car right directly in front of us. . . . And he evidently turned around [and] . . . he put on his lights and pulled her over. . . . He approached the car and asked her for her driver's license. . . . I asked her to ask him why did he pull her over, and he wouldn't tell her at first. And he just said, "Just give me your driver's license. Give me your driver's license." When she gave it to him, then he asked my name. I said, "Why? I'm not driving." So then he just asked my name. . . . So I gave him my address and social security number. He left, went back to his car.

When he returned . . . [h]e gave me her driver's license, told me to hand it back to her, and I did. Then he said, "And I got some papers for you to sign." I said, "What are they?" He said, "Trespassing papers." I said, "Why do I have to sign this?" He said, "Just sign it." So I asked him how can he arrest me if I don't sign the papers? He told me that he is appointed by DMHA and he is DMHA and he runs this and he can do it, so just sign the papers. So I sat there and I said, "Well, could you explain to me why you are putting me on trespassing?" I said, "I'm in the car. You see I'm leaving. Why?" He said, "Just sign the paper. I'm not going to tell you no more." He started hollering.⁹⁸

Mr. Williams' girlfriend, Latina Alexander, confirmed his testimony that the officer told him he had to sign the paper or go to jail.⁹⁹ When

95. *Id.* In order to spend time with his son, Mr. Williams would take his son's mother to the grocery store and the laundromat. *Id.*

96. *Id.* at 157-59.

97. *Id.* at 149-50.

98. *Id.* at 150-52.

99. *Brown Transcript*, Vol. 1, at 101-02.

asked whether the officer explained why Mr. Williams would have to go to jail if he didn't sign the paper, she replied:

He didn't—the police didn't say too much Brett was just asking him why did he have to sign the paper. And he was just like, "Well, I've seen you out here a couple times." And Brett was trying to tell him that he was coming to see his son. . . . [The officer] just said, "Either you sign it, or you go to jail."¹⁰⁰

Mr. Williams did try to get his name off the list. First, he spoke with the manager, Ed Hines, the same day he received the notice of trespass.¹⁰¹

Mr. Williams reported:

I had asked him if any reason, you know, could I come out there. I said, well, can I have visitation rights, maybe come out here three days a week, maybe an hour or two a day. He didn't want to do it. So I called down to DMHA to see if I could talk to someone else who would cooperate, and they addressed me to Mr. Arnold.¹⁰²

At the time of the hearing, his appeal to Mr. Arnold was still pending.¹⁰³

Alon Russell is a twenty-two-year-old African-American man who stayed at a cousin's apartment in Parkside in 1992.¹⁰⁴ The cousin's family asked a few relatives, including Mr. Russell, to stay overnight at her apartment while she was away in the hospital.¹⁰⁵ One morning, the police, the Parkside manager, and the assistant manager came into the apartment and woke Mr. Russell while he was asleep in bed.¹⁰⁶ Mr. Russell relates:

The police said—the manager at Parkside said we didn't have permission to be in the house and that the house had been burglarized and no one knew we were there so we were trespassing and we had to leave. . . . I told them that the house had been burglarized.

100. *Id.* at 102.

101. *Id.* at 156.

102. *Id.*

103. *Id.*

104. *Brown* Transcript, Vol. 1, at 213-16. Mr. Russell's cousin had suffered a nervous breakdown and was in a mental health facility. *Id.* at 213-16, 219-20.

105. *Id.* at 216. The cousin's family was concerned about the apartment being empty because it had been burglarized recently. *Id.* at 217.

106. *Id.* at 217.

They said, "We already know that. We'll be taking care of that, keeping an eye on the house. But no one should be here while she [the resident] is not here." . . . [I] [t]old them that she gave me permission to be there and gave me her key. The manager said I had to get off DMHA because I wasn't on the lease to be in the house. . . . [T]hey started writing down stuff, taking pictures of me and my other two cousins that were there. And then they put us out.¹⁰⁷

The police did not ask Mr. Russell his full name. When Mr. Russell said his name was "Alon," they wrote the trespass notice to "Alon Burton," assuming he had the same last name as his cousin.¹⁰⁸ Mr. Russell did not cooperate with the officers because he was mad they woke him up.¹⁰⁹

After Mr. Russell's cousin returned to her apartment, Mr. Russell, periodically went back to the apartment to care for her.¹¹⁰ At the end of November, Mr. Russell relates another encounter with police:

DMHA and the police came to the house once again to do the same thing. They said that we weren't supposed to be there, that we had broke into the house this time, and we didn't have the key, didn't have permission. So the police officers didn't lock us up at that time, even though I was there and I had been put on the trespass list the previous time. Police officers said they weren't going to lock us up, and they told everybody to leave.¹¹¹

In an effort to remove his name from the trespass list, Mr. Russell went to speak with the Parkside manager, Mr. Hines, however, he referred him to Mr. Foote of DMHA.¹¹² Unfortunately, Mr. Foote referred him back to Mr. Hines, telling him that "only Mr. Hines could take my name off the trespassing list since he put me on the trespassing list."¹¹³ Later that day, Mr. Hines gave Mr. Russell permission to help

107. *Id.* at 218.

108. *Id.* at 223.

109. *Brown Transcript*, Vol. 1, at 223.

110. *Id.* at 219-20.

111. *Id.* at 220-21.

112. *Id.* at 221.

113. *Id.*

his cousin and said he would take his name off the list.¹¹⁴ However, Mr. Russell failed to tell Mr. Hines he was listed as "Alon Burton."¹¹⁵

In February, 1993, while Mr. Russell was on his cousin's porch, a police officer pulled up. Mr. Russell recounted at the hearing:

[The officer] asked me some questions about some guy. And he asked me did I know his name, and I told him that I didn't know him by that name. Then when he told me his nickname, I told him I knew him. He asked me to get in the car, he had some questions to ask me. Then he said that he would be back. He left and went to the [Parkside] office. . . . Then he came back, and he sat in the alley for about five minutes and backup came. . . . He came over to me and told me to put my cigarette out and get in the car. I put my cigarette out, and he searched me. I got in the car. We rode up to the office. He got out the car, went into the office again for about five minutes. And he came back out, wrote something down . . . and said that I had to turn around and put the handcuffs on me, I wasn't supposed to be out there. The manager said I wasn't supposed to be out there. And he took me downtown . . . [t]o the police station . . . [where] I was arrested and booked for trespass.¹¹⁶

Mr. Russell stayed in jail for six to seven hours before being released.¹¹⁷

Kenneth Hudson, a twenty-seven-year-old African-American man honorably discharged from the military service in 1989, works at a local hospital and has no criminal record other than the criminal trespasses.¹¹⁸ Although Mr. Hudson does not live in DMHA housing, he grew up in a neighborhood adjacent to a project called Edgewood Court and often walks through that project.¹¹⁹

In the summer of 1992, two police officers approached him, asked him his name and what he was doing in the area.¹²⁰ Mr. Hudson, who

114. *Brown* Transcript, Vol. 1, at 222.

115. *Id.* at 223.

116. *Id.* at 213-15.

117. *Id.* at 215.

118. *Brown* Transcript, Vol. 4, at 103-04, 106.

119. *Id.* at 104.

120. *Id.* at 104-05.

mentioned that he formerly worked for DMHA, asked the police why they were questioning him.¹²¹ Mr. Hudson recalls:

One [officer] started telling me that they were hired by the [DMHA] to check people coming in and out of the area. . . . And he started to go on in more detail But I told him that there were no signs posted, nothing was mentioned about it in the newspaper, which I read the newspaper every day during lunch at work. I said nothing was mentioned about it on the news, local news.

And at that point he asked me to step over to the van. . . . Other officers gathered around us. And I think it was six all together. And a big discussion—the one in the van, the driver, got into a—I mean, he was—had an attitude because when I had mentioned working for Dayton Metropolitan Housing Authority, his language, he was very vulgar towards me, which he didn't even know why the other two . . . officers were having . . . a decent conversation. Then it kind of started getting out of hand.¹²²

While one officer accused Mr. Hudson of lying about working for DMHA, the other frisked him,¹²³ which upset Mr. Hudson:

I told him he didn't have no right to put his hands on me. And one of the officers said, 'Well, we're going to take your picture.' I asked him why. He said, 'Because the next time we catch you on this property again, then we can prosecute you, arrest you for criminal trespass.' So I said, 'Well go ahead on.' So then he took my picture.¹²⁴

Eventually Mr. Hudson told the officers his name was "John Doe," but this confused the police, as Mr. Hudson related:

The officer said, "Well, we have got to get his name. No we don't need his name, we need his picture." They said, "Well, he got to sign this form." Then one of them said,

121. *Id.* at 105.

122. *Id.*

123. *Brown Transcript*, Vol. 5, at 106.

124. *Id.*

“No, he don’t have to sign it. Just put John Doe on it.”¹²⁵

When Mr. Hudson received his copy of the form, he left the DMHA property but noticed a police van following him, as he later testified:

[T]hen I looked around. Two other officers was coming up from behind me and one said, “Let me have your I.D.” the same officers that was over in Dayton Metropolitan Housing Authority. . . . Then I got into a conversation with the two that was coming up from behind me. Meanwhile, the ones that was in the van had got out of the van. They had surrounded me.

[T]he driver, he had grabbed me from behind, slammed me down on the ground. One officer was on one arm, the other—one officer was on another arm, and another officer had one leg, and another officer had my other leg. Then one jumped down in my groin. And the other one, the van driver, used a chokehold. They covered my mouth and my nose at the same time to where I couldn’t breathe. My heart was racing. I couldn’t breathe. He was like, “You had enough, nigger? Because I can keep doing this shit all the goddamn day.” His words exactly.¹²⁶

After this frightening incident, the police booked Mr. Hudson for trespass and took him to the hospital for a groin and shoulder injury, and scrapes and bruises.¹²⁷ During a lengthy discussion, Mr. Hudson heard officers discussing what they *could* charge him with:

[O]ne was saying that we could charge him with resisting arrest. And another one said, “Well, if we charge him with that, we could charge him with disorderly conduct.” Another one said, “Well, we can probably make that jaywalking stick.”¹²⁸

Before booking him, an officer reached into Hudson’s pocket and took back the trespass notice:

125. *Id.* at 106-07.

126. *Id.* at 107-08.

127. *Id.* at 109.

128. *Id.* at 111.

[T]he other one asked, "Did he sign it?" And then he said, "No." He said, "Good, because if he had signed it, our ass would have been out."¹²⁹

The police charged Mr. Hudson with resisting arrest, disorderly conduct, jaywalking and assault.¹³⁰ Since this incident, Mr. Hudson has made a point of staying away from DMHA housing sites.¹³¹

CONCLUSION—PERSPECTIVES OF "TRESPASSERS"

The pattern of stops and, sometimes, arrests detailed by the foregoing men paints a picture of a standardless, arbitrary and sometimes dangerous policy under which law enforcement officers decide who is "in" and who is "out." The criminal trespass policy, as related by these men, appears to concern more than prevention of drug-related crime.

E. *Perspectives: Law enforcement*

Every law-abiding American, rich or poor, has the right to raise children without the fear of criminals terrorizing where they live. . . . There are many rights that our laws and our Constitution guarantee to every citizen, but that mother and her children have certain rights we are letting slip away. They include the right to go out to the playground and the right to sit by an open window, the right to walk to the corner without fear of gunfire, the right to go to school safely in the morning, and the right to celebrate your tenth birthday without coming home to bloodshed and terror.

—President Bill Clinton¹³²

[A]ny abstract analysis of people's rights, of the type the ACLU might do, is swamped in real life by people's rights being denied [by criminals].

—Henry G. Cisneros, Secretary of Housing and Urban Development¹³³

129. *Brown Transcript*, Vol. 4, at 110.

130. *Id.* at 111.

131. *Id.* at 112.

132. President's Radio Address, PUB. PAPERS 701-02 (Apr. 16, 1994).

133. *Clinton Backs No-Warrant Search Plan; Public Housing is Target*, ST. LOUIS POST-DISPATCH, Apr. 17, 1994, at 1A.

This section will explore the justifications of state actors for the criminal trespass policy by examining the experiences of those state actors most involved with the policy: the police. In response to complaints by the Public Defender Office concerning the criminal trespass policies, the Dayton police formulated its official position in a written memorandum.¹³⁴ Although there had been limited training prior to May of 1992, the police made several major changes to the program. Upon issuing the new notice of trespass form, officers had to complete a narrative section.¹³⁵ In addition, each officer had to attend a training program.¹³⁶

In the training sessions, instructors encouraged the Dayton police to speak with the residents and visitors in housing communities in an effort to get to know them.¹³⁷ But the police could not contact these people for mere "casual conversation" unless there was "some form of reasonable suspicion that attracted [the police] to [them]."¹³⁸ If an officer has reasonable suspicion to contact an individual, he must notate this suspicious behavior in the narrative part of the criminal trespass form, otherwise the officer may not trespass off that individual.¹³⁹ Officers who see suspicious activity are expected to investigate and issue a notice of trespass unless the suspected individual offers a legitimate or credible reason for being on the premises.¹⁴⁰

As a general rule, street level officers protect communities from people who may do harm. Therefore, officers look for signs of trouble

134. "Operation A.C.E." in Columbus, Ohio is a similar policy. In response to complaints about the program, the police department in Columbus drafted a manual of Supreme Court cases it felt officers needed to understand prior to participating in what they call "saturation" patrols. Officers must receive a score of 70% or higher before they can participate in the program. Meiring, *supra* note 5, at 501. Meiring suggests that every police department that institutes similar programs should have a detailed policy manual explaining how the program works and what officers should do. *Id.* at 535.

135. *Brown* Transcript, Vol. 3, at 170.

136. *Id.* at 168. There were approximately 200 officers participating in the overtime trespass program.

137. *Id.* at 172.

138. *Id.* at 171.

139. *Id.* at 170-71, 174. In addition, the officer will no longer be permitted to participate in the program.

140. *Brown* Transcript, Vol. 3, at 180.

with the intention of stopping it.¹⁴¹ The officers' work carries with it a constant risk of harm to the officer and other individuals. As a result, officers maintain a certain attitude toward the public:

Police officers relish respect and, in many small ways, insist on a show of deference from the ordinary folk among whom they work. They know they represent force—they are, after all, 'the Force'—and they move with an air of confidence that tells the world to yield the right of way as they pass by. The manner of assured, authoritative presence and control is so characteristic I am convinced it has a functional as well as an attitudinal base. Manifest confidence begets submission, and the cops learn the firm tone and hand that informs even the normally aggressive customer of the futility of resistance. It's effective.¹⁴²

However, there is a balance between demanding such respect and abusing this authority:

At the same time, we do not want our police to exploit their position of dominance to gain the corrupt rewards of office or to revel in their superiority at the expense of the

141. Professor H. Richard Uviller believes this attitude derives from an officer's need to be skeptical to do good work. He describes eight axioms police hold to be true:

1. Criminals are often the most persuasive liars.
2. When a crime has been committed, someone did it, and the suspect is the most likely candidate.
3. Self-serving statements, regardless of vehemence, are less likely to be true than self-damaging statements.
4. "Respectable citizens" (e.g., local merchants, middle-aged married people, conventionally employed people) are more likely to tell the truth than other sorts, but even honest people rarely tell cops the whole truth.
5. Friends and family members can be expected to lie to corroborate the story of a person in trouble.
6. Hope of monetary gain, fear of reprisal, and the settling of old scores are powerful inducements to fabrication.
7. Stories that fit the physical facts in some respects are entitled to careful consideration in all particulars.
8. Stories that are contradicted by the physical facts in some particular are likely to be false in all respects.

H. RICHARD UVILLER, *TEMPERED ZEAL* 214 (1988).

142. *Id.* at 16.

citizen's sense of personal dignity. The demands of restraint must be strong enough to balance the temptations of power; the freedom and peace of mind of the community hangs in that precarious balance. And the cop is stretched between broad license and severe limitation.¹⁴³

These officers, then, have a difficult job. They must become acquainted with residents and visitors in a positive way, so they develop a sophisticated instinct about which conditions are "normal" and which conditions should cause alarm. At the same time, the officers must be skeptical and vigilant. The authoritarian stance that protects them can easily lead to an abusive encounter unless the trained professional officer can defuse the tension inherent in many confrontational situations. Furthermore, the police face additional problems in subsidized housing communities. They are likely to be seen as outsiders because they do not typically live in poverty-stricken neighborhoods. In addition, police forces do not typically reflect the racial or ethnic composition of such neighborhoods, particularly in the larger urban projects.¹⁴⁴

Anecdotal accounts of police misconduct are well known. One incident, like that of Mr. Hudson, can spread quickly throughout the community. Officer Miles Clark of the Dayton Police describes residents as uncooperative, such as not answering their doors in response to repeated knocks.¹⁴⁵ Such an attitude by residents is reflected in national reports.¹⁴⁶ Residents living in economically more prosperous neighborhoods have fewer and more positive experiences with police

143. *Id.*

144. In 1965, for example, the non-white population of Dayton, Ohio was 26% and 4% of police officers in Dayton were non-white. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 321 (1968). In 1990, African-Americans constituted 40% of Dayton's population with an additional 2% consisting of other non-white people. See U.S. DEPARTMENT OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 81 (1990). In August, 1995, Dayton police reported that 9% of Dayton police officers were black. The author obtained the police composition from the Dayton Police Community Relations Office. As a general rule, public housing neighborhoods have even more highly concentrated non-white populations than the cities in which they are situated.

145. *Brown* Transcript, Vol. 4, at 46.

146. See DUNWORTH & SAIGER, *supra* note 2, at 60 ("[T]his rough proportionality [between arrests and crime rates in public housing] appears to occur without particularly close cooperation between police and either public housing residents or housing authorities.").

officers; where officers reside there is also social interaction. Dialogue between police and residents in such areas is logically more comfortable and more productive than in subsidized housing neighborhoods. This "outsider" status in public housing projects probably makes officers more concerned for their own physical safety, and more likely to look for signs of trouble, than they would in a less threatening environment.

Officer Larry Jones, an African-American, is a community based Dayton police officer assigned to the Parkside project.¹⁴⁷ Officer Jones was not a member of the drug "task force."¹⁴⁸ Part of his job, in addition to responding to citizen complaints in the area, was to enforce the trespass policy.¹⁴⁹ On the beat, he carried trespass notices and a copy of the list given to him by Parkside managers.¹⁵⁰ Officer Jones considered himself an agent of Parkside, but he had never attended the required training program nor had he seen any written policies concerning the enforcement of the list.¹⁵¹

Officer Jones further indicated that the criteria for issuing a notice of criminal trespass were subjective. While he does not know the term "Terry stop,"¹⁵² he testified that "the notices would be issued pursuant to any and all conduct that would appear to be illegal that would be happening out there that I would be observing."¹⁵³ He stated that observing illegal activity was "the only basis that I could make a decision like that, to trespass anybody off that area."¹⁵⁴ However, he suggested that he might have given a notice to someone loitering on DMHA property if he suspected that person was involved in illegal activity.¹⁵⁵ Officer Jones' suspicion of a particular person, however, was based on his observation of the person at that time or on previous

147. *Brown* Transcript, Vol. 2, at 5.

148. *Id.* at 7. HUD agreed to pay the police on the task force overtime to monitor DMHA property. *Id.*

149. *Id.* at 6.

150. *Id.* at 9.

151. *Id.* at 8. *See supra* notes 136-42 and accompanying text.

152. *Brown* Transcript, Vol. 2, at 35. For a discussion of police stop standard set out in *Terry v. Ohio*, see *infra* note 248-55 and accompanying text.

153. *Brown* Transcript, Vol. 2, at 9.

154. *Id.* at 9.

155. *Id.* at 10.

occasions.¹⁵⁶ Therefore, Officer Jones may have stopped and given a notice of trespass to individuals who had done nothing more than stand on DMHA property if he had previously seen them do something he suspected was criminal.

Officer Jones was the officer who issued the notice of trespass to Mr. Williams.¹⁵⁷ Officer Jones knew Mr. Williams because he had arrested him several months earlier for drug abuse outside of DMHA property.¹⁵⁸ A few weeks before issuing a notice of trespass to Mr. Williams in January, 1993, Officer Jones testified:

I have observed him for like over a two-week period. And Mr. Williams would be out at various apartments, in front of various apartments. There would be several areas that he would hang out. He would just walk—him and a few other people that he would associate out there. Cars would be coming in from out of the area. He and a few of his peers would be making contact with these people. And then basically he would go into another apartment, move around the projects. And it appeared that he was making transactions of some sort.

When I went to try to contact him or the other individuals that were involved, they would dart into various apartments, knock on doors real quick; and anybody who would let them in, they would dart in. And a couple of times I even went to an apartment to try to contact him, and he had gone out the back door. Went in the front, went out the back door.

And he would do this evasive action on several occasions after, what appeared to me, after he had been making transactions with people.¹⁵⁹

156. *Id.* at 15. Sometimes Officer Jones would issue a notice several weeks after he observed suspicious activity. *Id.* This could have happened because the people who were engaged in suspicious activity (usually apparent drug transactions) often fled when approached, thus he could not question nor give them a notice of trespass at the time. Moreover, Officer Jones normally did not call for backup or request a warrant to search the places where the suspicious people fled. *Id.* at 20.

157. *Id.* at 31. See *supra* notes 91-103 and accompanying text.

158. *Brown* Transcript, Vol. 2, at 26. Officer Jones testified that Mr. Williams had “admitted to me at that time that he was a drug dealer.” *Id.*

159. *Id.* at 36.

Officer Jones trespassed Mr. Williams off the property because he had been loitering “over a period of time,”¹⁶⁰ and thought it was appropriate to issue a notice to him, even though Officer Jones had no suspicion of any criminal activity at that time.¹⁶¹ Though Officer Jones apparently knew Mr. Williams had a child at Parkside, he could not recall whether Mr. Williams told him he was visiting his child, thinking that “he might have even told me something,”¹⁶² then later stating “he did not indicate that to me at all.”¹⁶³ He could not recall any other details of the stop except that Mr. Williams, who had been “very pleasant” months earlier, was now “very hostile.”¹⁶⁴ Officer Jones stated that he did not threaten to arrest Mr. Williams if he refused to sign the notice, nor did he pat him down.¹⁶⁵

Officer Jones was also the officer who arrested Alon Russell.¹⁶⁶ He had observed Mr. Russell around Parkside, playing basketball and not causing any problems, but noticed Mr. Russell:

[H]anging around and doing the same sort of things, I would see some of the other people do that I suspected were dealing drugs, going up to cars, hanging out front when people come by. He would go up and look like he is making transactions. Then he would leave that particular area and then go into another area and make more contacts with other people, and then they would drive off. I kept observing him doing this.¹⁶⁷

Officer Jones summoned Mr. Russell to court and told him he should not be at Parkside; Russell indicated he would appeal to remove his name

160. *Id.* at 18.

161. *Id.* at 21, 24.

162. *Id.* at 31.

163. *Brown Transcript*, Vol. 2, at 37.

164. *Id.*

165. *Id.* at 24.

166. *Id.* at 38-39. For a description of Alon Russell's arrest, see *supra* notes 104-17 and accompanying text.

167. *Id.* at 38-39.

from the list.¹⁶⁸ Officer Jones testified: “[A] week later . . . I observed him again on there. And at that point I arrested him.”¹⁶⁹

Officer Jones sometimes intervened in ways other than trespass or arrest. He testified, for example, that

[I]f these [juveniles] have been repeatedly doing the same sort of things that lead me to believe through my observation that they are doing something illegal, I’ve contacted their parents and let them know that I think they are doing something illegal and to let them handle them.¹⁷⁰

The Dayton Police Department hired Officer Miles Clark on the overtime trespass program in 1989, and by 1993 he had worked more shifts than any other police officer.¹⁷¹ Officer Clark testified that he would not stop anyone unless he had a “reasonable suspicion that criminal activity was afoot”¹⁷² such as “[l]oitering aimlessly, time of day, known dopers, or other criminals that I personally know . . . [S]uspicious criminal activity would have to be present visually for me in order to approach them in that regard.”¹⁷³ When he sees suspicious activity, he approaches the people and asks them their names and inquires why they are there.¹⁷⁴ If they have “any sort of reasonable explanation” about why they are there, he checks their names on the trespass list and walks away if they are not on it.¹⁷⁵ Although he testified that he only issues notices of criminal trespass when he sees “criminal activity on DMHA property,” he did issue a trespass notice to one man who was “loitering.”¹⁷⁶ When Officer Clark issues a notice,

168. *Brown* Transcript, Vol. 2, at 38-39. Mr. Russell (whose name was listed as “Alon Burton” on the list) testified that he had appealed that same day and the manager at Parkside said he would take his name off the list.

169. *Id.* at 39.

170. *Id.* at 37-38.

171. *Brown* Transcript, Vol. 4, at 42-43. Unlike Officer Jones, Officer Clark has attended training sessions on how to enforce the trespass program. *Id.* at 43.

172. *Id.* at 44.

173. *Id.* at 45. It is doubtful that “loitering aimlessly” can create a legitimate suspicion of criminal activity that would justify a stop. For a discussion of the constitutionality of loitering ordinances, see Joel N. Berg, Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461 (1993).

174. *Brown* Transcript, Vol. 4, at 46.

175. *Id.*

176. *Id.* at 72-75.

he records identifying information about the person, takes a snapshot of him, and asks him to sign the form.¹⁷⁷ He tells him that he is issuing the notice, advises the person of his right to appeal, and informs him that he must leave the property.¹⁷⁸ However, Officer Clark did not believe he needed to have a suspicion of criminal activity to question a person about whether he was on the list.¹⁷⁹ He might simply stop a person walking across a lawn or someone who is loitering and ask his name; if the person's name appears on the list, Officer Clark will arrest the person.¹⁸⁰ While Officer Clark testified that a person can refuse to speak with him or walk away, he ran after one man who had been "loitering" and gave him a trespass notice.¹⁸¹

CONCLUSION—POLICE PERSPECTIVES

Officers Jones and Clark revealed a jumbled understanding of criminal trespass programs, *Terry* stops, and Fourth Amendment law. As United States District Court Judge James B. Zagel stated:

Street-level enforcement, in my experience as both a prosecutor and state police director, has *always* depended on the police 'tossing' a large number of cars and people without much more than an educated hunch.¹⁸²

Police are likely to see the Fourth Amendment as an impediment to the fight against crime:

[W]e know that in this system even the conscientious cop is often tempted to bend the facts to reach what he believes to be the just outcome. . . . But the major temptation to perjury, I believe, is the desire to evade the

177. *Id.* at 49-50.

178. *Id.* at 50-51. Officer Clark fails to explain why he does not arrest the individual for the criminal activity.

179. *Brown* Transcript, Vol. 4, at 50-51.

180. *Id.*

181. *Id.* at 84. When that man was stopped after the chase, he admitted to gambling, a minor offense. However, Officer Clark was not aware of the gambling offense prior to the chase.

182. James B. Zagel, *Drug Rhetoric, Courts and the Law: A Response to Professor Rudovsky*, 1994 U. CHI. LEGAL F. 275, 282.

effects of constitutional rulings that seem to nullify good, honest police work.¹⁸³

The Dayton officers rarely considered obtaining an arrest warrant. Police officers generally find warrants extremely difficult to obtain and, if obtained, often too late to do any good.¹⁸⁴ While the officers admitted that they could stop, inquire, and arrest persons who had committed crimes in their presence without a trespass list, they appeared to find the trespass list a major convenience in ridding the projects of undesirable people. This should come as no surprise, as the trespass list helps create reasonable suspicion of criminal activity (virtually any young, black male could be on the list) and allows police to stop, question and “check out” anyone they find suspicious.

III. ENGAGING IN DIALOGUE

A. *The Process of Dialogue*

Understanding the variety of needs and experiences reflected by residents, “trespassers,” and police officers can inform public interest attorneys about the importance of meaningful dialogue in the creation, implementation, and evaluation of policies such as the criminal trespass policy. While many have written about the importance of a “dialogic process,” the focus by most attorneys has centered on “rights” and constitutional litigation.¹⁸⁵ Because public interest attorneys have done little to foster dialogue, they must take steps to assist the dialogue process.¹⁸⁶

183. UVILLER, *supra* note 141, at 113.

184. *Id.* at 124. Uviller titles his Chapter by proclaiming, “If only you had a warrant you could walk through walls.”

185. Anti-poverty lawyers have focused energies on procedural remedies for many reasons. As Rebecca Zietlow points out, low income people have fared better in formal, rather than informal, adjudicatory settings. Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. (forthcoming Spring 1996). While the content of the remedies has been far from adequate, formal procedures have at least held government officials accountable to some objective standards. I would argue, however, that it is time government officials realized that, without actual input from affected groups, many government programs will continue to fail to achieve their goals.

186. Whether lawyer-driven constitutional litigation strategies should dominate poverty lawyering has been the subject of debate among anti-poverty lawyers. For a discussion of these debates, see Martha F. Davis, *Poverty Lawyering in the Golden Age—A Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, 93 MICH. L. REV. 1401

Dialogue is more than giving residents and community members the right to comment on proposals. At a minimum, dialogue should mandate the actual participation of all the parties affected by the policies. Ideally, dialogue needs to bring with it a commitment by all parties—including those with the power to execute the policies—to actually consider and incorporate into the policies the legitimate needs of all affected parties. Rather than the state granting parties an *opportunity* to participate, the emphasis should be a process whereby the state takes the necessary steps to *ensure* actual participation by those parties.¹⁸⁷ In this way, each individual and group is “decentered” by being forced to look at the problem from alternative points of view.¹⁸⁸ This process assumes that no solution can be found by only one party—no matter how educated, powerful, or creative. Because no party can achieve a result without input from others, it is essential that dialogue takes place before the parties craft a solution.¹⁸⁹ This type of dialogue, however, is not likely to take place without paid professionals facilitating it.¹⁹⁰

(1995). For critiques of the lawyer-driven model, see GERALD L. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths From Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994). Analysis of anti-crime measures in public housing have focused almost exclusively upon constitutional analysis. See *supra* note 5. This Article is an attempt to illustrate how lawyers can further what Lopez refers to as the “rebellious lawyering” approach to analyzing anti-crime measures in poor communities rather than a “regnant lawyering” model. White, *supra*, refers to this as “collaborative” lawyering.

187. Jurgen Habermas promotes this type of reasoning in his discourse ethics. He maintains that decisions are legitimated by the active participation of all affected parties. A norm is valid only if “[a]ll affected parties can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities).” REHG, *supra* note 8, at 38.

188. *Id.*

189. *Id.* at 78-79.

190. Friere calls these professionals “investigators.” Friere offers a specific methodology for educated professionals to go into poor communities and learn from residents about their lives. These investigators then go back into those same communities and initiate dialogue designed to allow uneducated residents to speak with one another in a way that will encourage them to analyze the conditions of their own experience. In such an atmosphere, people from various stations in life learn with each other about the conditions and needs of the poor communities. FRIERE, *supra* note 8.

This dialogue process bears little relationship to the creation or implementation of the current criminal trespass policy. In an ideal process, residents, police ("beat" officers as well as superiors), housing authority personnel (local staff as well as HUD officials), and community members who have legitimate reasons to go on or near subsidized housing property would solicit input from each other prior to devising anti-crime policies.¹⁹¹ Rather than a few individuals devising policies and then requesting everyone else to agree, all parties would recognize that they could design effective solutions only after engaging in meaningful dialogue. Presumably, residents engaging in this process would not feel that they had to choose between only bad alternatives; guests would understand why police were present and what sort of information they needed; and officers would understand and respect the privacy and the community of the residents and their families.

The history of the Dayton policy suggests, by contrast, the government initiated a "top-down" formation of the criminal trespass policy. Litigation in other locations indicates a similar failure to understand these diverse perspectives prior to formulating the trespass policies.

Lawmakers based the subsidized housing statutes on the premise that residents are to have a voice in shaping the major decisions that affect residential life.¹⁹² This premise is deeply rooted in the democratic process upon which our society is based. While statutes and regulations state this principle, very few resources have actually been directed toward ensuring the widespread participation among residents, housing management, and law enforcement, when formulating possible

191. Because every community is composed of its own residents, police, and housing authority personnel, each community, after engaging in dialogue, may develop its own distinct anti-crime policy.

192. For a discussion of the role of tenant participation in public housing, see Marvin Krislov, Note, *Ensuring Tenant Consultation Before Public Housing Is Demolished or Sold*, 97 YALE L.J. 1745 (1988). As Krislov notes, "[f]ederal regulations require tenant consultation in a variety of contexts." *Id.* at 1751 n.47. See, e.g., 24 C.F.R. § 942.25 (1995) (requiring PHAs to consult elderly and handicapped residents when promulgating rules concerning pets); 24 C.F.R. § 961.3 (1995) ("The elimination of drug-related crime and the problems associated with it in public housing developments requires the active involvement and commitment of public housing residents. . ."); 24 C.F.R. § 961.18 (1995) (stating that applicants for funds must give residents a "reasonable opportunity to comment on its application for funding," and that "[t]he applicant must give these comments careful consideration in developing its plan").

anti-crime measures.¹⁹³ Rather, resident participation is seen more as a “right” of the tenants than as a necessary component to finding workable solutions. This view colors how government seeks resident participation. Viewed as a right, residents are given opportunities to participate via posted meetings and resident elections, but many residents appear not to avail themselves of these opportunities. Instead, housing management and lawmakers should make a concerted effort to solicit input and recommendations from residents. If participation were seen as a necessary component to finding viable solutions, housing authorities would seek resident participation much more vigorously.

In some communities, where residents and management are not communicating well, the parties may have to hire people to knock on residents’ doors to gather their opinions regarding various crime-fighting policies. In a pilot project in Dayton, Ohio, unrelated to the criminal trespass policy, some efforts were made to include residents in a dialogue about their community. While residents were not consulted in any meaningful way about the criminal trespass policy, the DMHA did hire a consulting firm to organize tenants and revitalize resident councils.¹⁹⁴ A former DMHA resident, who used grassroots, low-cost techniques to engage public housing residents’ participation, started the firm. Although this plan could have been the beginning of a dialogue on more important issues in DMHA, DMHA chose to end its affiliation with the consulting

193. Krislov argues that while “PHAs . . . can benefit from tenant consultation” they often thwart meaningful participation by tenants in important decisions. Krislov, *supra* note 192, at 1752-58 (citing PHA interference in Houston when tenants opposed demolition of public housing).

194. In 1992, the DMHA hired Faison’s Concepts to develop leadership abilities among residents. Randy Faison and Angelique Faison went door to door asking residents to participate in public housing governance. In “phase one” of their project, some of their notable successes were: registering 900 public housing residents to vote; organizing seminars and discussions on issues such as *Roberts Rules of Order*, community development, criminal justice, wellness, drug prevention and intervention, and team building. Unfortunately, DMHA cut off the funding for the Faisons just when they believed they had begun to build a core group of participating tenants. Had the funding continued, the Faisons planned to implement a series of workshops and events, including involving residents in: counseling school children about drug use, providing emotional support to children before and after school, providing after-school tutoring, choir-singing, and an arts program. Additional leadership training, career development, bookkeeping and management skills were also proposed. Speakers would be brought in to discuss criminal justice, mental health, alternatives to violence, and other topics. Proposals and reports from Faison’s Concepts (on file with the author).

firm.¹⁹⁵ This type of intensive, low-cost effort may be required to obtain actual participation by residents.

Other subsidized housing communities are experimenting with methods for increasing dialogue. Some are inviting police to be residents in their communities. Such a practice would encourage more meaningful dialogue between police and residents in an informal setting, and would integrate the police and residents by making some of the members of one group members of the other group, thus turning "them" into "us." Two other practices include recruiting more police from low income communities and communities of color, and amending federal housing laws to allow resident councils to take over the management of subsidized housing communities.¹⁹⁶ This Article, however, recommends a more explicit form of leadership in which a true participation by a large percentage of residents is necessary to achieve a workable solution.

Another benefit to the dialogue approach is that it allows residents, housing personnel, and law enforcement to test how well the policies are working. For example, there are a number of problems with the criminal trespass policy that the partnership could explore: Should non-residents be identified and if so, how? How will the community decide to differentiate between non-residents who have a right to be on subsidized housing property and those who do not? If the police are going to stop suspicious individuals, what are the factors that might make someone look suspicious? How can non-resident access be limited to assure housing community safety without invading the residents' privacy? Should there exist security to monitor all who come and go? Should that security serve as a "bouncer" or a "turnstile?"¹⁹⁷ The residents, police, and housing staff are all likely to have different responses to these questions. However, the different answers, considered together, might lead to different housing policies. Rather than groups taking sides

195. While DMHA never gave a clear reason for terminating the consulting firm's affiliation, both the consulting firm management and the Legal Aid attorneys who worked with the resident councils reported that difficulties started when the resident councils' corporate charters made no provision for oversight of the councils by DMHA.

196. See, e.g., Karlyn Barker, *Work Starts on Ward 7 Clinic; "Forgotten Washington" Has Waited Years for Drug Treatment Center*, WASH. POST, Aug. 15, 1989, at B3 ("At Kenilworth-Parkside, a public housing development, resident Kimi Gray established what is considered to be a model of tenant management, an arrangement in which residents manage the day-to-day operations of the project.").

197. Professor James Durham suggested this distinction to me.

against one another, suspicious of the motives and actions of the others, the groups could work out these answers cooperatively.

B. *The Content of Dialogue*

The history of laws that affect subsidized housing communities suggests some specific underlying topics that should be considered by the participants to the dialogue. An exploration of these topics might serve as a basis for improved cooperation. Lawyers can serve an important role in raising these historic legal issues and providing information to all parties who wish to explore them. Certain underlying issues should be discussed and worked out by affected parties prior to trying to reach consensus on specific anti-crime measures in public housing:

1. Must residents and guests be forced to choose between liberty and safety?

2. Can subsidized housing communities be protected without resorting to practices that make the residents feel as though they are living in a police state?

3. How does the history of racially oppressive laws and practices affect modern anti-crime policies?

4. What difference does it make that most public housing heads of households are poor women?

5. Do safety policies limit residents' abilities to rise out of poverty?

If the parties can begin to understand some of the issues raised by these questions, dialogue may become more productive. While these are not the only important issues worthy of discussion, they are examples of how laws have affected perspectives and affected parties may be unaware of the impact such laws have had on them. Moreover, traditional litigation will not resolve these issues because it fails to raise most of

them.¹⁹⁸ Rather, lawyers should play a role in presenting these issues to groups in public housing communities through a dialogue.

1. Must Residents and Guests Be Forced to Choose Between Liberty and Safety?

For hundreds of years, people have articulated a desire to be secure and free. Eighteenth century philosophers wrote of "natural rights" such as "life, liberty and the pursuit of happiness." Such rights were incorporated into the Declaration of Independence and the Bill of Rights in our Constitution. Even though the concept of natural rights is not universally accepted, most in American society desire to be secure in our personal safety *and* free to exercise our will over our own actions. The police play an essential role in securing our natural rights by protecting us from harm, but, as a community, we also expect the police to honor our freedom to go about our business of ordinary life.

Subsidized housing residents deserve no less. But, because their constitutional concerns about liberty infringements are framed in relation to public safety, public housing residents have reached the point where they have to take a stand either for liberty or safety, but not both. Without dialogue, decision-makers fail to consider residents' opinions and they implement policies that severely limit resident freedoms in the name of safety. As one scholar noted:

The liberty/community polarity is both a symptom and a cause of the general tendency to think dualistically about political questions that is a characteristic of American constitutional decisionmaking. It acts as a foundational, cognitive structure in constitutional theory that drastically reduces the options open for choice when rights claims are made by individuals; either the individual 'wins' in what is taken to be a struggle with the community over

198. There are several potential litigation strategies to challenge a criminal trespass policy other than the two constitutional doctrines explored later in this paper. *See infra* part IV. Void for vagueness doctrines, procedural due process, and racial discrimination are but three additional constitutional doctrines that might be raised. State analyses of the criminal trespass statute itself might yield favorable results, particularly analysis of what constitutes "privilege;" of state landlord-tenant theories of quiet enjoyment or federally subsidized housing laws regulating how much a PHA or landlord can impinge upon residents' rights to have guests; and whether or not resident comments were properly solicited or considered. Unfortunately, each of these doctrines only addresses a small piece of the problem which leads clients to seek help from lawyers in addressing the problems such policies create.

autonomy, or the community wins and proceeds to submerge the person's being into the group personality of the collectivity. . . . The model is one of combat or struggle.¹⁹⁹

The sweeps policies in general, and the criminal trespass policy in particular, appear in such dichotomous terms. Residents who have consistently voiced their desire to be both safe and free have been forced to choose a policy that compromises one interest over the other. Before dialogue begins, affected parties should consider whether this need be the case. Whoever controls the decision making process should ensure that resident freedoms are just as important as resident safety, and vice versa. Taken seriously, solutions might be found to protect residents' freedoms to associate with whomever they please; to keep their business personal; to move freely on their own property and not to worry about acquaintances or loved ones being harassed.²⁰⁰ For example, if police had not ignored residents' legitimate pleas for protection prior to the institution of drug elimination policies, perhaps measures as drastic as a trespass list would not have been considered necessary. If blatant disregard for the law has lessened as a result of such police presence, perhaps those creating new policies will understand that adequate police presence may in fact make a bigger difference than the more drastic measures. Subsidized housing residents have been given an all or nothing option: either virtually no police protection or total police control.²⁰¹ For them, neither alternative is acceptable.

Police might counter with a discussion of how difficult it is to protect safety when residents are loathe to cooperate. Police officers can protect more effectively if they know who the residents are and something about them. Such a discussion might lead to some of the reasons why some residents have difficulty trusting police officers or

199. Lind, *supra* note 7, at 1259-60 (footnotes omitted).

200. I have hesitated to propose any model solution because my point is that good solutions cannot be crafted by any one person. One could imagine, however, solutions that might preserve resident safety and liberty. For example, a policy favoring security checks on everyone who entered a complex, providing some resident control over the reception of visitors, might be less intrusive.

201. *See, e.g.*, testimony of DMHA residents, *Brown Transcript*, Vol. 4, at 134-35, describing how long it took police to respond to a complaint of a drug deal on a resident's front porch. Residents believed they had the option of accepting the total police/DMHA package, including the trespass policy, or going back to virtually no protection.

housing authority personnel.²⁰² Some of these reasons are discussed below.

2. Can Subsidized Housing Communities Be Protected Without Resorting to Practices that Make the Residents Feel as Though They Are Living in a Police State?

Subsidized housing communities are neighborhoods, not battlefields. While the blatant, open sale of drugs and use of guns had reached crisis proportions in the late 1980's, newspaper accounts indicate that in many locations these unusual activities have largely subsided, at least in the open.²⁰³ Residents may wonder whether they and their guests should be made to feel like criminals when they have done nothing wrong. Practices such as requesting identification, frisking and taking photographs of suspicious looking people are similar to police state practices when innocent people are subjected to them. If innocent people are repeatedly subjected to such practices, the community may feel besieged and residents may logically respond to police presence by moving in the opposite direction. Such a response may well lead police to feel even more suspicious, thus creating a vicious circle of distrust. Because police encounters can be scary and dangerous to residents of public housing

202. As the Justice Department's study states: "Clearly, in many communities, police-resident relations are tense, and there is distrust on both sides. Journalistic accounts of housing developments into which police refuse even to enter also contribute to a picture of police neglect in public housing. . . . The concept of 'police responsiveness' is in fact an amalgamation of a variety of factors: the frequency of patrol, response time, effectiveness of police tactics . . . sensitivity, concern, and cooperativeness." DUNWORTH & SAIGER, *supra* note 2, at 57 (citations omitted).

203. See, e.g., Nancy Lawson, *Paradise Revised Development: A Drug-Free Success Story*, WASH. TIMES, July 5, 1991, at B3.

communities,²⁰⁴ some communities have resorted to resident patrols or other citizen patrol groups to minimize the police state atmosphere. Some of these patrol groups are organized by local Nation of Islam groups.²⁰⁵ While the use of these groups has been controversial and has had mixed success, some residents report increased feelings of security and in some cases have fought to keep these patrols in existence.²⁰⁶ Although different communities may want a different

204. Associate Professor Patricia Williams describes several examples of racism linked to the legal system. She examined racism as a crime (which she calls "spirit-murder") in *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987). Alex Kotlowitz describes an incident which may have been spirit-murder in his account of a deadly tragedy between armed ATF agents and a 19 year old, African-American man named Craig. The agents stopped Craig, a high school graduate with a steady job, but the street was icy and when the agent slipped on the ice his gun accidentally discharged and killed Craig. Craig's death affected 13 year old Lafayette, a neighbor and friend who also lived in the projects:

From that day on, [Lafayette's mother] said, he started thinking, "I ain't doing nothing, I could get killed, or if not get killed I might go to jail for something I didn't do. I could die any minute, so I ain't going to be scared of nothing."

KOTLOWITZ, *supra* note 1, at 208-09.

205. At Paradise Manor and Mayfair Mansions in Washington, D.C., Nation of Islam "Dopebusters" worked with police in 1988 to help clean up drug dealing. That project also has a resident group called "Paradise Manor Control" that walks the project looking for signs of drug activities. Lawson, *supra* note 202. See also *Controversial Security Force*, SACRAMENTO BEE, Nov. 3, 1992, at B3 ("Security guards affiliated with the Nation of Islam are patrolling 14 federally subsidized housing projects in the crime-ridden Oakwood section of Venice."); Benjamin Forgey, *Paradise Reborn: Projects Transform NE Complexes*, Field, WASH. POST, July 4, 1992, at D1 (describing Paradise Manor); Gregory Freeman, *Farrakhan Gives Mixed Messages*, ST. LOUIS POST-DISPATCH, Mar. 1, 1994, at 9B (reporting security agency founded by Nation of Islam ended drug dealing and violence in housing complex); Clarence Page, *Condemning Farrakhan Without Offering Alternative Will Just Get us Ignored*, SUN SENTINEL (Fort Lauderdale), Feb. 18, 1994, at A15 ("[T]he Chicago Housing Authority plans to contract Nation of Islam members to patrol Rockwell [Gardens]. . ."); Adam Pertman, *Nation of Islam Walks Fine Line with Blacks*, BOSTON GLOBE, Feb. 20, 1994, at 1 (crediting Nation of Islam security with ending overt drug dealing and violence in Flag House Courts housing project in East Baltimore); Jonathan Tilove, *Divided Camps Claim Mantle of Malcolm X; Split Among U.S. Black Muslims Mirrors Assassinated Leader's Life*, ST. LOUIS POST-DISPATCH, Nov. 22, 1992, at 4B ("Only last month, the Los Angeles Police Commission contracted with the Nation to patrol 15 apartment projects.").

206. See also Ken Ellingwood, *Security Firm Taken Off Venice Patrols*, L.A. TIMES, Aug. 14, 1993, at B16. There has been a lot of criticism directed at cities that have used Nation of Islam patrols in light of anti-semitic statements made by Nation of Islam leader Louis Farrakhan. Some residents, however, appreciate the security while condemning the anti-semitism; Freeman, *supra* note 204 ("I don't pay any attention to that anti-Jewish stuff," says Jackson. "But I do like what he says about taking control of your life. . .").

style of protection, the police and residents need to discuss specifically which types of security are necessary in their effort to develop effective policies.²⁰⁷

3. How Does the History of Racially Oppressive Laws and Practices Affect Modern Anti-Crime Policies?

No discussion of American public housing policies can be productive without some acknowledgement of the role that race-based laws have played in creating many of the problems which affected parties experience. The list of racially conscious discriminatory policies that have affected modern public housing projects is astounding. Before dialogue can productively move forward to solve modern problems, it is necessary to discuss how race-motivated practices helped create problems in present-day projects and how modern conceptions of race continue to affect the way residents, community members, police, and housing authority staff view one another.

Most public housing units are located in the most economically depressed, racially segregated neighborhoods in the center of American cities. Historically, public housing projects were built in districts represented by the least influential politicians. Catering explicitly to racial politics, representatives from more affluent, powerful districts were successful in ensuring that no projects were built in their back yards. Thus, poor African-Americans and other non-whites were disproportionately corralled into huge urban projects which helped create a concentrated, racially segregated poverty.²⁰⁸

Racial segregation among the poor continues into the present day, with white, middle-class communities continuing to fight the placement

But see HUD Orders City to Void Pact with Nation of Islam, ST. LOUIS POST-DISPATCH, Nov. 11, 1995, at 16B (attempting to void contract because Nation of Islam not the low bidder for security).

207. For a discussion of how the Supreme Court sanctioned modern police practices because they may feel like police state tactics to some, see Mitchell, *supra* note 5, at n.1. For a list of suggested procedures that may make residents in a community feel a part of the crime-fighting process, see Meiring, *supra* note 5, at 534-35.

208. See John C. Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1337 n.208 (1993); John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1509-10 (discussing role of government mortgage assistance programs in "creating, sponsoring, and perpetuating the racially segregated dual housing markets that divide America").

of subsidized housing communities in their neighborhoods.²⁰⁹ In a 1992 report, the Center on Budget and Policy Priorities stated that:

Nationwide, poor black and Hispanic households are much more likely to live in deficient housing than poor white households . . . twenty-nine percent of all poor black households—including both poor renters and poor homeowners—lived in deficient housing. So did more than one in five—twenty-three percent—of poor Hispanic households. By contrast, thirteen percent of poor white households lived in these conditions.²¹⁰

When poverty is concentrated in racially segregated neighborhoods, the surrounding neighborhood is affected negatively. Thus, more African-American people suffer the peripheral effects of a downward economic turn as a result of racial segregation. Poor whites are more likely to live in economically healthy neighborhoods and less likely to be victimized by a downturn in the economy.²¹¹ Racial discrimination continues to affect the availability of employment, even without the difficulty people have in finding and keeping jobs without access to reliable transportation or childcare.²¹² Unemployment is higher for black people even considering education attainment, and black persons are twice as likely as white persons to be unemployed, regardless of whether they dropped out of high school, completed high school or completed college.²¹³

Historically, relations between police and black citizens have been tense and sometimes violent. While there has been improvement in the effort to increase the percentages of non-white officers in major police forces, in 1990 the highest percentage of black officers on city police forces was still only 78% of the black population percentage in that city.²¹⁴ In Dayton, whose black population is around 40%, roughly 9%

209. Boger, *supra* note 208, at 1338.

210. PAUL A. LEONARD & EDWARD B. LAZERE, CENTER ON BUDGET & POL'Y PRIORITIES, A PLACE TO CALL HOME: THE LOW INCOME HOUSING CRISIS IN 44 MAJOR METROPOLITAN AREAS 29 (1992).

211. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 115-47 (1993) (discussing the creation of the underclass communities).

212. See, e.g., ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, AND UNEQUAL 107-33 (1992).

213. *Id.* at 233.

214. *Id.* at 236.

of the police force is black.²¹⁵ Nationally, instances of police harassment of black men are well known: the beating of Rodney King, shown continuously on national television, confirmed what many in the black community had heard anecdotally was a frequent occurrence.²¹⁶

Officers of the law were the means of enforcing slavery and enforcing post-Civil War laws designed to keep African-American people subjugated. These laws, written in the seventeenth, eighteenth, and nineteenth centuries, created templates for police-citizen encounters in black communities and vestiges of these practices continue in some communities today. Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit, A. Leon Higginbotham, Jr., has classified "the essence of the relevant colonial and antebellum Virginia cases and statutes into ten basic, underlying precepts that formed the legal and moral foundation of American slavery and early race-relations law."²¹⁷

215. *Id.* at 209, 236; see also *supra* note 144 for additional statistics.

216. See *infra* note 298 and accompanying text for insight into the exclusive harassment of African-American men by police.

217. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The 'Law Only As An Enemy': The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 975 (1992).

Judge Higginbotham's ten precepts are:

1. *Inferiority*: Presume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of blacks.

2. *Property*: Define the slave as the master's property, disregard the humanity of the slave except when it serves the master's interest, and deny slaves the fruits of their labor.

3. *Powerlessness*: Keep blacks—whether slave or free—as powerless as possible so that they will be submissive and dependent in every respect, not only to the master, but to whites in general. *To assure powerlessness, subject blacks to a secondary system of justice with lesser rights and protections and greater punishments than for whites.*

4. *Racial purity*: Draw an arbitrary racial line and preserve white purity as thus defined. Tolerate sexual relations between white men and black women; severely punish sexual relations between white women and non-white men.

5. *Manumission and Free Blacks*: Limit and discourage manumission; minimize the number of free blacks in the state. Confine free blacks to a status as close as possible to slavery.

6. *Family*: Recognize no rights of the black family; *destroy the unity of the black family; deny slaves the right of marriage; demean and degrade black women, black men, black parents, and black children; then condemn them for their conduct and state of mind.*

In some respects, these precepts appear to have affected belief systems that have been incorporated into modern police practices.²¹⁸ Traces of them are undeniably present in practices that continue to curtail freedom of movement and association, destroy the unity of the black family, question non-Christian religious affiliation, and apply different standards of justice. For example, requests for identification may be reminiscent of laws in parts of colonial America which required African-Americans to carry passes.²¹⁹ Because of this history, African-Americans living in concentrated poverty may feel that certain policies are excessively demeaning or intrusive regardless of whether they are consciously discriminatory. Practices that continue to uphold these historic principles of discrimination should be reconsidered, not as a matter of "rights," but as a matter of *respect*.²²⁰

7. *Education*: Deny blacks any education, including a knowledge of their culture, and make it a crime to teach those who are slaves how to read or write.

8. *Religion*: Recognize no rights of slaves to define and practice their own religion, to choose their own religious leaders, or to worship with other blacks. Encourage them to adopt the religion of the white master and teach them that God is white and will reward the slave who obeys the commands of his master here on earth. Use religion to justify the slave's status on earth.

9. *Liberty—Resistance*: Limit blacks' opportunity to resist, rebel, or flee by curtailing their freedom of movement, freedom of association, and freedom of expression. Deny blacks the right to vote.

10. *By Any Means Possible*: Support any practice or doctrine from any source whatsoever that maximizes the profitability of slavery, legitimizes racism, and retaliate, frequently by means of violence, against those of both races who dare to advocate abolition or who, by their speech or actions, deny the inherent inferiority of blacks.

Id. at 957 & n.11 (emphasis added) (footnotes omitted).

218. See, e.g., Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 29 (1994) (quoting a Louisiana sheriff who stated his officers would "stop everybody that we think has no business in the neighborhood. . . . It's obvious that two young blacks driving a rinky-dink car in a predominantly white neighborhood . . . they'll be stopped").

219. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1260 n.4 (1990) (citing A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR, RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978)).

220. To appreciate the insulting nature of a police policy requesting identification from black males exclusively, consider, for example, a hypothetical government policy to eradicate a bug infestation by sending bug spray through the showers in people's homes located in a predominantly Jewish community. Even if the government could show that the policy was the most cost efficient way of eradicating these bugs and that it did not

While residents and police appear to share a common goal of fighting drug-related crimes, the community must acknowledge the racist history behind American drug laws. Laws criminalizing a variety of drugs were historically linked with various ethnic and racial groups:

The energy that has given impetus to drug control and prohibition came from profound tensions among socio-economic groups, ethnic minorities, and generations—as well as the psychological attraction of certain drugs. . . . [T]he bad results of drug use and the number of drug users have often been exaggerated for partisan advantage.

. . .
. . . .

The most passionate support for legal prohibition of narcotics has been associated with fear of a given drug's effect on a specific minority. . . . [C]ocaine was supposed to enable blacks to withstand bullets which would kill normal persons and to stimulate sexual assault. Fear that smoking opium facilitated sexual contact between Chinese and white Americans was also a factor in its total prohibition. Chicanos in the Southwest were believed to be incited to violence by smoking marihuana.²²¹

Today, federal anti-drug laws differentiate between the use of crack and powder cocaine, despite racial differences in the consumers of these drugs. Consequently, there are significant racial disparities in punishment for cocaine use.²²² While the validity of these disparate laws is controversial even among prominent African-Americans, it is clear that a far greater percentage of blacks who use drugs are imprisoned for it than whites who use the same drugs.²²³ Therefore, police who

intend to discriminate against Jews in the creation of this policy, nobody would question the blatant disregard for a community's history that such a distasteful, symbolic proposal would reflect. Basic human respect would defeat such a hideous policy. Likewise, the modern practice of requiring identification solely from young black males, in light of the African-American community's history which included the requirement that blacks carry passes, constitutes a disrespectful, symbolic remnant of an oppressive past.

221. DAVID F. MUSTO, M.D., *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 244-45 (1973).

222. *See State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (discussing the racially discriminatory effect of drug sentencing laws).

223. powell and Hershenov state: "Fully eighty to ninety percent of drug arrests nationwide involve African-American males, despite the fact that separate studies by the FBI and the National Institute for Drug Abuse came to the 'identical conclusion that blacks

encounter black men in housing projects are more likely to find a written record of criminal activity than similar encounters with white men. Victims of drug crimes are also disproportionately black, and this fact must be credited in seriously addressing solutions.²²⁴

Finally, police departments were once traditionally patronage jobs—relatively low pay, low education jobs composed of men of the same European ethnic backgrounds as those with political clout. Legislatures and courts, however, have imposed affirmative action remedies upon many of these police departments over the past twenty-five years. Thus, particular racial tensions may exist amongst police officers and between officers and civil rights organizations.

All of these race-based policies and practices have contributed to the difficult and testy relationships that often exist between subsidized housing residents and the police. Unless affected parties begin to talk through some of these issues, they will continue to fester under the surface of police-citizen encounters in these neighborhoods.

4. What Difference Does It Make that Most Public Housing Heads of Households Are Poor Women?

Community-based policing requires a consistently high level of cooperation between residents and police officers. Because most public housing residents are women who receive Aid to Families with Dependent Children (AFDC), police officers will need to understand the potential threat their presence might pose to these women.²²⁵ Single mothers who receive AFDC and other public benefits, including

make up only 12% of the nation's drug users." Further, "former federal drug czar William Bennett [acknowledged] that "[t]he typical cocaine user is white, male, a high school graduate employed full time. . . ." powell and Hershenov, *supra* note 5, at 610 (footnote omitted).

224. See Kennedy, *supra* note 75, at 1278 (noting that a policy protecting "lawabiding blacks" will increase the rate of incarceration of blacks).

225. See Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961 (1993) (referring to the "double-binds" experienced by women on welfare). In her analysis of threats to poor women's emotional and physical well-being, Professor White discusses three strategies used by women in South Central Los Angeles to cope with the shame of poverty and the violence inherent in alternative choices. These strategies are: preemption (expect to be judged), evasion of harm from institutional authorities, and self-medication (through television, sleep, and drugs). *Id.* at 1990-99. The women in public housing appear to face double-binds in determining whether they can or should cooperate with community based police. Cooperation might lead to risk of economic or psychic harm, but failure to cooperate might lead to increased physical violence.

subsidized housing itself, must adhere to a large number of federal and state eligibility requirements. Among other things, these requirements limit who can live in a household, how much income can come into a household and from what source and how many assets a family can have.

Historically, women on welfare have had little privacy. This country has a long history of punishing poor women who have "frequent or continuing sexual relations" with a man to whom they are not married.²²⁶ As late as 1968, for example, twenty states had "man-in-the-house" rules which denied AFDC to any woman who "cohabited" with a man,²²⁷ which did not necessarily mean he lived in the house.²²⁸ Moral character requirements have ceased to be an overt prerequisite for obtaining benefits such as welfare and Food Stamps, in part because such disqualification provisions "were habitually used to disguise systematic racial discrimination."²²⁹ Although public housing landlord-tenant law prohibits interference with any guests of residents regardless of marital status²³⁰ and public housing definitions of "household" include non-married individuals,²³¹ housing authorities still inquire about the details of residents' personal lives. If a woman tenant receiving welfare has a live-in boyfriend, she could lose her benefits because of failure to report status, income, or household composition to caseworkers.

226. For a discussion of this history, see *King v. Smith*, 392 U.S. 309, 311-13 (1968), which held the "man-in-the-house" rule violated the Federal welfare law and thus did not reach the constitutional issues.

227. For a list of these twenty states, see *id.* at 338-39 (Douglas, J., concurring).

228. In Alabama, a man and woman are considered to cohabit if they "have 'frequent' or 'continuing' sexual relations," which could mean "once a week . . . once every three months . . . [or] once every six months . . ." even though the man might live elsewhere. *Id.* at 314.

229. *Id.* at 321-22. For a detailed discussion of overt racial discrimination in early benefits programs, see Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).

230. See *McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332, 335 (2d Cir. 1981) (concluding a rule requiring tenants to inform their landlord of overnight visitors was overbroad); *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985) (same).

231. See Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 736 (1994) ("HUD adopted regulations prohibiting PHAs from establishing or implementing tenant selection criteria that exclude persons from public housing because they are welfare recipients, are unwed mothers, have a nontraditional family composition, or have not lived as a family for a particular duration.") (footnotes omitted).

In addition, a police officer who knows too much about a family might intrude in several ways. He might discover some familial indiscretion such as a relative who is temporarily residing with a family until new housing is found, or money made from playing cards that occasionally allows the family to buy new clothes. Similarly, an officer might misinterpret innocent activity by concluding that a boyfriend who sleeps over one or two nights a week is living with the family, or by assuming a regular babysitter, who has three children of her own, is a member of the family. In such instances, an officer might call child protective services to investigate these "overcrowded" conditions. In any case, the family might spend months, if not years, fighting legal battles just to preserve the welfare benefits the family needs to survive.

Families who are threatened with a benefits cut-off are typically in such a situation because of landlord information, law enforcement information, or information provided by other residents. Because eligibility requirements change, it is difficult to know precisely what is allowed and what is not. Therefore, rational behavior would lead these women to keep their personal business private. Moreover, historic policing of the morals of those women who receive benefits might lead to even less trust of police or housing authority personnel.

Police and housing authority staff need to understand the effect their role as "welfare benefits police" plays in preventing closer cooperation with residents. Consideration of the relationship between fighting serious violent crime and fighting less serious "benefits crimes" might be discussed.

In addition, domestic violence and the role of women in society also play a role in these police-citizen encounters. While responses to complaints of domestic violence are important, women might be reluctant to call police officers for help if they feel the police will overstep their role and substitute their own judgments for those of the women involved. Thus, when an officer notifies a boyfriend that he cannot return to the housing site because a woman sought assistance to have him removed from her apartment, the officer is refusing that woman's right to determine who she can invite to her apartment in the future. Even though a victim of domestic violence may not have a say in prosecution of the battery crime, she still retains the choice of whether to invite the person back to her house in the future. For instance, a woman may invite the perpetrator back into her house if he has received counseling or other help. When officers assert their power to prevent visits from men who have not even been charged with a crime, they seize power

from a woman. In the case of a public housing resident, they seize power from a woman who has little power in the first place.

5. Do Safety Policies Limit Residents' Abilities to Rise Out of Poverty?

People who live in poverty should not be prevented from improving their economic situation because of government policies. Yet anti-crime measures such as criminal trespass policies may unwittingly interfere with residents' efforts to improve their ability to work or obtain an education by making the arrangement of child daycare difficult. Adult women cannot work unless they have adequate care for their children. Typically, such care comes from friends and extended family members, and often that care comes from the fathers of the children. Any policy which prevents caretakers from having easy access to resident households may destroy the opportunities some women have to find or keep a job or to stay in school. Caretakers are essential because some of these low-wage jobs are in the evening. In addition, if a poor family does not have a private phone, caretakers may need to use the public pay telephones to maintain contact with the working parent. Because these pay phones are in public housing common areas, caretakers who use the phone may violate a criminal trespass policy.

Furthermore, teenage children living in subsidized housing may also seek work or attend school themselves. Many of these teens will not have automobiles, and may rely upon friends from outside the housing community to provide them with transportation. If these teens or their friends are harassed or prevented from coming onto housing property, the teens may lose their jobs or drop out of school.

Affected parties should discuss how police practices will affect the ability of residents to hold jobs or obtain an education. Policies that interfere with this ability should be seen as unworkable; it is unacceptable for any of the parties to enact policies that keep poor people poor.

C. *Problems with the Dialogue Method*

This section has described how affected parties can use the dialogue method to create and test anti-crime policies in subsidized housing communities. There are five sets of issues that ought to be addressed by affected parties when they engage in such dialogue. There are, however, several potential problems with the dialogue method.

First, not all affected parties may be willing to engage in dialogue. Police departments and housing authority staff may see such a process as a waste of valuable time. Believing they have solutions that can

work, they may fail to see the benefit to what will probably be a slow, cumbersome and tense process. It may be incumbent upon lawyers who represent community groups or residents to persuade government actors that the dialogue method will produce superior results. Perhaps public interest lawyers can use the emphasis on "local control" and community based policing to convince local government actors that solving tough problems will require real input from all people involved.

It may be equally difficult to persuade residents and community members to participate in such dialogue. People may feel that more "talk" and less "action" are not worth their time. The benefits of policing discussed above may give women residents reasons not to make affirmative connections with the housing authority, staff, or police. Moreover, jobs, school, demands of children, and demands made by the government may persuade many residents that there is simply not enough time to participate in this activity. Prior to engaging in dialogue, residents may need to be convinced that the people with whom they make the policies will actually consider their ideas.

Public interests lawyers who are asked to represent residents or community groups may need to encourage these clients to speak with their neighbors and friends about participating. In Dayton, community organizers were successful in engaging public housing residents in a variety of activities, which suggests that if residents believe their participation will be heard and considered, they will participate. Additionally, just as public interest lawyers would not hesitate to knock on doors to investigate facts for constitutional litigation, attorneys may need to knock on doors to investigate people's opinions about anti-crime policies and participation.

Ultimately, however, to have real participation by many residents and community members, government actors will have to pay community organizers to solicit input. Public interest attorneys can play a role in fashioning settlement proposals that include salaries for such organizers. Because constitutional litigation will be timely, expensive, and likely to result in a remedy that satisfies no one, public interest attorneys might agree to delay such litigation if the government would agree to fund the dialogue process as a means to resolve policy differences.

Another critique of the dialogue method is that it has no place in our current jurisprudence. It may trouble clients to be asked by their lawyers to abandon the only set of legal theories that have traditionally offered any relief: those based upon the Constitution.

However, the dialogue approach might work alongside other traditional legal strategies. Public interest attorneys might use a perspectives approach in understanding the issues prior to deciding whether litigation is appropriate. As suggested above, attorneys might suggest the dialogue approach as an alternative to litigation in a settlement posture. Nevertheless, if litigation is chosen, the refusal of the state to seriously attempt such dialogue might be used to defeat a claim that the policies meet a legitimate societal need. In doing so, public interest attorneys might hire an expert to poll affected groups and present a sophisticated analysis of perspectives on a proposed policy. Such an analysis might include alternate solutions suggested by affected parties to achieve the same anti-crime goals of the policy under attack, but without the more negative effects. Presented with such an analysis, a court might be reluctant to uphold the policy if it can be shown that large numbers of people find the policy intrusive and alternate methods can attain the same goals. Robert Hayman, Jr. has written that constitutional law needs new traditions based upon dialogue, pluralism, and multiculturalism that finds its roots in Critical Race Theory.²³² Dialogue about the types of issues that are implicated in anti-crime measures might serve as a springboard for the creation of such a tradition.

Another concern in using the dialogue method is that participants will reach solutions that fail to sufficiently protect minority needs. The great benefit to constitutional rights strategies, it is said, is that they protect the minority from a tyrannical majority. Although Habermas²³³ and Friere²³⁴ have built in some protections for minorities, there are some possible pitfalls in their methods. Habermas' method depends upon the involvement of all "affected parties," but if some person or group is left out of the definition of affected parties, then their needs do not have to be considered. For example, a person, who comes to public housing for the sole purpose of selling drugs to minors, should not be permitted to express his viewpoint in fashioning anti-crime policies. After all, combatting drugs is the goal. But who decides which goals are legitimate and which are not? Who decides which outside parties have legitimate interests in the outcome and which do not? Who decides that

232. Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57 (1995).

233. For discussion of Habermas' theory, see REHG, *supra* note 8.

234. FRIERE, *supra* note 8.

there are so many participants that discussion is just too unwieldy to yield results? As Rehg states:

[I]t is almost always impossible to carry on a discourse with all those possibly affected by a decision, even in a restricted context of application. . . . The problem is reinforced when one inquires into the possibility of elaborating need interpretations, eliminating power differentials among the participants, and so on. . . .²³⁵

Perhaps such decisions are for the courts to make. Rather than balancing interests themselves, the courts could assume the role of determining who must participate in interest balancing. While this is not a perfect solution, it could provide some independent oversight of these important decisions.

A final concern might be that the dialogue process is too time-consuming for creating an on-going policy in a crisis situation. If all affected parties had to engage in the process each time a change was made in the policy, it is conceivable that no policy would ever result. A committee-like structure is time-consuming. However, Rehg suggests that as long as assurances are made that all relevant perspectives are considered, quicker procedures, rather than actual dialogue, could be employed.²³⁶ Such procedures could involve the use of experts, public debate followed by a vote, or the use of committees. Certainly it is not possible to engage all affected parties in dialogue all of the time. Thus, decisions reached should be acknowledged to "incorporate[] a common interest at the present point in time and according to the present state of knowledge."²³⁷ Nonetheless, in situations that involve public housing communities, this Article argues that actual, extended dialogue between affected parties must take place initially before more expedient routes are chosen. Too many people have spoken in lieu of residents, visitors, and police for too long for a shorter version to be effective. In the long-run, however, quicker measures could be instituted if larger dialogue is allowed to occur at regular intervals. Such details would depend upon the history of particular communities and the level of communication that actually exists at any point in time.

235. REHG, *supra* note 8.

236. REHG, *supra* note 8, at 196 ("To arrive at timely decisions in real cases, especially in more urgent issues, time-constrained institutional procedures are required.")

237. *Id.* at 190 (footnote omitted).

IV. A LOOK AT CONSTITUTIONAL LAW

Despite efforts to facilitate dialogue, public interest lawyers working with clients who are unhappy with anti-crime measures may need to turn to constitutional litigation. Although the issues raised in the previous section of this Article can be raised in constitutional litigation, they can only be raised peripherally.²³⁸ This section will examine two constitutional doctrines to determine how it might be possible to incorporate the issues suggested by the perspectives examined in section II. I conclude, however, that constitutional litigation of these policies offers poor and incomplete remedies for each of the parties involved.

The two constitutional doctrines this section will explore are the Fourth Amendment doctrine relating to police-citizen encounters and the First and Fourteenth Amendment doctrines relating to a citizen's right to associate with friends and family members. Analysis of these doctrines will illustrate the limitations inherent in constitutional doctrines when parties are evaluating, guiding or developing policies to help resolve community conflicts arising out of programs such as criminal trespass policies. The analysis will show, however, circumstances in which it might be possible to use the litigation forum to raise relevant issues with the courts, opposing parties, and the community.

A. *Fourth Amendment*

The key constitutional challenge to the criminal trespass policy, and other sweeps policies, is whether the policy violates citizens' Fourth Amendment rights.²³⁹ The criminal trespass policy raises several discrete Fourth Amendment questions: Upon what basis can law

238. If the issues that are of concern to residents, lawful visitors, and law enforcement officials are not easily raised by constitutional doctrines, then perhaps those constitutional doctrines are flawed. See Richard B. Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity*, 42 OHIO ST. L.J. 335, 380-81 (1981) (arguing that the Constitution should serve as a "crucible . . . for moral dialogue" in society but acknowledges the problems associated with determining whose morality should govern). I would argue that until the needs, opinions, and views of people affected by government policies are sought after by those who create constitutional doctrine, the moral legitimacy of constitutional doctrine is in grave danger. This is especially true when those most disenfranchised from the government are not consulted.

239. The Fourth Amendment states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

enforcement stop suspicious individuals? If an initial stop is lawful, how long and for what purposes can the officer detain the individuals? Upon what basis may the officers lawfully issue a notice of trespass? If notices are improperly given, is a subsequent arrest for trespass lawful? If such notices are properly given, upon what basis may an officer subsequently stop individuals, question them, detain them, or arrest them for criminal trespass? The answers to these questions are far from clear.

The heart of the criminal trespass policy involves police officers stopping people whom they believe should not be on the public housing site. The goal of the program is to prevent people from coming onto public housing properties unless they have a legitimate reason to be there. The police and housing authority personnel believe that they will reduce crime by keeping out these "extraneous" people, and residents will be safer.

Any program that involves police officers stopping people, questioning them, and possibly arresting them is potentially violative of the Fourth Amendment of the Constitution. To analyze whether a particular practice violates the Fourth Amendment, a lawyer must determine whether the police stops are governed by normal requirements of individualized suspicion, or are part of a "special needs" administrative program that does not require individualized suspicion. If the policy falls within normal, individualized suspicion requirements, many opportunities exist for constitutional challenges. However, if the policy falls within the special needs category, it is highly unlikely that a court will find constitutional violations. Criminal trespass policies appear to fall squarely within the normal requirements of individualized suspicion. The very nature of the programs require individual police officers to assess whether individual people should be stopped, listed, or arrested.

To comply with the Fourth Amendment requirement that persons cannot be seized unreasonably, the Supreme Court has directed police officers to detain a person only after obtaining a warrant or, if obtaining a warrant is impracticable, only after observing the person commit some act that the officer can articulate as suspicious of criminal activity.²⁴⁰ However, if the government can demonstrate that "special needs, beyond the normal need for law enforcement, make the warrant and probable-

240. *Terry v. Ohio*, 392 U.S. 1 (1968) (addressing Fourth Amendment issues concerning police stopping citizens on the street).

cause requirement impracticable,"²⁴¹ a search or seizure might be found reasonable under the Fourth Amendment.²⁴² While it is unclear whether a criminal trespass policy might ultimately be upheld under the special needs cases, any such program that allowed suspicionless stops would clearly be defeated unless certain characteristics were present. To uphold such a program, the government would have to ensure that the police officers have no discretion about whom they select to stop. Further, the government would have to provide affected persons with a clear notice about the program and how it operated. These requirements would indicate that any such program would have to be in writing and available to the public.²⁴³

The criminal trespass policies reflected in appellate cases and district court lawsuits do not meet these criteria. In *Dayton*, the written policy requires the officers to have individualized suspicion of criminal activity pursuant to *Terry* before making any stops.²⁴⁴ However, officers clearly have discretion about whom to stop; about whether to issue a notice of trespass if the person is not on the list; and about whether to arrest the person if they are on the list.²⁴⁵

241. *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995) (holding that a public school can require athletes to submit to urinalysis to test for drug use without individualized suspicion of drug use).

242. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (holding brief stops at sobriety checkpoints where no suspicion of criminal activity exists are reasonable seizures and thus do not violate the Fourth Amendment); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding federal regulations that require railroad engineers to submit to drug tests each and every time there is an accident do not violate the Fourth Amendment); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (allowing government to require drug tests for any employee who is involved with the interdiction of drugs or use of firearms); *New York v. Burger*, 482 U.S. 691 (1987) (permitting government to inspect vehicles without individualized suspicion where periodic inspections occur in a highly regulated commercial setting); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) (finding traditional probable cause standard unworkable in a building inspection and that the Court should balance the need to search against the invasion created by the search).

243. It is certainly possible to envision a program that restricts access to public housing sites that would meet at least part of the special needs criteria. For example, residents could be required to carry ID cards and visitors could be required to check in at a central location or have visitor passes. Each and every person who enters a public housing site could be checked for a pass. Such a program would be non-discretionary and would, I believe, be more fair than the criminal trespass approach.

244. See *infra* notes 248-55 and accompanying text for a discussion of *Terry v. Ohio*.

245. Some might question my conclusion that these programs do not fall within the special needs category. David E.B. Smith outlines two models of constitutional

If officers enforcing criminal trespass programs have to articulate a reasonable suspicion when stopping suspects, then what rights do the suspects have when confronted by police? The Supreme Court has articulated that ordinary citizens may walk away from police officers and refuse to speak with those officers if they so choose.²⁴⁶ Supreme Court cases which purport to delineate how a person would know if he or she were involuntarily, rather than voluntarily, detained are inconsistent, creating what Professor Maclin refers to as "the mystical line beyond which police conduct is deemed sufficiently 'intimidating' to cause a person to believe that she is not free to leave."²⁴⁷

Analysis of police stops begins with the landmark case of *Terry v. Ohio*.²⁴⁸ In that case, the Supreme Court departed from the prior principle that an officer must have probable cause that a person has committed a crime before stopping to question that person. Instead, the Court held that an officer can stop and question *anyone* if the officer has a "reasonable articulable suspicion" that the person has committed a crime.²⁴⁹ The Court, however, grappled with the question of whether a "stop" is the same as a "seizure." The Court stated:

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly

jurisprudence articulated by the Supreme Court—the "home" model and the "administrative" model. Smith, *supra* note 5, at 514. He argues that sweeps policies can be found to be constitutional or unconstitutional depending upon which model the Court chooses to follow. *Id.* at 546. While the criminal trespass programs have an overarching government need (fighting crime and illegal drugs) and consist of a large-scale, planned program, the amount of discretion granted to police officers eliminates it from the special needs category.

246. When a police officer stops an individual and asks a few questions, there is not a Fourth Amendment violation because the police officer has not seized that individual. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). See also *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210 (1984); *United States v. Mendenhall*, 446 U.S. 544, 560 (1980); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

247. Maclin, *supra* note 219, at 1265 (footnote omitted).

248. 392 U.S. 1 (1968).

249. *Id.* at 22. Because there is a governmental interest in crime prevention, police officers may approach an individual when investigating a crime even though the police officer has no probable cause. *Id.*

friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. . . . *Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.*²⁵⁰

The Court was unwilling either to state that officers have discretion to question whomever they please, or that police officers must *always* be able to articulate a reasonable suspicion prior to *any* citizen contact. In doing so, the Court has created the fiction of the right to walk away.²⁵¹ The distinction between the “right to inquire” line of cases and the “*Terry-stop*” line of cases rests upon the premise that citizens will know whether or not they have that right to walk away.²⁵² The police are under no obligation, however, to inform a stopped person that he or she has such a right in a given situation.²⁵³ In *Terry*, the Court stated: “[I]t must be recognized that whenever a police officer accosts an individual and *restrains his freedom to walk away*, he has ‘seized’ that person.”²⁵⁴ A seizure occurs when a person does not feel free to leave because the officer “by means of physical force or show of authority, has in some way restrained the liberty of [that person].”²⁵⁵ The Court defined “show of authority” and “restraint” in later cases in ways that make it difficult for the average person to know whether he or she has been

250. *Id.* at 13 (emphasis added) (footnote omitted).

251. *Id.* at 16; *id.* at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring) (“[N]othing . . . suggests that the respondent had any objective reason to believe that she was not free to . . . proceed on her way.”).

252. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980). For a detailed discussion of the right to inquire doctrine, see Maclin, *supra* note 218, at 1266-77, and Richard A. Williamson, *The Dimensions of Seizure: The Concepts of ‘Stop’ and ‘Arrest,’* 43 OHIO ST. L.J. 771 (1982).

253. Some argue that police should be required to inform citizens of their right to walk away if no reasonable suspicion or probable cause exists prior to the stop; this would have the effect of “Mirandizing” this area of the law. See, e.g., Williamson, *supra* note 252, at 797-802. Absent such a requirement, the right to walk away does not, in my opinion, exist for most people.

254. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (emphasis added).

255. *Id.* at 19 n.16. As Professor Maclin points out, there is virtually no difference in real encounters between an officer’s “request” and “demand,” for an individual’s identification. Maclin, *supra* note 219, at 1299-1300 n.198.

shown authority or restrained.²⁵⁶ In *Wainwright v. City of New Orleans*,²⁵⁷ the Court further mystified these questions. In that case, the police stopped the defendant because he matched a general description of a murder suspect, but he refused to produce identification and exercised his right to walk away.²⁵⁸ The police arrested him for resisting arrest, and subsequently for loitering and "reviling the police."²⁵⁹ On appeal of his conviction on all three counts, Wainwright argued that a person cannot be convicted of resisting arrest when the initial stop was unlawful.²⁶⁰ Without explanation, the Court simply dismissed the appeal, upholding the underlying conviction.²⁶¹

In a concurring opinion, Justice Harlan stated that the only issue was whether the defendant used "an unreasonable amount of force in resisting what on this record must be regarded as an illegal attempt by the police to search his person."²⁶² However, this issue is not resolved because the majority of justices found there was insufficient information in the record to make any decision.²⁶³ This case demonstrates the uncertainty and confusion the Supreme Court has over what rights a person has to refuse to speak with police officers.

Twelve years later, in *United States v. Mendenhall*,²⁶⁴ the Supreme Court began to define when a citizen has the right to walk away.²⁶⁵

256. See *Florida v. Bostick*, 501 U.S. 429, 434-36 (1991); *U.S. v. Delgado*, 466 U.S. 210, 220-21 (1984).

257. 392 U.S. 598 (1968).

258. *Id.* at 600.

259. *Id.* at 601.

260. *Id.* at 598 (Harlan, J., concurring).

261. Initially, the Supreme Court granted Mr. Wainwright's Writ of Certiorari. *Wainwright v. City of New Orleans*, 385 U.S. 1001 (1967). Eventually, the Court issued a per curiam report stating: "The writ of certiorari is dismissed as improvidently granted." 392 U.S. 598 (1968). Justice Harlan and Justices Fortas and Marshall joined in two separate concurring opinions, and Justices Douglas and Warren wrote two separate dissenting opinions. *Id.*

262. *Id.* at 598.

263. *Id.* at 598, 600.

264. 446 U.S. 544 (1980).

265. Although *Mendenhall* launched the most recent line of right to inquire cases, Professor Maclin traces its modern origins to a concurring opinion in *Brinegar v. United States*, 338 U.S. 160 (1949). Maclin, *supra* note 219, at 1266. In *Brinegar*, Justice Burton concurred with the majority opinion which held probable cause to search an automobile existed, but would have additionally held that probable cause was not necessary because

The Court grappled with a drug courier profile in a public airport concourse.²⁶⁶ Federal agents, not wearing uniforms nor displaying weapons, approached the defendant and asked to see her airline ticket and identification.²⁶⁷ After the agents returned the ticket and identification to Mendenhall, she followed the agents to a Drug Enforcement Agency (DEA) office located within the airport, where the agents asked to search her purse and herself.²⁶⁸ The defendant agreed to the search and the agents found two packages of heroin.²⁶⁹

Although the Court did not reach a majority opinion in *Mendenhall*, a majority of justices did find that a seizure had occurred.²⁷⁰ However, Justice Stewart, who delivered the opinion, found that no seizure took place because the agents were in a public place and showed no

agents had "a positive duty to investigate" under the circumstances. 338 U.S. at 179. There was at least an articulable suspicion to stop the car, as evidenced by the fact that a majority held that probable cause existed. As Professor Maclin noted, "For Justice Burton law enforcement officers were required to make a stop when they had a mere 'reasonable ground for an investigation.'" Maclin, *supra* note 219, at 1267 (quoting *Brinegar*, 338 U.S. at 179 (Burton, J., concurring)). While this concern could have been merely an anticipation of *Terry* eighteen years later, the statement mirrors the struggle the Supreme Court would later show in wanting to allow law enforcement officers leeway in investigating crime by speaking with citizens, but without giving those officers the freedom to question citizens without limitation.

266. The drug courier profile is a list of characteristics purported to be shared by drug couriers (as well as innocent citizens). Because local law enforcement departments each develop their own profiles, some traits "known" to exist among drug couriers in some locations are apparently the opposite of traits targeted in other locations. See Justice Marshall's dissent in *United States v. Sokolow*, 490 U.S. 1 (1989):

Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's 'chameleon-like way of adapting to any particular set of observations.'

Id. at 13 (citation omitted). Justice Marshall then cites several examples of contradictory profiles illustrating their arbitrary, meaningless nature. For example, one profile may target those individuals who deplane first, while another targets those who deplane in the middle or last; similarly, one profile may target those who fly nonstop while others target those who change planes; one targets those who fly round trip, while others target those who fly one-way; one targets those who act nervously, while others look for those acting calmly. *Id.* at 13-14.

267. *Mendenhall*, 466 U.S. at 547-48.

268. *Id.* at 548.

269. *Id.* at 549.

270. *Id.* at 566 (White, J., dissenting).

weapons.²⁷¹ He reasoned that Mendenhall voluntarily complied with the DEA agents' request because she should have known she could have simply walked away.²⁷² Presumably, Justice Stewart thought that escorting her to the airport DEA office was not a show of authority anticipated by *Terry*.

A majority of justices in *Florida v. Royer*²⁷³ adopted Justice Stewart's reasoning in *Mendenhall*. *Royer* repeats earlier holdings that the police are free to question citizens, and that if those citizens are free to leave, no Fourth Amendment seizure has taken place.²⁷⁴ In *Royer*, a majority of justices found that the defendant had not been free to leave because the agents, after initially requesting the defendant's identification and airline ticket, asked him to follow them into another room and they did not return his belongings.²⁷⁵ The remarkable aspect in *Royer* is that most of the justices found that the original request for identification was not a seizure,²⁷⁶ which arguably conflicts with the normal understanding of the words show of authority and restraint.

Accordingly, by the time the Court decided *Royer*, police could request identification and question an individual with no need for suspicion at all, and no Fourth Amendment protections applied. As several commentators have pointed out, such requests for "papers" are more reminiscent of a police state than a democracy:

[I]t is unsettling that without any cause, the police can come up to any of us and ask for identification. It's just too much like being asked for our "papers," especially in a society that so values autonomy from government and to just be left alone. . . . [I]t is hard to accept that we are really free to go when such a 'request' is made. . . . A law enforcement officer is not like some street leafleteer who, if you refuse her offering, will go on to the next

271. *Id.* at 555.

272. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980).

273. 460 U.S. 491 (1983).

274. *Id.* at 497-98.

275. *Id.* at 501-02. The circumstances "amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'" *Id.* at 502 (quoting *United States v. Mendenhall*, 446 U.S. 544, (1980)). The Court concluded that *Royer* was not free to walk away because the agents retained his identification, ticket, and luggage. *Id.* at 503 n.9.

276. *Id.* at 504.

person. How do you really walk away from the police?²⁷⁷

The erosion of the right to walk away was completed in two Supreme Court cases: *INS v. Delgado*²⁷⁸ and *Florida v. Bostick*.²⁷⁹ The Court signalled that police may request identification—even in a large scale planned program—without any individual articulable suspicion of wrongdoing, and in situations where the persons questioned cannot physically leave.

In the *Delgado* case, INS agents were posted at worksite exits while on-duty employees were systematically asked for identification.²⁸⁰ No seizure took place because these employees were held to know they could refuse to respond, although they literally could not walk away.²⁸¹ In *Bostick*, armed officers requested identification from a passenger on a bus about whom they had no articulable suspicion.²⁸² The Court, however, refused to consider whether the police seized Bostick.²⁸³ The Court shifted its emphasis from whether the citizens could *actually* leave to whether they *felt* they could refuse to respond, but “psychological pressure” to respond did not render the responses involuntary.²⁸⁴

The *Delgado* and *Bostick* cases raise an interesting question: why did the Court choose not to simply state that people are required to speak to the police? The Court appears to need the rhetoric of a person’s right to walk away to maintain the fiction that such encounters are not seizures in order to prevent Fourth Amendment protections from coming into play. This doctrine is truly a maze that could not possibly be understood by an ordinary enforcement officer or person on the street.²⁸⁵

277. Mitchell, *supra* note 5, at 54 (footnotes omitted). See also Maclin, *supra* note 219, at 1265 (“The right of the people to come and go as they please—their right of locomotion—is no longer as broad as the people might assume.”).

278. 466 U.S. 210 (1984).

279. 501 U.S. 429 (1991).

280. *Delgado*, 466 U.S. at 212-13.

281. *Id.* at 219-20.

282. *Bostick*, 501 U.S. at 431-32.

283. *Id.* at 437. Rather, the Court concluded the Florida Supreme Court erred in its decision because it only considered one factor—that the encounter occurred on a bus—and did not consider the totality of the circumstances. *Id.*

284. See *Delgado*, 466 U.S. at 216.

285. It appears to be an example of what Greg McCann, David Tarbert and Michael Lenetsky label “the problem of indeterminacy.” They write:

How does the right to walk away/right to inquire doctrine translate in criminal trespass policy encounters? An innocent person would have no way of knowing whether he or she could lawfully walk away or refuse to respond to police questions. For example, assume that an innocent person is walking down the street wearing a maroon and green T-shirt with white polka dots. He has dark hair and dark skin and is in an all white neighborhood. Two white police officers are patrolling and do not recognize him. They approach him on foot, with weapons on but not drawn, and ask for identification. Under this hypothetical, the Supreme Court would say that this citizen may refuse to answer their questions and could leave, notwithstanding the psychological pressure that might attend a decision to defy armed authority in a strange neighborhood, not knowing how these particular police officers might react.

Now assume that just prior to spotting our innocent citizen the police hear on the radio that a man in a green and maroon T-shirt with white polka dots was seen leaving a house which was just robbed. In this scenario, the police may approach our innocent citizen with reasonable suspicion of wrongdoing. If this citizen refuses to answer questions and tries to leave he may be guilty of obstructing justice. In this hypothetical, the innocent man has no way of knowing whether the police have reasonable suspicion, probable cause, or just don't like the way he looks. He has no way of knowing whether he can lawfully leave or not. His own instinctive understanding of whether he is restrained or whether the police have shown authority is not likely to be the standard by which his decision will be judged. The only rational choice, then, must be for him to assume that he cannot leave without being potentially

In the nonlegal realm, words . . . have intentions and meanings that are distinct in comparison to words . . . in the legal realm . . . [W]ords are more unfocused and unstable; they are indeterminate. Compounding this problem is the uncertainty regarding the consequences resulting from the meaning we give to legal language. The innate tension manifested in the practice of law through its adversarial structure even further compounds the problem of indeterminacy. . . .

Legal language is full of words that are devoid of a predetermined meaning, although as professionals we religiously maintain the fictions that words have predetermined meanings.

The Sound of No Students Clapping: What Zen Can Offer Legal Education, 29 U.S.F. L. REV. 313, 324 (1995).

guilty of the crime of obstructing justice.²⁸⁶ He might even be hurt in a physical altercation with police. Therefore, the right to walk away is meaningless.²⁸⁷

It is precisely these types of encounters that characterize initial contact between police and citizens in criminal trespass programs. Officers see young men they do not recognize and, based upon little but their gut feelings, the officers stop or pursue. Frequently, the police file an obstruction of justice charge along with the trespass charge.²⁸⁸

The consolidated trespass cases from the Washington Supreme Court raise the question of what constitutes reasonable suspicion in high-crime neighborhoods.²⁸⁹ In each case, the arrested boys were simply standing in a group with other young, black men and they ran when the police approached. The majority held that the officers "had reasonable suspicion to conduct a *Terry* stop of the appellants . . . [and that] appellants' flight from the police constituted obstruction of a police officer."²⁹⁰ The Court reasoned that:

[B]ased on the officers' familiarity with the residents, the posted warnings prohibiting trespassing and loitering, and the flight of the appellants, the officers had reasonable suspicion to believe that a criminal trespass was being

286. To further complicate matters, when a police officer chases a suspect with less than articulable suspicion of wrongdoing, and the suspect discards contraband before the officer physically seizes him, the contraband can be used against him. In other words, if the suspect does not respond to an officer's show of authority, there is neither a seizure nor a Fourth Amendment violation. See *California v. Hodari D.*, 499 U.S. 621 (1991).

287. Some scholars might argue that this procedure simply relies upon the good faith of the police; if an individual officer chooses to act in bad faith, he or she can be sued in a civil court. See, e.g., *Zagel*, *supra* note 182 (arguing that civil suits are the proper remedy to abuses by police rather than changes in Fourth Amendment law).

288. The Supreme Court of Washington held that police had reasonable suspicion to conduct a *Terry* stop for criminal trespass and that companion convictions for obstructing justice should be affirmed. *State v. Little*, 806 P.2d 749, 753 (Wash. 1991). The New Mexico Court of Appeals, in *State v. Jones*, 835 P.2d 863 (N.M. Ct. App. 1992), reached an opposite result when it held that police had to have individualized suspicion that someone was engaged in criminal activity to stop and frisk that person. *Id.* at 867. That decision invalidated a stop of a known gang member who was walking in a high crime area. *Id.* at 865. See also Monique M. Salazar, Note, *Terry Stops and Gang Members in New Mexico: State v. Jones*, N.M. L. REV. 463 (1994).

289. For an excellent discussion of the role of poverty and race in identifying reasonable suspicion, see David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

290. *Little*, 806 P.2d at 753.

committed and properly attempted to conduct an investigatory stop. Appellants' refusal to stop when requested by the officers hindered, delayed and/or obstructed the officers in the discharge of their official duties.²⁹¹

In a concurring opinion, one justice stated the police did not violate *Terry* because the boys were not stopped merely for loitering, not stopped merely for being in a high crime area, not stopped only because they were not recognized, and not stopped singly because of flight.²⁹² However, Justice Utter dissented, noting that the officer testified that he not only had no suspicion of one suspect until he ran, but that that suspect was not even a part of the larger group that broke up.²⁹³ Justice Utter pointed out that, astoundingly, the prosecutor argued that "*Terry* standards do not apply to minimal police intrusions in high crime areas."²⁹⁴ Justice Utter wrote that the officer testified that all he knew about the suspect he chased was that "he was a black male in the area."²⁹⁵ Justice Utter writes:

Applying the totality of the circumstances test, the only factors the officer could have considered when he decided to seize Little were: (1) Little is a black male, and (2) Little ran. Surely race cannot be a factor in justifying a stop. That leaves the majority only with flight as possible justification for the stop.²⁹⁶

The Justice concluded by targeting the heart of the right to walk away fiction stating, "a person's refusal to stop cannot be the basis for criminal liability unless the officer has a legal basis for stopping that person."²⁹⁷

What makes the criminal trespass encounters even more complicated is the fact that officers can create a reasonable suspicion of criminal activity by giving a trespass notice on a previous date. This creates a circular process: an officer cannot stop a person with the intention of detaining him unless he has a reasonable articulable suspicion that that suspect committed a crime. Therefore, giving an individual a trespass

291. *Id.* at 754.

292. *Id.*

293. *Id.* at 756.

294. *Id.* at 755.

295. *Little*, 806 P.2d at 757.

296. *Id.*

297. *Id.* at 758.

notice on a previous date renders that person suspicious because he might be engaging in the criminal activity of trespass. When virtually all of the people trespassed off are of a similar race, age and gender, then all other people of that race, age and gender may appear more suspicious of criminal trespass. Thus, attributes which clearly would not have been grounds for a *Terry* stop before the trespass program was established have now become attributes for a *Terry* stop.

In the context of litigation, attorneys can educate courts, police officers and others about many of the issues discussed in this section. While most Fourth Amendment analysis focuses on the particular nature of the suspicion that existed in a particular police-citizen encounter, attorneys can use information about discriminatory actions to explain certain behavior. For example, attorneys can put on evidence to show why, in certain neighborhoods, it is perfectly rational behavior for black men to avoid police contact.²⁹⁸ Attorneys can point out the history of laws that have given police the power to stop, question, detain, and arrest black men based upon little if any necessity, and how the trespass program continues in that vein. Attorneys can suggest that courts keep police powers separate from landlord management responsibilities. Although police would have sufficient power to stop and detain persons they suspect were engaging in criminal behavior, only landlords would be able to issue trespass citations to those persons who were known to be disruptive. Therefore, the police could not use the trespass ticket as

298. Citizens, and male African-American citizens in particular, widely report that police routinely stop and question them with no legitimate basis for suspicion and, upon finding nothing incriminating, allow such citizens to go on their way. These stops are sometimes accompanied by verbal or physical abuse. When such harassment occurs to celebrities or other persons with substantial financial resources, civil suits sometimes follow. See Finkelman, *supra* note 5, at 1410-33. For example, the police pushed National Baseball Hall of Fame member Joe Morgan to the floor of the L.A. airport, handcuffed and dragged him away with his mouth covered because a black drug courier indicated that his companion "looked like me" and the officer looked for a black man who was nervous. *Id.* at 1429-30. The Long Beach police physically harassed Don Jackson, a black L.A. police officer, based on manufactured suspicion. Maclin, *supra* note 219, at 1295 n.176. The description of what happened to Kenneth Hudson in his encounter with the Dayton Police is strikingly similar. See *supra* notes 118-31 and accompanying text. In a recent example, police grabbed, interrogated, and frisked Earl Graves, Jr. in Chappaqua, New York in May, 1995. The police seized Mr. Graves, a clean-shaven black man over six feet tall, wearing a suit and carrying a briefcase, when he exited a commuter train, even though they were looking for a small, mustachioed black man. The police department gave him a letter of apology. Lisa Genasci, *Success Is No Shield From Racism*, L.A. TIMES, June 14, 1995, at D9.

a means to banish undesirable people. Finally, attorneys can demonstrate how difficult it is to understand the complexities of the laws concerning street encounters, and suggest to courts that police and community members be required to discuss appropriate behavior by all of the parties. Attorneys will have to be forceful, however, in raising these types of issues in a litigation context. Judges may consider much of this information irrelevant and not the central focus of a process designed to narrowly consider elements and case theories.

Fourth Amendment challenges will not resolve underlying problems experienced by residents, visitors, or police. Residents rarely have standing to raise Fourth Amendment challenges—although some residents are stopped and detained by police under the policy, resident detention appears to be rare. The traditional Fourth Amendment challenge pits visitors against police. If the visitor “wins” the case, he may succeed in voiding the trespass procedure but the court would be authorized to do little else. The visitor also has an interest in his own safety, and in the safety of his friends and family who reside in the housing. A “success” under a Fourth Amendment attack would protect the visitor’s liberty interests but offer little protection of his safety interests. Additionally, while the policy might be struck down, there is no guarantee that the state would not rewrite a policy that would comply with the letter of the law but not address many of the underlying issues. These issues, such as racially charged encounters and unclear expectations, would likely remain. A lawful visitor unlawfully detained could thus litigate for many years and spend many dollars only to obtain an incomplete remedy. If, on the other hand, the police “win” the case, they will still be left enforcing an unpopular policy in hostile territory. Litigation will only polarize the community of residents and lawful visitors, who will be forced to “choose sides.” Police, who must depend upon community support to make community-based policing work, will find themselves isolated and unsupported by those members of the community who resent the intrusions caused by the policy.

Neither of the extreme positions likely to be chosen by advocates in litigation serve the interests of the parties. Residents and lawful visitors are not interested in denying law enforcement the right to all interaction with citizens on housing property. Some reasonable interactions are not only allowable, but desirable to protect their safety. Likewise, police have no interest in unrestricted access to residents and lawful visitors at their whim. Such access would foster precisely the kind of atmosphere that would render the police officer’s job difficult

and dangerous. Some reasonable restrictions would allow police greater credibility and lead to greater success. Fourth Amendment litigation is designed to assign blame to one side or the other, either striking down or upholding particular police action. It is not designed to help the parties reach a workable solution that would benefit the entire group.

The dialogue process has a much greater chance of success. A group who engaged in dialogue might, for example, decide that all interests could be met by a procedure that gave police officers authority to check everyone who came onto subsidized housing property. Police would not rely upon unfettered discretion in determining whom to stop because they would stop everyone. Procedures could be developed that would allow police to determine whether the person had a legitimate reason to be present. For example, police might contact the resident who was to be visited. Once it was determined that a legitimate reason existed, the person would be allowed to proceed. If no legitimate reason were determined, the person would be turned away, but not banned indefinitely. Such a procedure or other procedures could be developed to meet the needs of all of the affected parties.

B. *Right of Association Claims*

People who have challenged criminal trespass programs often allege violations of their right of association.²⁹⁹ As a matter of state law, people generally have a right to invite guests onto their property.³⁰⁰ It is clear that a criminal trespass program carries the threat of turning away guests of residents, including family members and close friends. It is less clear whether any constitutional right is implicated by such a result.

In *Roberts v. United States Jaycees*,³⁰¹ the Supreme Court outlined two types of associational freedoms protected by the Constitution: freedom of "expressive association" and freedom of "intimate associa-

299. See, e.g., *Brown v. Dayton Metro. Hous. Auth.*, No. C-3-93-037 (S.D. Ohio filed Jan. 26, 1993); *Miller v. St. Michaels Hous. Auth.*, No. Y-91-2412 (D. Md. filed Aug. 26, 1991).

300. See generally 49 AM. JUR. 2D *Landlord and Tenant* § 504 (1995). A criminal trespass statute, however, makes it a crime for a person to enter onto another's property "without privilege." OHIO REV. CODE ANN. § 2911.21(A) (Baldwin 1994). See *supra* note 21.

301. 468 U.S. 609 (1984).

tion.³⁰² Expressive association, which is derived from the First Amendment, involves the right of people "to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."³⁰³ By contrast, intimate association derives from the Fourteenth Amendment concepts of Due Process and the broader conception of liberty and privacy found in the Ninth Amendment and the Bill of Rights.³⁰⁴

In *Roberts*, the Court defined the right of association as a "fundamental element of personal liberty."³⁰⁵ The Court found that the Bill of Rights "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."³⁰⁶ This high level of scrutiny affords constitutional protection to those relationships "that attend the creation and sustenance of a family."³⁰⁷ These relationships include marriage,³⁰⁸ procreation and abortion,³⁰⁹ the raising and education of

302. *Id.* at 617-18.

303. *Id.* at 618. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. For a discussion of the right of expressive association, see Shannon L. Spangler, Note, *Freedom of Association—Explanation of the Underlying Concepts*—Republican Party of Connecticut v. Tashjian, 34 KAN. L. REV. 841 (1986). Examples of cases defining these rights are *Healy v. James*, 408 U.S. 169, 180-85 (1972) (holding a state college may not refuse to recognize a national student group with a reputation for violence as a legitimate campus organization); *NAACP v. Button*, 371 U.S. 415, 438-45 (1963) (holding that a state cannot prohibit an organization from soliciting legal business for political litigation); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960) (holding teachers need not reveal a list of organizations to which they belong); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-63 (1958) (holding that a state cannot compel NAACP to reveal names and addresses of members); *De Jonge v. Oregon*, 299 U.S. 353, 363-66 (1937) (holding that a state cannot prohibit communist meetings).

304. The Fourteenth Amendment reads, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

305. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

306. *Id.*

307. *Id.* at 619.

308. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (invalidating a statute making it illegal to marry without court permission if behind in child support because the right to

children,³¹⁰ and family composition.³¹¹ What these relationships have in common, according to Justice Brennan, are

deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.³¹²

The Court left open the possibility that other types of relationships not specified in *Roberts* might have constitutional protection from state interference.³¹³ For example, the Court held that a large business organization, such as the United States Jaycees, is clearly not protected by the right of intimate association.³¹⁴ However, “[b]etween these

marry is fundamental).

309. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that liberty interests of women include right to choose abortion before viability and to obtain it without undue influence from the state); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking law prohibiting use of contraceptives because it affects “relationships lying within the zone of privacy created by several fundamental constitutional guarantees”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking sterilization law because marriage and procreation are “one of the basic civil rights of man”).

310. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (limiting to parental control of children, if child protection is involved; “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”); *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35 (1925) (holding a state cannot force parents to send children to public school because it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”).

311. *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

312. *Roberts v. United States*, 468 U.S. 609, 620 (1984).

313. *Id.* at 620-22.

314. *Id.* at 620.

poles [large business enterprise versus selection of one's spouse] . . . lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State.³¹⁵ A court would have to assess "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."³¹⁶

The Court has failed to find such relationships in two cases after *Roberts*: *Bowers v. Hardwick*³¹⁷ and *FW/PBS, Inc. v. City of Dallas*.³¹⁸ In *Bowers*, the Court considered whether a statute making sodomy illegal violated the Constitution. In a five to four decision, the majority stated "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."³¹⁹ Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, wrote an impassioned dissent; they found the relationships implicated by Georgia's sodomy statute to fall squarely within the right to intimate association.³²⁰

In *City of Dallas*, the Court found that patrons of a motel, which limited rental of rooms to ten hours, did not have the type of relationship protected by the right of intimate association.³²¹ Justice O'Connor wrote for the majority:

We do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*. Any "personal bonds" that are formed from the use of a motel room for fewer than 10 hours are not those that have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."³²²

315. *Id.*

316. *Id.*

317. 478 U.S. 186 (1986).

318. 493 U.S. 215 (1990).

319. *Bowers*, 478 U.S. at 191.

320. *Id.* at 204. First, the decision regarding sexual activity was thought to fall squarely within those decisions that only individuals can make. *Id.* at 205. Second, the dissent found that regulating activity that takes place in one's bedroom violates a "spatial aspect" of the right to privacy. *Id.* at 204.

321. *City of Dallas*, 493 U.S. at 237.

322. *Id.* at 237 (quoting *Roberts*, 468 U.S. at 618-19).

If a relationship does fall within the definition of intimate association, the state action must "directly and substantially" interfere with that association to be actionable.³²³ In *Lyng*, the Court held that a state food stamp law that classified family-member households differently from non-family-member households did not directly affect whether families could choose to live together, and was therefore not subject to strict scrutiny.³²⁴

Analysis of criminal trespass policies to determine whether associational rights are implicated requires an examination of two elements. First, a plaintiff must show that one or more intimate relationships are involved.³²⁵ Second, there must be a showing that some state action directly and substantially interfered with that relationship.³²⁶ If these elements are proven, the challenger has established a prima facie case that the state action has violated the right of intimate association. Because this right is considered fundamental, the burden shifts to the state to show a compelling state interest in the action that outweighs the liberty interests of the challengers.³²⁷ Policies are rarely upheld when faced with this test.

1. Does the Type of Relationship Meet the Criteria of the Intimate Association Test?

Several different categories of relationships have been affected by various criminal trespass policies. Men who have been trespassed off public housing property have claimed interference with their relationships with their children, girlfriends, immediate family members, and extended family members. Similarly, residents have claimed interference with their relationships with their boyfriends, fathers of their children, adult children, and extended family members. The Supreme Court has consistently held that immediate family, extended family (including grandparents, grandchildren, aunts, uncles, and cousins), and all parent-child relationships are protected by the right to intimate association.³²⁸

323. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

324. *Id.* at 642-43. Justice Marshall in his dissenting opinion, criticized the majority's view that a "loss of benefits" would not "influence family living decisions." *Id.* at 644.

325. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984).

326. *Lyng*, 477 U.S. at 638.

327. *Roberts*, 468 U.S. at 623.

328. *Moore v. City of East Cleveland*, 431 U.S. 494, 509 (1977).

It is not as clear, however, whether boyfriend or girlfriend relationships are included, particularly in light of *Bowers* and *City of Dallas*. While relationships between adult men and women would appear to meet the requirements set forth in *Roberts*,³²⁹ the Court has been reluctant to provide protection to non-blood relatives who are not married.³³⁰ Moreover, it is unclear whether the Court's stance against sexual relationships between adult men and women might be expressed as it was in the Court's analyses in *Bowers* and *City of Dallas*. If the Court were to look to deeply-rooted American values for guidance, no clear moral stance emerges. Attorneys arguing for a broader definition of intimate association might point out that federal entitlements are now available to persons who live together without being married,³³¹ and federally subsidized housing residents are protected against rules that govern who can visit them.³³² Birth control and abortion services are accessible to women regardless of whether they are married, and a law that tried to limit those services to married women would certainly be found unconstitutional.³³³

People who oppose criminal trespass policies have complained of interference in relationships that, for the most part, are clearly protected by the Constitution. Unmarried adults who are prevented from visiting boyfriends or girlfriends, however, may or may not be considered to be involved in protected relationships.

2. Do Criminal Trespass Policies Directly and Substantially Interfere with Protected Relationships?

Assuming that the relationships between residents and their prospective guests who are trespassed off housing sites do enjoy constitutional protection, it is not clear whether criminal trespass policies would be found to directly and substantially interfere with those protected relationships.

329. The requiring factors include "size, purpose, policies, selectivity, longenality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620.

330. See *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990); *Bowers v. Hardwick*, 478 U.S. 186 (1986). One circuit court has found that the right of intimate association applies to adult women who wish to marry one another in a religious ceremony. *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).

331. See *supra* notes 229-32 and accompanying text.

332. See *supra* notes 233-34 and accompanying text.

333. Cf. *Griswald v. Connecticut*, 381 U.S. 479 (1965).

If an officer stops a person because he is suspected of criminal activity other than trespass, and if criminal activity is substantiated, then the person could be arrested or cited for the underlying criminal act. In and of itself, this does not constitute any interference with rights of association.³³⁴ However, if the person is subsequently given a notice of trespass without the police first ascertaining whether the person has a legitimate basis for being on the property, a direct and substantial interference with associational rights may occur if that person was visiting a resident on the property.³³⁵ In Dayton, for example, persons found to be engaging in criminal behavior, no matter how slight, are always given a trespass notice regardless of why they were on the property. Thus, men playing dice, drinking beer, or arguing with their girlfriends were all given notices of trespass even though the underlying offense did not merit a citation and the men were visiting family at the time. A trespass notice, however, interferes with a man's associational rights because he can no longer visit the public housing property for some period of time.

Another scenario might involve an officer stopping someone who appears to be engaging in criminal behavior and finds no such behavior substantiated. If the officer then proceeds to issue a notice of trespass, this state action would directly and substantially interfere with that individual's right of association. For example, the police might stop a man in his car and give him a notice of trespass even though he could not identify any criminal behavior. Rather than instinctively issuing this notice, the officer may ask the person why he is present and verify the explanation given. If the explanation is confirmed (*e.g.*, a person states he is visiting his grandmother and she verifies his explanation) and the officer allows the person to proceed without interference, it is doubtful that the state directly and substantially interfered with his right of association. Similarly, if the proffered explanation is refuted by a resident (*e.g.*, the alleged grandmother states that the person is not her grandson), then it is doubtful that issuing a notice of trespass would directly and substantially interfere with a protected relationship.³³⁶

334. Even if there is a direct and substantial interference, there is a compelling state interest in stopping and detaining someone who is engaging in criminal behavior.

335. While the detention related to the criminal behavior would be lawful, the future restraint on association is directly implicated here.

336. However, this circumstance could directly and substantially interfere with a person's right of association if the person is prevented from visiting someone else in the

Finally, an officer may stop an individual if he has reason to believe that person has previously been given a notice of trespass and suspects that person is trespassing. Hence, one's mere presence on the property is apparently seen by officers as sufficient grounds to arrest that person for criminal trespass.³³⁷ If the officer makes no attempt to solicit or verify an explanation for why the person is on the property—as is more common with these types of stops—then the officer has directly and substantially interfered with the person's right of association.

3. If Direct and Substantial Interference of a Right of Intimate Association is Established, Can the State Justify this Interference?

If a plaintiff establishes a direct and substantial interference with a fundamental right, the burden shifts to the state to prove that public policy justifies the state action.³³⁸ This justification must be more than a mere showing of a rational relationship, the state, following the "strict scrutiny" test, must show a "compelling state interest."³³⁹ Although the states rarely meet this burden, they might overcome it by proving criminal trespass policies fight crime, and specifically drug related crimes. However, it is hard to determine whether the persons receiving trespass notices are actually committing drug related crimes. First, while states can often show a decrease in overall crime following the enactment of criminal trespass policies, crime statistics are not typically categorized by drug status. Second, it is impossible to credit decreased crime statistics solely with trespass policies because most public housing communities added community based officers and increased officer numbers when these policies were instituted. By the same token, it is also impossible to prove that the decrease in crime is unrelated to the policy. Thus, it is difficult to see how banishing a person who is drinking beer with his cousin or playing dice on the sidewalk will assist in the termination of drug trafficking.

future. Given the person's lack of forthrightness in the initial stop, however, it is doubtful that such a circumstance would lead to constitutional protection unless there were no legitimate appeal process. If there were no appeal process, even these stops would be suspect because a person could never have his name removed from the trespass list.

337. State criminal trespass statutes would still require an independent verification of whether the person has permission to be on the property.

338. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

339. When the state is found to restrict a fundamental right, the state must show that it has a compelling state interest in the policy or it will be found unconstitutional. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973).

Even if an individual commits a drug-related crime, the state might have difficulty showing how such a policy adds to the compelling state interest of punishing these individuals. Punishment and control are sought by means other than prohibiting such persons from visiting their relatives. For example, if a middle class, white male is arrested for selling powder cocaine and is released on bond, he is usually free to return to his home and visit his friends and neighbors, pending trial. After serving his sentence, if convicted, he is again free to associate with his loved ones. However, a poor, black male arrested for selling crack cocaine in a public housing project can—in addition to all the other penalties, which may themselves be higher for him than for his white counterpart—be prohibited from visiting family and friends for several years due to the trespass policy.

Because associational rights involve fundamental rights balanced against government interests, lawyers can raise the issues discussed in section III of this Article in their arguments for a less intrusive policy. Fundamental rights cases, however, are rarely decided on an ultimate balancing test. Rather, it is more likely a court would uphold or strike a trespass program based upon the intimate relationship test or the direct and substantial interference test.³⁴⁰ But, the presence of a balancing test does allow attorneys to bring in evidence of the interests of the various parties affected by the policy.

Clearly, the greatest benefit of the trespass program to police officers is an officer's ability to arrest someone who has not committed any other crime. Consider this: if an officer sees and substantiates criminal behavior, he can arrest that person at that time. The trespass program, however, allows the officer to arrest the person even if he has not committed a crime. The opportunities for abuse are widespread. In some communities, selectively arresting persons for minor misdemeanors such as jaywalking as a method of controlling drug crimes are overt, and some courts have suggested these methods violate the Fourth Amendment.³⁴¹ Criminal trespass programs can serve a similar function for law enforcement in a less overt manner. It is hard to see what legitimate purpose is served by the trespass program that cannot be

340. See *supra* note 22. But see *Brown v. DMHA*, No. C-3-93-037 (S.D. Ohio filed Jan. 26, 1993) (ruling against plaintiffs' request for a preliminary injunction that the trespass policy did not directly and substantially interfere with rights of association).

341. Meiring, *supra* note 5, at 529.

achieved through regular law enforcement methods. Attorneys representing parties who challenge these programs can make these arguments.

It is not likely that the Supreme Court would find a violation of associational rights in a trespass program. The Court has not found any state program to violate the right of intimate association or right of privacy in any circumstances, other than procreation, since the 1978 *Zablocki v. Redhail* decision involving the right to marry.³⁴² While the circuit courts still recognize the right as a legitimate constitutional protection, they too have not been eager to find violations of that right.³⁴³ As a federal district court judge stated in a public housing case in 1995:

[T]he extent to which a housing authority official may infringe on a tenant's right to association to promote a safe living environment is not well or clearly established. The courts have not articulated objective criteria that will enable public housing officials to reasonably determine, in any given set of circumstances, when the housing authority's legitimate interest in promoting the health and safety of its tenants justifies interfering with a tenant's right of association and when it does not. In the absence of such criteria, a reasonable housing official could not determine whether issuing a notice of termination to a tenant based upon a perceived health and safety threat resulting from the tenant's association with protest group members violated that tenant's right of association.³⁴⁴

342. *Zablocki v. Redhail*, 434 U.S. 374 (1978). *Cf.* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding no right of intimate association existed between members of the United States Jaycees).

343. *See, e.g., Parks v. City of Warner Robins, Georgia*, 43 F.3d 609, 614 (11th Cir. 1995) (finding city's antinepotism policy did not violate employee's right of intimate association); *McCabe v. Sharrett*, 12 F.3d 1558, 1569 (11th Cir. 1994) (transferring police chief's secretary to a less desirable job after she married another police officer did not violate her right to intimate association); *Coronel v. Hawaii*, No. 91-16842, 1993 WL 147318, at *2 (9th Cir. May 6, 1993) (holding prison rule that inmate can only make long distance calls to his family during evening hours did not violate his right of intimate association); *Griffin v. Strong*, 983 F.2d 1544, 1549 (10th Cir. 1993) (holding police officer did not unduly interfere with right of intimate association by falsely informing wife that her husband confessed to child abuse). *But see Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).

344. *Herring v. Chicago Hous. Auth.*, No. 90-C-3797, 1995 WL 77305, at *9 (N.D. Ill. Feb. 21, 1995). Although, this case involved alleged violations of the right of expressive association, the court granted the individual defendants qualified immunity because

In spite of strong logical arguments to the contrary, it is extremely unlikely that a court would conclude that a criminal trespass program would violate the right of intimate association. While the Supreme Court rhetoric is built upon the presence of this fundamental, "intensely personal" right, Supreme Court practice shows that the right is on shaky ground. Public housing authorities, police officers, residents, and visitors are left confused and uncertain regarding what the boundaries are when police interfere with personal relationships.

Litigation using association theories cannot resolve the underlying problems either. Residents and lawful visitors would not want to prevent police officers from ever questioning a friend or family member. The safety interests of residents and lawful visitors would suggest that residents and lawful visitors would want police officers to be able to determine whether people have a legitimate purpose for being on the premises. Residents would not want police, however, to become involved in the details of their personal lives; nor would they want police to use information learned as a result of the fight against violent crime against them in their efforts to maintain food, clothing, and shelter.

Police, too, have an interest in setting boundaries. Police do not want to work in a setting where residents and lawful visitors are afraid to speak frankly with them. Litigation using association theories, like those employing the Fourth Amendment, result in one side winning or losing. If the police win, they may be forced to work in a hostile, angry and hurt community of people who feel their personal lives are invaded. If the residents or lawful visitors win, they may lose police protection. Police may be genuinely confused about how they can and cannot act under the law. Litigation based upon constitutional violations is not structured to allow courts to craft appropriate remedies or to allow courts to instruct parties to engage in dialogue. Rather, a constitutional violation is found to exist or not to exist, thus voiding or maintaining the policy.

V. CONCLUSION

Most challenges to subsidized housing anti-crime measures have been based upon constitutional analyses. Constitutional analysis has traditionally failed to address issues that must be resolved in fashioning anti-crime measures that will work. Methodologies based on dialogue

the law was so unclear. *Id.*

between affected parties are more likely to result in practices that are workable to housing authority staff, law enforcement, residents, and members of the community. A policy which comes out of this process will take into account the needs of a variety of affected parties, protecting minority as well as majority interests in most instances. Public interest attorneys must take affirmative steps to increase the opportunities for meaningful dialogue to take place. Attorneys should consider whether the time and money spent on litigation will ultimately result in policies and practices that will benefit their clients. If litigation is needed, lawyers should consult different perspectives and present the information to the court. Attorneys can craft settlement plans that will pay community leaders to organize meaningful dialogue concerning the underlying issues that prevent anti-crime measures from working effectively. They can also encourage their clients to begin discussions about these underlying issues. If resident and community needs are to shape the policies and practices of the future, public interest attorneys must find ways to create and sustain dialogue between those parties who would be defined as opponents in traditional litigation.

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