

2010

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Tayyab Mahmud

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### Recommended Citation

Tayyab Mahmud, “*Surplus Humanity*” and the Margins of Legality: *Slums, Slumdogs, and Accumulation by Dispossession*, 14 CHAP. L. REV. 1 (2010).

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## **“Surplus Humanity” and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession**

*Tayyab Mahmud\**

*Marooned on the outskirts of the law, more than one billion people worldwide live in urban slums and squatter settlements, mostly in the global South. Law, extra-legality, and illegality commingle in urban slums to produce spaces and subjects at the margins of legal orders and formal economies. Three enduring and inter-related features of capitalism—accumulation by dispossession, a reserve army of labor, and an informal sector of the economy—produce and sustain urban slums. The genesis and persistence of slums and slum-dwellers testify to the iron fist of the state working in concert with the hidden hand of the market in the service of accumulation of capital. Over the last thirty years, neoliberal restructuring of economies and reordering of the responsibilities of states have accentuated this process. As a result, slums in the global South have grown exponentially. An examination of public policy and pronouncements of the judiciary in India, as they related to slums and slum-dwellers, calls into question traditional understandings of the law, citizenship, and responsibilities of the state. Mainstream remedial prescriptions for housing for the urban poor increasingly rely on market forces, falling woefully short of their goal, and often accentuating the problem. The incipient right to the city provides a productive framework to re-imagine the concept of citizenship, and to guide public policy and popular action to ensure adequate housing with dignity for the urban poor and marginalized.*

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\* Professor of Law and Director, Center for Global Justice, Seattle University School of Law. I want to thank Jaswinder Brara, Richard Delgado, Carmen Gonzalez, Hamid Khan, Victoria Kill, Henry McGee, Audrey McFarlane, Bob Menanteaux, Charles Pouncy, and Meenakshi Rishi for their thoughtful comments on earlier drafts. Research librarians at Seattle University School of Law provided invaluable assistance with this project.

*One's ideological perspective is likely to be shaped by one's housing status.<sup>1</sup>*

—Peter Ward

*[T]here is a politics of space because space is political.<sup>2</sup>*

—Henri Lefebvre

## INTRODUCTION

From Cabrini-Green in Chicago to the Mau Forest in Kenya, the housing of the poor is threatened by predatory forces unleashed by global capitalism in its neoliberal incarnation.<sup>3</sup> Formal housing markets in the global South<sup>4</sup> rarely supply more than twenty percent of new housing needs, turning people to self-built shanties, informal rentals, pirate subdivisions, or the streets.<sup>5</sup> The population of slums and shantytowns on the urban peripheries often outnumbers that of the city, leading some to suggest that “[t]hese compounds are called ‘peri-urban’ but in reality, it is the city proper that is peripheral.”<sup>6</sup> Planning experts warn that if this trend continues, “we will have only slums and no cities.”<sup>7</sup> Urban slums are seen as warehouses of “surplus humanity,”<sup>8</sup> and slum-dwellers as a “surplus population.”<sup>9</sup> A

<sup>1</sup> PETER M. WARD, *MEXICO CITY: THE PRODUCTION AND REPRODUCTION OF AN URBAN ENVIRONMENT* 193 (Richard Peet ed., 1990).

<sup>2</sup> Henri Lefebvre, *Reflections on the Politics of Space*, in *RADICAL GEOGRAPHY: ALTERNATIVE VIEWPOINTS ON CONTEMPORARY SOCIAL ISSUES* 339, 345 (1978).

<sup>3</sup> See generally Megan Cottrell, *At the End of her Rope: Cabrini-Green Resident Faces Eviction Tomorrow*, TRUE/SLANT (Nov. 16, 2009, 10:00 AM), <http://trueslant.com/megancottrell/2009/11/16/at-the-end-of-her-rope-cabrini-green-resident-faces-eviction-tomorrow/>; Jeffrey Gettleman, *Forest People May Lose Home in Kenyan Plan*, N.Y. TIMES, Nov. 15, 2009, at A6.

<sup>4</sup> The terms “global South” and “global North” are used here not necessarily to describe distinct geographical regions, but to indicate what have been termed the “two-third” and “one-third” populations of the world that occupy broadly different positionalities within the global economy. See Eric Sheppard & Richa Nagar, *From East-West to North-South*, 36 *ANTIPODE* 557, 557–58 (2004).

<sup>5</sup> A. S. OBERAI, *POPULATION GROWTH, EMPLOYMENT AND POVERTY IN THIRD-WORLD MEGA-CITIES: ANALYTICAL AND POLICY ISSUES* 13 (1993). See also ROBERT NEUWIRTH, *SHADOW CITIES: A BILLION SQUATTERS, A NEW URBAN WORLD* 7–9 (2005); MARK KRAMER, *DISPOSSESSED: LIFE IN OUR WORLD'S URBAN SLUMS* 3–4 (2006). Accurate statistics are difficult to come by because poverty estimates are often obfuscated and slum populations are under-counted. See, e.g., JONATHAN RIGG, *SOUTHEAST ASIA: A REGION IN TRANSITION* 119, 143–46 (1991).

<sup>6</sup> K.C. Sivaramakrishnan, *Urban Governance: Changing Realities*, in *PREPARING FOR THE URBAN FUTURE: GLOBAL PRESSURES AND LOCAL FORCES* 225, 229 (Michael A. Cohen et al. eds., 1996).

<sup>7</sup> Gautam Chatterjee, *Consensus versus Confrontation*, 8 *HABITAT DEBATE* 11, 11 (2002).

<sup>8</sup> Mike Davis, *Planet of Slums: Urban Involution and the Informal Proletariat*, 26 *NEW LEFT REV.* 5, 23 (2004).

<sup>9</sup> Henry Veltmeyer, *Surplus Labor and Class Formation on the Latin American Periphery*, in *THEORIES OF DEVELOPMENT: MODES OF PRODUCTION OR DEPENDENCY?* 212 (Ronald H. Chilcote & Dale L. Johnson eds., 1983).

global study finds that “[t]he primary direction of both national and international interventions during the last twenty years has actually increased urban poverty and slums.”<sup>10</sup> In a world where “2.7 billion struggle to survive on less than two dollars per day,”<sup>11</sup> urban poverty may well be the “most significant, and politically explosive, problem of the . . . century.”<sup>12</sup>

The ongoing global recession and the popularity of the Academy Award winning film *Slumdog Millionaire*<sup>13</sup> furnish a unique opportunity to reexamine the question of slums. The 2007–2009 deep recession and the global financial crisis are lifting the fog of neoliberal market ideologies that have dominated global and national public policies for over a generation.<sup>14</sup> This has opened up the possibilities for clear-eyed analyses of how market forces and the law come together to produce questionable distributions of gain and pain. Slums and urban poverty are ripe for such an analysis.

Set in Dharavi, the infamous slum of Mumbai, *Slumdog Millionaire* is an acerbic snapshot of law and illegality tangled in a brutal drama of power and resistance in the life of slum-dwellers. We see an urban space that radically departs from the original meaning of “city,”—which is derived from *civ’tade*, *civitat-em*, and *civitas*, and “its primary sense was therefore ‘citizenship’; thence concretely ‘the body of citizens, the community.’”<sup>15</sup> Neither does the modern “public sphere,”

<sup>10</sup> UN-HABITAT, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS 2003, at 6 (2003) [hereinafter UN-HABITAT, THE CHALLENGE OF SLUMS].

<sup>11</sup> *Fast Facts: The Faces of Poverty*, UN MILLENNIUM PROJECT, [http://www.unmillenniumproject.org/resources/fastfacts\\_e.htm](http://www.unmillenniumproject.org/resources/fastfacts_e.htm) (last visited Sept. 22, 2010).

<sup>12</sup> Anqing Shi, *How Access to Urban Potable Water and Sewerage Connections Affects Child Mortality* 14 (World Bank Dev. Res. Group. Finance, Working Paper No. 2274, 2000).

<sup>13</sup> *Slumdog Millionaire*—Official Site, FOX SEARCHLIGHT, <http://www.foxsearchlight.com/slumdogmillionaire/>. The term “slumdog,” borrowed from this film, can be seen as an offensive characterization of those who live in slums. I use it, as I believe the film does, by combining the words “slum” and “underdog” to signal the subordinated and marginalized state of those constrained to make slums their abode. The meaning of a slum has evolved over time, substantiating that “(spatio)legal representations are imbricated with elements of the (spatio)legal material world.” David Delaney, *Tracing Displacements: Or Evictions in the Nomosphere*, 22 ENV’T & PLAN. D: SOC’Y & SPACE 847, 851 (2004). For a critique of the deployment of the term, see generally, Alan Gilbert, *The Return of the Slum: Does Language Matter?*, 31 INT’L J. URB. & REGIONAL RES. 697, 697 (2007).

<sup>14</sup> See generally JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010); PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); RICHARD D. WOLFF, *CAPITALISM HITS THE FAN: THE GLOBAL ECONOMIC MELTDOWN AND WHAT TO DO ABOUT IT* (2010); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

<sup>15</sup> THE OXFORD ENGLISH DICTIONARY 252 (2d ed.1996).

saturated by legality, contemplate a slum like Dharavi.<sup>16</sup> Rather, slums emerge as liminal spaces<sup>17</sup> where law, extra-legality, and illegality are braided to produce the other side of universality—“moral and legal *no man’s land*, where universality finds its *spatial* limits.”<sup>18</sup>

This article examines the production and persistence of urban slums in order to explore and evaluate remedial strategies that could ensure adequate housing for the urban poor. This inquiry is informed by the spatial turn in social inquiry that deems spatial factors crucial to social phenomena,<sup>19</sup> and the renewed interest in urban sociology and “the city.”<sup>20</sup> It takes cognizance of the mutually constitutive roles of law and space,<sup>21</sup> and of the fact that “[w]e live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings.”<sup>22</sup> First, the article presents a picture of Dharavi to underscore the complexity and gravity of the problem of urban slums. Second, it articulates a theoretical framework to argue that urban slums are produced by

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<sup>16</sup> See JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 74–75 (1999). See generally HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1993); AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE (Nick Crossley & John Michael Roberts eds., 2004).

<sup>17</sup> According to Victor Turner:

The attributes of liminality or liminal *personae* (‘threshold people’) are necessarily ambiguous, since this condition and these persons elude or slip through the network of classifications that normally locate states and positions in cultural space. Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial.

VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 95 (1969).

<sup>18</sup> Denise Ferreira Da Silva, *Towards a Critique of the Socio-logos of Justice: The Analytics of Raciality and the Production of Universality*, 7 SOC. IDENTITIES 421, 422 (2001).

<sup>19</sup> See generally DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1990); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); SPACE & SOCIAL THEORY: INTERPRETING MODERNITY AND POSTMODERNITY (Georges Benko & Ulf Strohmayer eds., 1997); PLACE AND THE POLITICS OF IDENTITY (Michael Keith & Steve Pile eds., 1993).

<sup>20</sup> See, e.g., EDWARD W. SOJA, POSTMETROPOLIS: CRITICAL STUDIES OF CITIES AND REGIONS xi, xii (2000); ASH AMIN & NIGEL THRIFT, CITIES: REIMAGINING THE URBAN 2–4 (2002); POSTMODERN CITIES AND SPACES 1 (Sophie Watson & Katherine Gibson eds., 1995).

<sup>21</sup> See generally Nicholas K. Blomley, *Text and Context: Rethinking the Law-Space Nexus*, 13 PROGRESS IN HUM. GEOGRAPHY 512 (1989); NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); Desmond Manderson, *Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory*, 20 MELB. U. L. REV. 1048 (1996); Chris Butler, *Critical Legal Studies and the Politics of Space*, 18 SOC. & LEGAL STUD. 313 (2009).

<sup>22</sup> BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 473 (1995).

three inter-linked and enduring features of capitalism that have been accentuated by neoliberalism: accumulation by dispossession, the labor reserve army, and an informal sector of the economy. Third, using the history of slums in India as a case study, it applies this framework to demonstrate how colonial stratagems, misguided post-colonial development policies, and mandates of neoliberalism have produced and sustained slums in the global South. Fourth, it shows how material and discursive changes spawned by neoliberalism transformed India’s judiciary’s response to the problem of slums and slum-dwellers from humane treatment to hostility. Fifth, it evaluates alternative models for the eradication of urban slums in the global South, and finds the “state as developer” model<sup>23</sup> to be most promising. Finally, it argues that the incipient right to the city provides a productive framework to reimagine the concept of citizenship, and to guide public policy and popular action to ensure adequate housing with dignity for the urban poor and the marginalized.

#### I. DHARAVI: MAXIMUM SLUM IN MAXIMUM CITY

In India, the number of people living in slums grew approximately twenty-five percent in the last decade.<sup>24</sup> In Mumbai, over twenty million people cram into 169 square miles, with population density exceeding one million per square mile in some parts of the city.<sup>25</sup> With twelve million squatters and tenement-dwellers, Mumbai is also the global capital of slum-dwelling.<sup>26</sup> While real estate prices in Mumbai compete with those of Manhattan,<sup>27</sup> every second person in Mumbai lives in slums, which collectively occupy just six percent of all the land in the city.<sup>28</sup> In Mumbai, a typical tenement *chawl*—which makes up seventy-five percent of the city’s formal housing stock—is a dilapidated, one-room rental dwelling that on average crams a

<sup>23</sup> See *infra* notes 431–459 and accompanying text.

<sup>24</sup> Bibhudatta Pradhan, *India’s Number of Slum-Dwellers Surges as Economy Draws People to Cities*, BLOOMBERG.COM (Sept. 3, 2010, 5:06 AM), <http://www.bloomberg.com/news/2010.09.03/india-s-number-of-slum-dwellers-surges-as-economy-draws-people-to-cities.html>.

<sup>25</sup> Seamus Murphy, *Bombay: Maximum City*, VIIPHOTO.COM, [http://www.viiphoto.com/detailStory.php?news\\_id=1086](http://www.viiphoto.com/detailStory.php?news_id=1086) (last visited Sept. 22, 2010).

<sup>26</sup> UN-HABITAT, *Slums of the World: The Face of Urban Poverty in the New Millennium?* annex 3 (Monitoring the Millennium Development Goal, Target 11-World-wide Slum Dweller Estimation Working Paper, Nairobi 2003).

<sup>27</sup> Gayatri Ramanathan, *Dharavi Redevelopment Plan is Robbing Us of Space: Residents*, LIVEMINT.COM (Sept. 5, 2007, 7:07 AM), <http://www.livemint.com/2007/09/05002021/Dharavi-redevelopment-plan-is.html>.

<sup>28</sup> Komal Panchamatia, *Every Second Person in Mumbai Resides in Slum: UNDP Report*, BUSINESS STANDARD (Sep. 4, 2009, 11:25 AM), <http://www.business-standard.com/india/news/every-second-person-in-mumbai-resides-in-slum-undp-report/72631/on>.

household of six people into fifteen square meters, with a latrine usually shared by six families.<sup>29</sup> Pavement and sidewalk dwellers in Mumbai reach approximately one million.<sup>30</sup> Of these, seventy percent have been in the city for at least six years, and one-third have been evicted from a *chawl* or a slum.<sup>31</sup> While Mumbai's estimated annual housing deficit of 45,000 units translates into a corresponding increase in slum dwellings, 400,000 units lie empty because owners loath the mandated regime of fixed rents and the resulting propensity of tenants to become permanent occupiers.<sup>32</sup> Homelessness and slum growth in Mumbai is directly related to job losses associated with industrial restructuring. In 1921, textile mills hired 16.2% of the males and 9.5% of the females of the city's population.<sup>33</sup> In 1931, the Census Commissioner stated that "[s]ave for its textile manufacture', . . . 'Bombay has really little claim to be called an industrial city. . . .'"<sup>34</sup> Until 1980, 250,000 textile mill workers lived in Mumbai; today the number has fallen below 30,000.<sup>35</sup> This is part of a broader contraction of the formal sector of the economy that has forced the urban poor to fend for themselves in the so-called informal sector.

Life in Dharavi demonstrates that, for the urban poor, housing is a verb.<sup>36</sup> Dharavi, a 175-hectar (0.67 square miles) maze of dark alleys and corrugated shacks, compacts 18,000 people per acre into 10-by-15 foot rooms stacked on top of one another.<sup>37</sup> Here, slum-dwellers juggle housing cost, tenure security, quality of shelter, distance from work, and personal safety. Even pavement-dwelling, much less an extra-legal shack, is not free; regular fees have to be paid to the police, crime

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<sup>29</sup> ALAIN R.A. JACQUEMIN, URBAN DEVELOPMENT AND NEW TOWNS IN THE THIRD WORLD: LESSONS FROM THE NEW BOMBAY EXPERIENCE 89 (1999).

<sup>30</sup> Minar Pimple & Lysa John, *Security of Tenure: Mumbai's Experience*, in HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES 75, 76, 78 (Alain Durand-Lasserve & Lauren Royston eds., 2002).

<sup>31</sup> JACQUEMIN, *supra* note 29, at 90.

<sup>32</sup> SUKETU MEHTA, MAXIMUM CITY: BOMBAY LOST AND FOUND 117 (2004).

<sup>33</sup> R. CHANDAVARKAR, THE ORIGINS OF INDUSTRIAL CAPITALISM IN INDIA: BUSINESS STRATEGIES AND THE WORKING CLASSES IN BOMBAY, 1900–1940 77 (1994).

<sup>34</sup> *Id.*

<sup>35</sup> Sharit K. Bhowmik, *The Politics of Urban Space in Mumbai: 'Citizen' versus the Urban Poor*, in CONTESTED TRANSFORMATIONS: CHANGING ECONOMIES AND IDENTITIES IN CONTEMPORARY INDIA 149, 151 (Mary E. John et al. eds., 2006) [hereinafter CONTESTED TRANSFORMATIONS]. The decline of the textile industry in Mumbai resulted from the global shift of textile production to comparatively low-wage settings like Bangladesh, China, and Vietnam. See Sanjaya Lall, *India's Manufactured Exports: Comparative Structure and Prospects*, 27 WORLD DEV. 1769, 1769–70 (1999).

<sup>36</sup> John F. C. Turner, *Housing as a Verb*, in FREEDOM TO BUILD: DWELLER CONTROL OF THE HOUSING PROCESS 148, 151 (John F. C. Turner & Robert Fichter eds., 1972).

<sup>37</sup> KALPANA SHARMA, REDISCOVERING DHARAVI: STORIES FROM ASIA'S LARGEST SLUM 18 (2000).

syndicates, or both.<sup>38</sup> Furthermore, squatters are required to pay sizable amounts of money as bribes to the police, politicians, or criminal gangs to gain access to the sites, and continue to pay informal “rent” in money, loyalty, and votes.<sup>39</sup> The unavoidable costs of an un-serviced location add to the bill. Slum-dwellers who have been in the city since before 1995 pay a monthly fee to the city for a “photo-pass”—an identity card with the photograph of the head of the household on it.<sup>40</sup> While holders assume that this pass gives them a right of permanent residency, the small print on the back side states that the holder is an encroacher who has to pay a monthly fine.<sup>41</sup>

In Dharavi and other slums of Mumbai, death rates are fifty percent higher than in adjoining rural areas, with forty percent of the mortality being a product of infections and parasitic diseases due to contaminated water and inadequate sanitation.<sup>42</sup> “Breathing the air in [Dharavi] now is the equivalent to smoking two-and-a-half packs of cigarettes a day.”<sup>43</sup> Clean water, sanitation, and toilets are rare commodities, which puts special burdens on women.<sup>44</sup> The few public toilets run by the municipal corporation charge for each use.<sup>45</sup> A study of twenty-two slums in India found nine with no latrines at all; in another ten, only nineteen served 102,000 people.<sup>46</sup>

Dharavi is also a hub of small-scale industries, with an estimated annual turnover between \$50 and \$100 million.<sup>47</sup> Against all odds, Dharavi has developed into a “kind of self-sufficient, self-sustaining ‘village,’” one with a “vibrant

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<sup>38</sup> Erhard Berner, *Learning from Informal Markets: Innovative Approaches to Land and Housing Provision*, in DEVELOPMENT AND CITIES: ESSAYS FROM DEVELOPMENT PRACTICE 226, 233 (David Westendorff & Deborah Eade eds., 2002) [hereinafter Berner, *Learning from Informal Markets*].

<sup>39</sup> MIKE DAVIS, PLANET OF SLUMS 38 (2006) [hereinafter DAVIS, PLANET OF SLUMS].

<sup>40</sup> Bhowmik, *supra* note 35, at 148.

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

<sup>42</sup> JACQUEMIN, *supra* note 29, at 90–91.

<sup>43</sup> MEHTA, *supra* note 32, at 29.

<sup>44</sup> See generally UNITED NATIONS DEV. PROGRAMME, SUMMARY HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS (2006), available at [http://hdr.undp.org/en/media/HDR2006\\_English\\_Summary.pdf](http://hdr.undp.org/en/media/HDR2006_English_Summary.pdf).

<sup>45</sup> Kalpana Sharma, *Mumbai's Other Half* (Countercurrents.org, Kerala, India), Oct. 17, 2004, available at <http://www.countercurrents.org/gender-sharma171004.htm>.

<sup>46</sup> Chatterjee, *supra* note 7, at 12. In Mumbai “half the population doesn’t have a toilet to shit in, so they shit outside . . . that’s two and a half million kilos of shit each and every day.” MEHTA, *supra* note 32, at 127. Such lack of privacy presents particular problems for women, who often have to wait for the dark of the night to relieve themselves. See Loes Schenk-Sandbergen, *Women, Water and Sanitation in the Slums of Bangalore: A Case Study of Action Research*, in LIVING IN INDIA’S SLUMS: A CASE STUDY OF BANGALORE 187, 198 (Hans Schenk ed., 2001).

<sup>47</sup> Mitu Sengupta, *Slumdog Millionaire’s Dehumanizing View of India’s Poor*, COUNTERPUNCH (Feb. 20/22, 2009), <http://www.counterpunch.org/sengupta022009.html>.



community and economy,” which “has achieved a unique informal ‘self-help’ urban development over the years, without any external aid.”<sup>48</sup> While bereft of adequate housing, the slum-dwellers have established “close to 5000 industrial units, producing textiles, pottery and leather, and performing services like recycling, printing, and steel fabrication.”<sup>49</sup> The economic activity in Dharavi is “decentralized, human scale, home-based, low-tech and labor-intensive . . . pedestrianized, community-centric, and network-based . . . . A simplistic re-zoning and segregating of these activities . . . would certainly hurt this very unique urban form.”<sup>50</sup>

Polluting, toxic, and often illegal industries find Dharavi, where “Darwin beats Keynes,” attractive.<sup>51</sup> Sweatshops profitably mine cheap labor under the radar of regulatory oversight.<sup>52</sup> Writers analogize Dante’s *Inferno* to portray the struggle for survival in slums where poverty, filth, crime, and marginalization stalk the daily life of human beings.<sup>53</sup> Slum-dwellers trade away physical security and public health for minimal shelter, and suffer environmental degradation including filthy water, polluted air, and toxic industrial waste.<sup>54</sup> They contend with the “garbage dump syndrome,”<sup>55</sup> which is “a concentration of toxic industrial activities such as metal plating, dyeing, rendering, tanning, battery recycling, casting, vehicle repair, [and] chemical manufacture.”<sup>56</sup> Dharavi, like most slums, is located in a disaster-vulnerable, ecologically fragile area, so that even a heavy rain can wipe out shelters.<sup>57</sup> An omnipresent

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<sup>48</sup> Prakash M. Apte, *Dharavi: India’s Model Slum*, PLANETIZEN (Sept. 29, 2008, 5:00 AM), <http://planetizen.com/node/35269>.

<sup>49</sup> *Id.*

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

<sup>51</sup> Hans Schenk, *Urban Fringes in Asia: Markets versus Plans*, in REALIGNING ACTORS IN AN URBANIZING WORLD: GOVERNANCE AND INSTITUTIONS FROM A DEVELOPMENT PERSPECTIVE 117, 131 (I. S. A. Baud & J. Post eds., 2002).

<sup>52</sup> SHARMA, *supra* note 37, at xxxv, 106.

<sup>53</sup> MICHAEL TAUSSIG, LAW IN A LAWLESS LAND: DIARY OF A LIMPIEZA IN COLUMBIA 114–15 (2003); DAVIS, PLANET OF SLUMS, *supra* note 39, at 49.

<sup>54</sup> ELLEN BRENNAN, WOODROW WILSON INT’L CTR. FOR SCHOLARS, POPULATION, URBANIZATION, ENVIRONMENT, AND SECURITY: A SUMMARY OF THE ISSUES 12–14 (1999). See also DAVIS, PLANET OF SLUMS, *supra* note 39, at 128–29.

<sup>55</sup> GITA DEWAN VERMA, SLUMMING INDIA: A CHRONICLE OF SLUMS AND THEIR SAVIOURS 16 (2002); DAVIS, PLANET OF SLUMS, *supra* note 39, at 129.

<sup>56</sup> DAVIS, PLANET OF SLUMS, *supra* note 39, at 129.

<sup>57</sup> See Mohamed Hamza & Roger Zetter, *Structural Adjustment, Urban Systems, and Disaster Vulnerability in Developing Countries*, 15:4 CITIES 291, 291 (1998) (explaining that “urban areas are not disaster prone by nature; rather . . . the structural processes which accelerate rapid urbanisation . . . increase the disaster vulnerability of the mass of low-income urban dwellers”). During the twentieth century, more than one hundred million homes were destroyed by earthquakes, mostly in slums, tenements districts, and poor rural areas. DAVIS, PLANET OF SLUMS, *supra* note 39, at 126.

threat is fire, accidental or as the result of “hot demolition”—arson used by landowners to clear out squatters.<sup>58</sup>

Recently, the Mumbai city government approved a plan, styled “Vision Mumbai,” to create a “world-class city” by 2013.<sup>59</sup> Dharavi, where the land occupied by the slum is estimated to be worth \$2 billion,<sup>60</sup> is a particular target of this plan.<sup>61</sup> Demolitions by bulldozers, supervised by the police and with little notice to the residents, is the *modus operandi*.<sup>62</sup> The dwelling of the lead child-actor in *Slumdog Millionaire* proved not to be immune to demolition.<sup>63</sup> Besides being a violation of many international conventions and covenants to which India is a party,<sup>64</sup> these actions betray class divides, and “the constitutive and mutually defining relations between corporeality and the metropolis.”<sup>65</sup> As one Dharavi resident put it:

Why wreck the homes and lives of people who have built the city and lived in it for decades? . . . Because from your luxury high-rise apartment you don’t want the humiliation of India’s poor in your line of vision as you make money and succeed. Forcing them out is the only option. You simply can’t wish them away.<sup>66</sup>

<sup>58</sup> See ERHARD BERNER, DEFENDING A PLACE IN THE CITY: LOCALITIES AND THE STRUGGLE FOR URBAN LAND IN METRO MANILA 144 (1997); HANS SCHENK, *Living in Bangalore’s Slums*, in LIVING IN INDIA’S SLUMS: A CASE STUDY OF BANGALORE, supra note 46, at 17, 34.

<sup>59</sup> See generally BOMBAY FIRST & MCKINSEY & CO., VISION MUMBAI: TRANSFORMING MUMBAI INTO A WORLD-CLASS CITY (2003), available at [www.bombayfirst.org/pdf/McKinseyReport.pdf](http://www.bombayfirst.org/pdf/McKinseyReport.pdf).

<sup>60</sup> David Harvey, *The Right to the City*, 53 NEW LEFT REV. 23, 35 (2008) [hereinafter Harvey, *The Right to the City*].

<sup>61</sup> Henry Chu, *Where Every Inch Counts*, L.A. TIMES, Sept. 8, 2008, at A1.

<sup>62</sup> Habitat Int’l Coal., *NGO Appeals Against Slum Demolitions in Mumbai*, <http://www.europe-solidaire.org/spip.php?article2242> (last visited Sept. 11, 2010).

<sup>63</sup> Hiram Lee, *Home of Slumdog Millionaire Child Actor Destroyed by Mumbai Authorities*, WORLD SOCIALIST (May 15, 2009), <http://www.wsws.org/articles/2009/may2009/slum-m15.shtml>.

<sup>64</sup> See International Covenant on Economic, Social, and Cultural Rights, Articles 2 & 11, Jan. 3, 1976, available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf>; Committee on Economic, Social and Cultural Rights, Comments No. 4 on the right to adequate housing, and No. 7 on forced evictions, available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>; Convention on the Rights of the Child, Articles 16, 27 and 39, available at <http://www2.ohchr.org/english/law/crc.htm>; Convention on the Elimination of All Forms of Discrimination Against Women, Article 14, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>; Basic Principles and Guidelines on Development-based Evictions and Displacement, UN Special Rapporteur on Adequate Housing of the UN Commission on Human Rights, available at [http://www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf).

<sup>65</sup> Elizabeth Grosz, *Body-Cities*, in THE FEMINISM AND VISUAL CULTURE READER 507, 508 (Amelia Jones ed., 2003).

<sup>66</sup> Dan McDougall, *Waste Not, Want Not in the £700m Slum*, GUARDIAN (Mar. 4, 2007), <http://www.guardian.co.uk/environment/2007/mar/04/india.recycling>.

An architect claims, “[t]here’s very little vision with this plan. They’re more like hallucinations.”<sup>67</sup> A Dharavi resident asks: “Development for whom? The government’s idea of development doesn’t include us. I’ve seen the plans. Wonderful. No room at all for ugly poor people.”<sup>68</sup> A companion plan adopted by the Maharashtra state government proposes to resettle slum-dwellers of Dharavi into 225 square foot flats per family, if the slum-dweller’s name appeared on the voters’ list in 1995 and he or she was an actual occupant of the dwelling.<sup>69</sup> Together, Lehman Brothers and HDIL, one of the largest property developers in India, were awarded a contract to implement the plan, but they abandoned it citing a liquidity crunch and lack of clarity of policy.<sup>70</sup> Many earlier plans met a similar fate. In all, slum upgrading plans in Mumbai promised to provide relief to three million people, but the results remain dismal.<sup>71</sup> An expert review concluded that “the scheme for slum upgrading had fallen well short of expectations and only nine percent of recipients belonged to low-income groups . . . .”<sup>72</sup> In the meantime, the global real estate price-escalation has also reached Dharavi, making even the slum beyond the reach of the destitute.<sup>73</sup> A Dharavi real estate broker explains:

Ten years ago, poor people were my only clients and huts my only properties . . . . My only line was: ‘Poor people can afford it.’ Now I sell to businessmen, investors and speculators. I tell them, ‘This place is a commercial center. It’s slap in the middle of the city. Its [*sic*] development is approved. It’s a sure thing! It’s golden! Get in now!’<sup>74</sup>

This picture of Dharavi in Mumbai suggests that most cities of the global South are less made of glass and steel soaring toward the sky, than of crude brick, straw, scrap wood, and plastic in the midst of squalor, pollution, and excrement. It also

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

<sup>68</sup> Alex Perry, *Life in Dharavi: Inside Asia’s Biggest Slum*, TIME (Asia), June 19, 2006, available at <http://www.time.com/time/asia/covers/501060619/slum.html>.

<sup>69</sup> See Slum Rehabilitation Authority, *Dharavi Redevelopment Project*, SRA.GOV, <http://www.sra.gov.in/htmlpages/Dharavi.htm> (last visited Sept. 25, 2010). See also Kalpana Sharma, *A Reprieve for Dharavi*, INFOCHANGEINDIA.ORG, <http://infochangeindia.org/Urban-India/Cityscapes/A-reprieve-for-Dharavi.html> (last visited Sept. 22, 2010) (outlining recent history of the Dharavi Redevelopment Project, including a Maharashtra government compromise increasing dwelling size to three hundred square feet and extending the voters’ list cut-off date to January 1, 2000).

<sup>70</sup> *Dharavi: ‘Slum’ping Developments*, ECONOMIC TIMES (Apr. 2, 2009, 12:07 AM), <http://economictimes.indiatimes.com/> (click “news” above search box; enter search term “Slum’ping developments”).

<sup>71</sup> Greg O’Hare et al., *A Review of Slum Housing Policies in Mumbai*, 15 CITIES 269, 278 (1998).

<sup>72</sup> *Id.* at 279.

<sup>73</sup> Perry, *supra* note 68.

<sup>74</sup> *Id.*

suggests that Dharavi, like other urban slums of the global South, is not a space invested with formal legality. Dharavi emerges as a liminal zone of a regulatory vacuum, where predatory entrepreneurs, corrupt politicians, and state functionaries operate unfettered by law or public scrutiny.

## II. SLUMS, CITIES, AND CAPITALISM

### A. Accumulation by Dispossession and “Surplus Humanity”

Slum-dwellers have been characterized as “outcast proletariat.”<sup>75</sup> They are the “disincorporated” and “un-incorporatable” of capitalism.<sup>76</sup> They stand “condemned to the world of the excluded, the redundant, the dispensable, having nothing to lose, not even the chains of wage-slavery. . . . [They are] the shadowy figures of the rejected, the marginal, the leftovers of capital’s arising, the wreckage and debris . . . .”<sup>77</sup> All this renders them “structurally and biologically redundant to global accumulation and the corporate matrix.”<sup>78</sup> Any productive inquiry of slums and slum-dwellers must take account of the conditions of their production. Three interlinked historical features of capitalism furnish the contours of this process: accumulation by dispossession, the reserve army of labor, and the informal economy.

David Harvey coined the term *accumulation by dispossession* to signify that accumulation facilitated by legal and extra-legal non-economic means is an enduring condition of capitalism, rather than just its historical precondition.<sup>79</sup> The construct signals that markets always rely on non-market forces, particularly legal orders and extra-legality, to disproportionately allocate power and resources to owners of capital.<sup>80</sup> The concept builds on that of primitive accumulation—appropriation of value by force—seen as the pre-history of capitalism and critical to the development of *free* labor and *free* markets.<sup>81</sup> As a prerequisite to the desired positioning of bodies and spaces, legal and extra-legal

<sup>75</sup> Mike Davis, *The Urbanization of Empire: Megacities and the Laws of Chaos*, 81 SOC. TEXT 9, 11 (2004) [hereinafter Davis, *The Urbanization of Empire*].

<sup>76</sup> *Id.* at 11, 13 (quoting UN HUMAN SETTLEMENT PROGRAM, THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS 2003) (internal citations omitted).

<sup>77</sup> KALYAN SANYAL, RETHINKING CAPITALIST DEVELOPMENT: PRIMITIVE ACCUMULATION, GOVERNMENTALITY & POST-COLONIAL CAPITALISM 53 (2007).

<sup>78</sup> Davis, *The Urbanization of Empire*, *supra* note 75, at 11.

<sup>79</sup> See DAVID HARVEY, THE NEW IMPERIALISM 137–38, 145–46 (2003) [hereinafter HARVEY, THE NEW IMPERIALISM].

<sup>80</sup> *Id.*

<sup>81</sup> See MICHAEL PERELMAN, THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION 13 (2000); Jim Glassman, *Primitive Accumulation, Accumulation by Dispossession, Accumulation by ‘Extra-Economic’ Means*, 30 PROGRESS HUM. GEOGRAPHY 608, 610 (2006).

coercion made capital accumulation possible.<sup>82</sup> Coercion triggered the genesis of capitalism—availability of “free” labor with no other means of livelihood except their labor to be sold in a nascent “free” labor market, and the availability of capital to be deployed in the incipient manufacturing industries. Historically, the process turned on “ex-novo separation between producers and means of production.”<sup>83</sup> The key issue here involves the “*conditions, circumstances and contexts* in which this separation is enforced.”<sup>84</sup> Contrary to the mythologies of classical economics, this is a realm outside the market governed by *pure* economic laws—a zone where this separation is effectuated through direct extra-economic forces residing in the coercive power of the state and the law.<sup>85</sup> Two domains of extra-economic power were critical to this process: coercive laws that forced subsistence producers into the “free” wage labor market, and colonial plunder that made capital available for investment.

Colonialism, facilitated by an elaborate reordering of international law, filled the coffers of the fledgling mercantile class of Europe and generated the financial resources to engage the “freed” labor in production governed by profit maximization.<sup>86</sup> Besides direct plunder of resources in the colonies, agricultural lands in the Americas and plantation colonies in the Caribbean

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<sup>82</sup> As Polanyi reminded us, “[t]he road to the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism.” KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 146 (2001). Jessop adds:

[N]either capitalism as a whole nor the capital-labor relationship on which its contradictory and conflictual dynamic depends can be reproduced purely through market relations. Both require supplementary modes of reproduction, regulation and governance[,] including those provided in part through the operations of the state.

BOB JESSOP, *THE FUTURE OF THE CAPITALIST STATE* 11 (2002).

<sup>83</sup> Massimo De Angelis, *Separating the Doing and the Deed: Capital and the Continuous Character of Enclosures*, 12 *HIST. MATERIALISM* 57, 63 (2004).

<sup>84</sup> *Id.* at 66.

<sup>85</sup> Polanyi focuses on the role of state power in the commodification of land and labor, what he terms “fictitious commodities.” POLANYI, *supra* note 82, at 71. He points out that capitalism “was submerged in general social relations; markets were merely an accessory feature of an institutional setting controlled and regulated more than ever by social authority.” *Id.* at 70.

<sup>86</sup> For example, silver from the “New World” roughly tripled Europe’s supply. FERNAND BRAUDEL, *II CIVILIZATION AND CAPITALISM, 15TH–18TH CENTURY: THE WHEELS OF COMMERCE* 198 (Sian Reynolds trans., Univ. of Cal. Press 1992) (1979). For the relationship between colonialism and international law, see Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, in *LAWS OF THE POSTCOLONIAL* 89, 89–91 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth-Century International Law*, 40 *HARV. INT’L L.J.* 1, 2–5 (1999); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 116–17 (2004); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 98–178 (2002).

were the “ghost acres” that relieved output pressures and threats of diminishing returns that confronted European agriculture.<sup>87</sup> The genesis of capitalism in un-free labor is reflected in the fact that the word *capital* first came into vogue in the era of capital-intensive but slave-hungry Antillean sugar plantations.<sup>88</sup> The Enclosure Acts<sup>89</sup> and Game Laws<sup>90</sup> in England are examples of coercive use of law to dispossess rural farmers, hunters, and other subsistence producers, forcing them to seek a livelihood in the “free” wage market. Primitive accumulation thus entailed two interlinked processes: direct expropriation of people’s means of providing for themselves, and forcing people into wage labor.

Canonical critical political economy had relegated primitive accumulation to the pre-history of capitalism.<sup>91</sup> However, later

<sup>87</sup> See NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* 285 (2008).

<sup>88</sup> See BRAUDEL, *supra* note 86, at 232. Braudel credits the 1770 publication of Anne Turgot for the first use of the word capital in the sense of bases for capitalism as a new mode of production. See ANNE ROBERT JACQUES TURGOT, *REFLECTIONS ON THE FORMATION AND THE DISTRIBUTION OF RICHES* (William J. Ashley trans., Augustus M. Kelly ed., 1898) (1770).

<sup>89</sup> See 6 SIR JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 1483–1558, at 650–52 (2003).

<sup>90</sup> Modern Game Laws that began in England in 1671, severely restricted hunting and were part of the effort to cut off large masses of the rural people from one traditional means of their livelihood. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 94, 99, 207, 261 (1975). The Waltham Black Acts of 1722 were among the earliest of the severe measures to punish poachers. *Id.* The scope of the Game Laws expanded rapidly. *Id.* As a result, by the end of the eighteenth century “[m]eat virtually disappeared from the tables of the rural poor.” PHYLLIS DEANE, *THE FIRST INDUSTRIAL REVOLUTION* 42 (1979). The British courts enforced these laws with shocking ferocity, and many poachers were executed under the Black Acts. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 68 (1975). Between 1820 and 1827, in Bedfordshire, “nearly a quarter of those committed were in prison for poaching offences.” A. G. L. SHAW, *CONVICTS AND THE COLONIES* 155 (1966). Blackstone acknowledged this connection, observing: “the only rational footing, upon which we can consider it [violation of Games Laws] as a crime, is that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings...” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 174–75 (Univ. of Chicago Press 2002) (1766). The Game Laws also prohibited the rural poor from keeping weapons, thereby diminishing their ability to resist the onslaught on their means of subsistence. Blackstone noted that “[f]or preventing of popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason oftener meant, than avowed, by makers of forest or game laws.” 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 412 (Univ. of Chicago Press 2002) (1766). Research confirms that the level of exploitation was greatest against those who lacked access to weapons. John S. Pettengill, *Firearms and the Distribution of Income: A Neo-Classical Model*, 13 *REV. RADICAL POL. ECON.* 1, 1–10 (1981). One the earliest acts of the French Revolution was to repeal the hated Game Laws in France. Michael Perelman, *Primitive Accumulation from Feudalism to Neoliberalism*, 18 *CAPITALISM NATURE SOCIALISM* 44, 54 (2007).

<sup>91</sup> See PERELMAN, *supra* note 81, at 2. The portrayal of primitive accumulation by critical political economists was marred by historicism, Eurocentricism, and anti-peasant prejudice of their milieu. Glassman, *supra* note 81, at 610–12.

scholarship on endemic crises of capitalism,<sup>92</sup> the political economy of growth,<sup>93</sup> dependency theory,<sup>94</sup> world systems theory,<sup>95</sup> accumulation on a world scale,<sup>96</sup> and articulation of modes of production,<sup>97</sup> establishes that primitive accumulation is “a basic ontological *condition* for capitalist production, rather than just a historical precondition.”<sup>98</sup> As a result, “production of value that enters into the circuits of capitalist accumulation through parasitization of formally non-capitalist processes is a deeply embedded feature of capitalism.”<sup>99</sup> These interventions underscore the continuing role of coercive political forces in underwriting the purportedly extra-political realm of the market. They also alert us that capitalism, since its origins is a global phenomenon that often co-opts rather than displaces non-capitalist modes of production, and results in uneven development of different geographical zones within its ambit. The global geography of capitalism enables this accumulation by extra-economic means through a myriad of legal and extra-legal regimes that range from global to local, and from formal to customary. These insights highlight that primitive accumulation does not lead to complete proletarianization and that non-proletarian and semi-proletarian labor remains integral to capitalism.<sup>100</sup>

<sup>92</sup> Rosa Luxemburg argued that “the accumulation of capital, seen as an historical process, employs force as a permanent weapon, not only at its genesis, but further on down to the present day.” ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL* 351 (Agnes Schwarzschild trans., Routledge 2003) (1913). Hannah Arendt emphasized that crises of capital necessitate that “the original sin of simple robbery, which centuries ago had made possible the ‘original accumulation of capital’ . . . had eventually to be repeated lest the motor of accumulation suddenly die down.” HANNAH ARENDT, *IMPERIALISM: PART TWO OF THE ORIGINS OF TOTALITARIANISM* 28 (1968). David Moore noted that colonized societies could not “protect themselves against the ravaging international trade and imperialism that destroys precapitalist communities of kinship, neighbourhoods, profession and creed . . . all forms of indigenous, organic society.” David Moore, *The Second Age of the Third World: From Primitive Accumulation to Global Public Goods?*, 25 *THIRD WORLD Q.* 87, 93 (2004).

<sup>93</sup> See generally PAUL A. BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957).

<sup>94</sup> See generally ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA* (1969).

<sup>95</sup> See generally IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* (1979) [hereinafter WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY*].

<sup>96</sup> See, e.g., SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* 38 (1974); SAMIR AMIN, *UNEQUAL DEVELOPMENT* 93 (1976).

<sup>97</sup> Aidan Foster-Carter, *The Modes of Production Controversy*, 107 *NEW LEFT REV.* 47, 51 (1978); Harold Wolpe, *Introduction*, in *THE ARTICULATION OF MODES OF PRODUCTION: ESSAYS FROM ECONOMY AND SOCIETY* 1, 5, 9–10 (1980).

<sup>98</sup> Glassman, *supra* note 81, at 615.

<sup>99</sup> *Id.* at 617.

<sup>100</sup> WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY*, *supra* note 95, at 276–78. As a result of articulation of dependent economies with global accumulation and coexistence of modes of production, “no matter how universal the process of proletarianization, the result is not the creation of a homogeneous proletariat.” HARVEY, *THE NEW IMPERIALISM*,

The enduring nature of accumulation by dispossession can be seen in the various forms of social capital that are required by capital but not paid by it.<sup>101</sup> David Harvey initially used the phrase “accumulation by dispossession” to signify that global primitive accumulation is an enduring “spacio-temporal fix” for cyclical crises of capital.<sup>102</sup> In this global frame, accumulation by dispossession emerges as central to the exercise of colonial and imperial domination that has moved from the background to become the dominant form of accumulation in the current neoliberal era.<sup>103</sup> The entire panoply of forms of value extraction by means other than commodified or “free” wage labor makes for accumulation by dispossession.

Examples drawn from various contexts should help us appreciate this enduring phenomenon. Publically funded infrastructure, subsidies for research and development, public education, and public health are canonical instances of non-market processes that sustain the market. Gendered and often racialized household labor, both productive and reproductive, is another pervasive field of such appropriation.<sup>104</sup> The history of

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*supra* note 79, at 147. See also IMMANUEL WALLERSTEIN, *THE ESSENTIAL WALLERSTEIN* 142–43, 240, 363 (2000).

<sup>101</sup> Social reproduction entails “the social processes and human relations associated with the creation and maintenance of the communities upon which all production and exchange rest.” Nancy Hartsock, *Globalization and Primitive Accumulation: The Contributions of David Harvey’s Dialectical Marxism*, in DAVID HARVEY: A CRITICAL READER 183, 183 (Noel Castree & Derek Gregory eds., 2006).

<sup>102</sup> The cyclical crises of under-consumption, over-accumulation, and falling rates of profit, endemic to capitalism, necessitate spatial and temporal solutions. Spatio-temporal fix is “a metaphor for a particular kind of solution to capitalist crises through temporal deferral and geographical expansion.” HARVEY, *THE NEW IMPERIALISM*, *supra* note 79, at 115. The spatial fix derives from capitalism’s drive to resolve its crisis tendencies by geographical expansion and geographical restructuring. This includes developing external markets, exporting surplus capital, and expanding the labor-pool available for engagement in accumulation of capital. The temporal fix involves expropriation of resources from a commons for short-term profit where the rate of economic exploitation of a given resource exceeds its natural rate of renewal and/or the absorptive capacity of the environment. See Bob Jessop, *Spatial Fixes, Temporal Fixes and Spatio-Temporal Fixes*, in DAVID HARVEY: A CRITICAL READER, *supra* note 101, 142, 142–43.

<sup>103</sup> HARVEY, *THE NEW IMPERIALISM*, *supra* note 79, at 140–42, 149–50, 153, 172.

<sup>104</sup> See Claude Meillassoux, *From Reproduction to Production: A Marxist Approach to Economic Anthropology*, 1 *ECON. & SOC’Y* 93, 100–02 (1972); CLAUDE MEILLASSOUX, *MAIDENS, MEALS AND MONEY: CAPITALISM AND THE DOMESTIC COMMUNITY* xii–xiii (1981); Nona Y. Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, 16 *REV. RADICAL POL. ECON.* 61, 61 (1984); Carmen Diana Deere, *Rural Women’s Subsistence Production in the Capitalist Periphery*, 8 *REV. RADICAL POL. ECON.* 9, 9 (1976); Lourdes Benería, *Reproduction, Production, and the Sexual Division of Labour*, 3 *CAMBRIDGE J. ECON.* 203, 203 (1979); J. K. GIBSON-GRAHAM, *THE END OF CAPITALISM (AS WE KNEW IT): A FEMINIST CRITIQUE OF POLITICAL ECONOMY* 33–34 (1996); ALTHA J. CRAVEY, *WOMEN AND WORK IN MEXICO’S MAQUILADORAS* 6–7 (1998); Cindy Katz, *On the Grounds of Globalization: A Topography for Feminist Political Engagement*, 26 *J. WOMEN CULTURE & SOC’Y* 1213, 1219 (2001); Cindy Katz, *Vagabond Capitalism and the Necessity of Social Reproduction*, 33 *ANTIPODE* 709, 710–13 (2001).



agricultural labor in California, saturated by the instrumental use of race, class, and nationality in immigration and land-ownership laws that consolidated agro-capital, is also a story of accumulation by dispossession.<sup>105</sup> Finally, trade regimes that entail “neoliberal rescaling of governance to escape national-scale environmental constraints,”<sup>106</sup> and new appropriation of the commons for private profit whereby “the global commons are being enclosed,”<sup>107</sup> are instances of accumulation by dispossession.

One specific result of accumulation by dispossession that is central to the production of slums is the emergence of a reserve army of labor. While dispossession destroys traditional entitlements and subsistence economies and estranges direct producers from their means of labor, all those dislocated are not absorbed in the new production process.<sup>108</sup> This unabsorbed labor may be “free,” but it is suspended between the shrinking subsistence economy and the volatile formal markets. This unabsorbed labor is the so-called surplus humanity and includes:

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<sup>105</sup> Agricultural employers “used one group after another, in a vast, repetitive cycle of recruitment, employment, exploitation, and expulsion.” RICHARD A. WALKER, *THE CONQUEST OF BREAD: 150 YEARS OF AGRIBUSINESS IN CALIFORNIA* 66–74 (2004). Since the Civil War, California’s agricultural labor was recycled and displaced with the bulk furnished serially by European immigrants, the Chinese, the Japanese, Filipinos, Mexicans, and undocumented workers. *Id.* The cycle of labor rotation prevented workers from securing better wages and more rights. The extra-economic measures to orchestrate this cycle included the Chinese Exclusion Acts of 1882, 1892, and 1902, the 1917 Immigration Act, the *bracero* program, and the 1965 Immigration Reform Act. One should include here other extra-economic developments like breakdown of the late Q’ing era regime in China, the U.S. colonization of the Philippines, and the Mexican Revolution. *Id.*

<sup>106</sup> James McCarthy, *Privatizing Conditions of Production: Trade Agreements as Neoliberal Environmental Governance*, 35 *GEOFORUM* 327, 330–32 (2004). McCarthy sees this as a reinforcement of the neoliberal “regulatory takings” thesis “that completely unencumbered, asocial private property is the norm and that the state must pay its citizens for any exercise of its governance powers.” *Id.* Legal regimes of agreements, such as NAFTA, inscribe private rights to surplus value by reinforcing public responsibility for externalities generated by private appropriation. *Id.* One specific instance is global legal regimes that force governments to reimburse capital interests for any costs that environmental protection legislation may entail. *Id.* In this schema, environmental protection is construed as a barrier to trade and penalized or struck down. *Id.*

<sup>107</sup> Hartsock, *supra* note 101, at 176. At play here is the enforcement of ever-expanding intellectual property rights, depletion of global environmental commons, privatization of public assets and services, and rollback of regulatory frameworks governing the commons. HARVEY, *THE NEW IMPERIALISM*, *supra* note 79, at 146–48.

<sup>108</sup> It is the foundation of Keynesian critique of classical economics that capitalism does not produce any automatic tendency toward full employment. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* (1936); Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, in *NEOLIBERALISM: A CRITICAL READER* 20, 20–23 (Alfredo Saad-Filho & Deborah Johnston eds., 2005) [hereinafter Palley, *From Keynesianism to Neoliberalism*]; SKIDELSKY, *supra* note 14.

People who have lost their subsistence outside the cash economy . . . [who] are neither members of the economy, nor are they capable of living, feeling and acting as they did before they lost the support of a moral economy of subsistence. The new category of economic cripples, thus defined, may in fact survive, but they do not fully partake of the characteristics of *homo economicus* . . . any choice between alternative satisfactions, which is implied in the concept of economic need, is ruled out for them.<sup>109</sup>

What do those who cannot fully partake of the characteristics of *homo economicus* do while suspended in the “imaginary waiting room of history?”<sup>110</sup> They tend to their subsistence needs as best as they can by exchanging needs and capacities in networks of barter, petty trade, and casual employment under the radar of the law. The result is the emergence of a “need economy”<sup>111</sup>—a zone outside the formal legal frames of contract and regulation, signifying “[i]nformalization within the accumulation economy.”<sup>112</sup> This is the zone of the so-called informal economy. While ostensibly “discovered” in Africa in the early 1970s,<sup>113</sup> the informal economy has been a perennial and enduring companion of the formal capitalist economy. Its emergence was contemporaneous with the emergence of capitalism, and it endures as capitalism persists. This is the context of the emergence of a reserve army of labor—populations separated from their non-capitalist means of subsistence but not integrated into the productive circuits of wage labor on a stable basis. The reserve army

arises out of the very nature of capitalist accumulation, and the surplus population that constitutes the reserve army resides within rather than outside the domain of the capitalist mode of production. Unemployment and pauperism is the mirror image of employment . . . —an appendage that is brought into being and reproduced by the capitalist mode of production itself.<sup>114</sup>

Economists recognize that some measure of unemployment plays a crucial role in a market economy.<sup>115</sup> They speak of the

<sup>109</sup> Ivan Illich, *Need*, in THE DEVELOPMENT DICTIONARY 88, 94 (Wolfgang Sachs ed., 1997).

<sup>110</sup> DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 8 (2000).

<sup>111</sup> SANYAL, *supra* note 77, at 208–15.

<sup>112</sup> *Id.* at 237.

<sup>113</sup> Martha Alter Chen, *Rethinking the Informal Economy: Linkages with the Formal Economy and Formal Regulatory Environment* 1–2 (Expert Grp. on Dev. Issues, Research Paper No. 2005/10, 2005).

<sup>114</sup> SANYAL, *supra* note 77, at 54.

<sup>115</sup> The unemployed serve as an instrument of economic and political control over the working class. They can serve as a backlog of strikebreakers during boom times, be expelled during downturns, and then are reabsorbed in the next upward cycle. When a capitalist economy grows rapidly and the reserve army of the unemployed is depleted,

“natural rate” of unemployment, and its offspring—the non-accelerating inflation rate of unemployment,<sup>116</sup> and the “labor force reserve.”<sup>117</sup> The reserve army of labor helps to contain significant wage increases and corresponding decline of profits.<sup>118</sup> This dovetails with disciplinary uses of the poor and the underclass in the market system.<sup>119</sup> Formation of the reserve army is often augmented by regional inequalities, racial divides and rural-urban migration.<sup>120</sup> Economists of all stripes recognize that the question of employment is not simply a matter of a “free” labor market, and that public policy plays a critical role in calibrating and managing unemployment.<sup>121</sup> Fiscal and

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workers utilize their increased bargaining power to demand raises in wages and distribution of income in their favor. Profits are put under pressure. This leads to reduction in investment, a fall in employment, and a replenishment of the reserve army of the unemployed. See Robert Pollin, *The “Reserve Army of Labor” and the “Natural Rate of Unemployment”*: Can Marx, Kalecki, Friedman, and Wall Street All Be Wrong?, 30 REV. OF RADICAL POL. ECON. 1, 4 (1998); Fred Magdoff & Harry Magdoff, *Disposable Workers: Today’s Reserve Army of Labor*, 55 MONTHLY REV. 18, 21 (2004).

<sup>116</sup> See WENDY CARLIN & DAVID SOSKICE, *MACROECONOMICS AND THE WAGE BARGAIN: A MODERN APPROACH TO EMPLOYMENT, INFLATION AND THE EXCHANGE RATE* 5 (1990); *THE NATURAL RATE OF UNEMPLOYMENT: REFLECTIONS ON 25 YEARS OF THE HYPOTHESIS* (Rod Cross ed., 1995).

<sup>117</sup> The Labor Reserve Force is “an estimate of the deviation of the actual labor force from the labor force that would be observed if the economy was continuously at full employment.” Wayne Vroman, *The Labor Force Reserve: A Re-estimate*, 9 INDUSTRIAL RELATIONS: J. ECON. & SOC’Y 379, 379 (2008).

<sup>118</sup> David M. Gordon, *Six-Percent Unemployment Ain’t Natural: Demystifying the Idea of a Rising “Natural Rate of Unemployment,”* 54 SOC. RES. 223, 233–34 (1987); David M. Gordon, *The Un-Natural Rate of Unemployment: An Econometric Critique of the NAIRU Hypothesis*, 78 AM. ECON. REV. 117, 122 (1988).

<sup>119</sup> See Herbert J. Gans, *Positive Functions of the Undeserving Poor: Uses of the Underclass in America*, 22 POL. & SOC’Y. 269, 272–73 (1994); Miles S. Kimball, *Labor-Market Dynamics When Unemployment is a Worker Discipline Device*, 84 AM. ECON. REV. 1045, 1049 (1994).

<sup>120</sup> See Doreen Massey, *Regionalism: Some Current Issues*, 6 CAP. & CLASS 106, 114 (1978); Richard Peet, *Inequality and Poverty: A Marxist-Geographic Theory*, 65 ANNALS ASS’N. AM. GEOGRAPHERS 564, 567 (1975); Richard A. Walker, *Two Sources of Uneven Development Under Advanced Capitalism: Spatial Differentiation and Capital Mobility*, 10 REV RADICAL POL. ECON. 28, 31 (1978). For mainstream theories of rural-urban migration, see MICHAEL P. TODARO & STEPHEN C. SMITH, *ECONOMIC DEVELOPMENT* 335–37 (2006).

<sup>121</sup> See KEYNES, *supra* note 108; Palley, *From Keynesianism to Neoliberalism*, *supra* note 108. Michal Kalecki was the first to clearly state, in an appropriately titled chapter, “Political Aspects of Full Employment,” that while a capitalist economy can be sustained at full employment, this is the case only if challenges to capitalists’ social and political hegemony can be contained by means of public policy. MICHAL KALECKI, *SELECTED ESSAYS ON THE DYNAMICS OF THE CAPITALIST ECONOMY* 138–45 (1971). The “challenge” was to devise a “solution,” even if a fascist one, to capitalism’s unemployment problem whereby workers would have jobs, but they would not be permitted to exercise the political and economic power that would otherwise accrue to them in a full-employment economy. Pollin, *supra* note 115, at 5. Even Milton Friedman, the veritable advocate of the “free market,” admitted that:

[B]y using the term “natural” rate of unemployment, I do not mean to suggest that it is immutable and unchangeable. On the contrary, many of the market characteristics that determine its level are man-made and policy-made. In the

monetary policies are the primary instruments of this calibration.<sup>122</sup> Such instrumental use of policy does not mean that concessions won by the working classes are not the results of their struggles. For example, Keynesian welfare systems like the New Deal in the United States were a response to the endemic crises of capitalism and popular struggles for security of employment and a better quality of life.<sup>123</sup> As Polanyi eloquently put it: “*Laissez-faire* was planned; planning was not.”<sup>124</sup>

Since the late 1970s, a neoliberal counter-revolution has been afoot on a global scale. This has accelerated accumulation by dispossession, enlarged the surplus army of labor, and expanded the informal sectors of economies. Neoliberalism is an ensemble of interconnected ideas and practices. It rests on a theory of capitalist market fundamentalism—markets are optimal and self-regulating, and if allowed to function without restraint, they optimally serve all economic needs, efficiently utilize all resources, and generate full employment for everyone.<sup>125</sup> It mandates tight fiscal and monetary policies, unbridled private property rights, unencumbered markets, and free trade.<sup>126</sup> It is an ideology of the market and private interests as opposed to state intervention to safeguard collective

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United States, for example, legal minimum wage rates, the Walsh-Healy and Davis-Bocon Acts, and the strength of labor unions all make the natural rate of unemployment higher than it would otherwise be.

Milton Friedman, *The Role of Monetary Policy*, 58 AM. ECON. REV. 7, 9 (1968). In the absence of state intervention, employment depended on the confidence of the capital, which gave the latter

a powerful indirect control over Government policy: everything which may shake the state of confidence must be carefully avoided because it would cause an economic crisis. But once the Government learns the trick of increasing employment by its own purchases, this powerful controlling device loses its effectiveness.

KALECKI, *supra* note 121, at 139.

<sup>122</sup> Calibration of unemployment has a parallel in the “[l]aw of [r]acial [t]hermodynamics,” in which law serves as a type of thermostat assuring that the system contains just the right amount of racism: too much would be destabilizing; too little would forfeit valuable pecuniary and psychic profits. Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 105–06 (1990).

<sup>123</sup> POLANYI, *supra* note 82, at 23.

<sup>124</sup> *Id.* at 147.

<sup>125</sup> See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64–65 (2007); SKIDELSKY, *supra* note 14, at 105; Costas Lapavistas, *Mainstream Economics in the Neoliberal Era*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 30, 30–40; Gerard Dumenil & Dominique Levy, *The Neoliberal (Counter-) Revolution*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 9; William I. Robinson & Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64 SCI. & SOC’Y 11, 41 (2000); DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM 10 (2010).

<sup>126</sup> See Palley, *From Keynesianism to Neoliberalism*, *supra* note 108, at 25; Anwar Shaikh, *The Economic Mythology of Neoliberalism*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 41, 41–49.

interests.<sup>127</sup> It envisages the state as limited to minimal executive and juridical functions that are necessary to secure private property rights and to support freely functioning markets.<sup>128</sup> By extension, neoliberalism deems globalization of free markets as the best way to extend these benefits to the whole world.<sup>129</sup>

The neoliberal project aims to unfold a new social order across the globe to reverse the setbacks that the economic power and political hegemony of the wealth-owning classes had suffered on account of Keynesian welfare in the West, socialism in Eastern Europe, and nationalism in the global South.<sup>130</sup> Neoliberalism makes increasing recourse to the law to displace Keynesian welfare states through liberalization, deregulation, and privatization, and uses the discipline of expanded markets to remove barriers to accumulation that earlier democratic gains had achieved.<sup>131</sup> To secure unfettered rights to private property and profits, it expands and deepens the logic of the market, collapses the distinctions between culture and economy, undermines state sovereignty and national autonomy, and links local and global political economies to facilitate transnational accumulation of capital.<sup>132</sup> Through new regimes of trade, finance, and property rights, the sovereignty of states transfers to international institutions dominated by hegemonic states.<sup>133</sup>

<sup>127</sup> David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 22 (2007) [hereinafter Harvey, *Neoliberalism as Creative Destruction*].

<sup>128</sup> See Simon Clarke, *The Neoliberal Theory of Society*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 50, 50–59; Susanne MacGregor, *The Welfare State and Neoliberalism*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 142–48.

<sup>129</sup> See HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 28 (2008); HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 15 (2002); Matthew Sparke, *American Empire and Globalization: Postcolonial Speculations on Neocolonial Enframing*, 24 SINGAPORE J. TROPICAL GEOGRAPHY 373, 379 (2003).

<sup>130</sup> See DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 10 (1998); Harvey, *Neoliberalism as Creative Destruction*, *supra* note 127, at 32.

<sup>131</sup> For an articulation of the case for neoliberal global political economy and related accounts of the law, see ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 237 (1984); Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

<sup>132</sup> See Boaventura De Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 J. LAW & SOC'Y 279, 293–94 (1987); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY 244–46 (2003); WILLIAM I. ROBINSON, A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD 101–03 (2004); William I. Robinson, *Capitalist Globalization and the Transnationalization of the State*, in HISTORICAL MATERIALISM AND GLOBALIZATION 210, 211–12 (Mark Rupert & Hazel Smith eds., 2002).

<sup>133</sup> See B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUROPEAN J. INT'L L. 1, 12–13 (2004). The exponential rise of extra-territorial jurisdiction in unilateral and multilateral forms has become an avenue to

The hidden hand of the market continues to work in concert with the iron fist of the state in the service of accumulation by dispossession. Explosive growth of slums and slum-dwellers is a direct result.

Neoliberalism does not displace the state as much as it reformulates it and restructures its options.<sup>134</sup> The neoliberal project is to turn the “nation-state” into a “market-state,”<sup>135</sup> one with the primary agenda of facilitating global capital accumulation unburdened by any legal regulations aimed at assuring the welfare of citizens. Social formations in the global South, situated in an asymmetrical relationship with global capitalism, are a particular target of this project. The neoliberal

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govern matters beyond international territorial boundaries by reaching deeply inside domestic jurisdiction of states and enforcing the neoliberal agenda upon reluctant states in the global South. The United States, for example, increasingly uses certification mechanisms “to create law for other States and to monitor its observance, while the United States itself remains unbound and unmonitored.” Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 160–61 (Michael Byers & Georg Nolte eds., 2003). This combines with “substantivism” in U.S. courts where “a choice-of-law methodology . . . is to select the better law in any given case.” Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT’L L. 931, 957 (2002). This results in “over-application of U.S. law” in international disputes, and acts “as a lever of forcing convergence . . . outside the political process that generally structures the harmonization movement.” *Id.* at 966, 972. See also JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 475–77 (2000) (showing how this has impacted the fields of banking, securities regulation, civil aviation, cyber law). The multilateral form is exemplified by the WTO’s compulsory jurisdiction over disputes that lie within its extensive regimes which opens the door for unilateral prescriptions and measures related to trade and environmental policies of states in the global South. See, e.g., World Trade Org., Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of DSU by Malaysia* (Oct. 22, 2001). See also B.S. Chimni, *WTO and Environment: Legitimation of Unilateral Trade Sanctions*, ECO. & POL. WEEKLY 133, 133–38 (2002) [hereinafter Chimni, *WTO and Environment*]; B. S. Chimni, *India and Ongoing Review of WTO Dispute Settlement System*, 37 ECON. & POL. WEEKLY 264, 265 (1999). Increasingly, courts of the global South are deemed unsuitable for adjudicating claims against multinational corporations, thus creating “new national frontiers of responsibility for the conduct of global capital.” Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 RECUEIL DES COURS 297, 312 (1999). See also Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 NETH. INT’L L. REV. 143, 159 (2001); Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 402 (2002).

<sup>134</sup> Many perceptive observers reject the “state shrinking and declining” argument as political posturing of neo-liberals. In particular, they point to the expansion of the coercive apparatuses of the state and the shift of the state from a managerial mode befitting the Fordist era toward a neoliberal entrepreneurial mode. See, e.g., David Harvey, *From Managerialism to Entrepreneurialism: The Transformation in Urban Governance in Late Capitalism*, 71 (B) GEOGRAFISKA ANNALER (SPECIAL ISSUE) 3, 9 (1989).

<sup>135</sup> Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 169, 170 (Susan Marks ed., 2008) [hereinafter INTERNATIONAL LAW ON THE LEFT].

regimes, with their bedrock principles of private property rights and free trade, are a coercive mechanism to get states in the global South to adopt neoliberal economic and social policy frames conducive to global capital.<sup>136</sup> The enabling mechanism is “[t]he extension of the normative force of international standards by the device of conditionality.”<sup>137</sup> These regimes advance particular understandings of development and poverty that “disregard[] the social context of provision, the lived experiences of the poor and dismiss[] and/or reinforce[] the way in which deprivations are constituted.”<sup>138</sup> The mandate is to privatize public assets, roll back social services, and allow unbridled mobility of capital.<sup>139</sup> Now “[s]trait-jacketed within the global logic of capital and market and the global regime of property rights,” states in the global South “can no longer act as developmental states and engage in management of poverty on their own.”<sup>140</sup> Instead, non-state actors representing interests of global capital play an active role in designing legal orders that circumscribe state sovereignty and autonomy.<sup>141</sup> Mandates of privatization make education, health, infrastructure, utilities, housing, and a range of state enterprises available for private appropriation.<sup>142</sup> By its insistence on the rollback of the state,

<sup>136</sup> These regimes include the WTO multilateral agreements including the Agreement on Trade Related Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), the Agreement establishing the Multilateral Investment Guarantee Agency (MIGA), and bilateral investment protection treaties (BITS). Together these regimes provide global capital ease of entry and investment, protection from national performance requirements, protection of expansive intellectual property rights, generous compensation in case of expropriation, insurance against non-economic risks, and mechanisms to avoid national laws and dispute resolution fora. See Chimni, *WTO and Environment*, *supra* note 133, at 138.

<sup>137</sup> Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 212 (Michael Byers ed., 2000).

<sup>138</sup> Richard Higgott & Heloise Weber, *GATS in Context: Development, an Evolving lex marcatoria and the Doha Agenda*, 12 REV. INT'L POL. ECON. 435, 436 (2005).

<sup>139</sup> For a detailed account of how the interests of the global South are jeopardized by concentration of finance capital and monetary regimes of the IMF, see JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 89–104 (2003).

<sup>140</sup> SANYAL, *supra* note 77, at 77.

<sup>141</sup> See generally *GLOBAL LAW WITHOUT A STATE* xiv–xv (Gunther Teubner ed., 1997). The exponential expansion of international commercial arbitration has created a space for private justice to serve global capital at the expense of the state. See Buxbaum, *supra* note 133, at 938–39.

<sup>142</sup> *GLOBAL LAW WITHOUT A STATE*, *supra* note 141, at 147–49, 159–60. See also David A. McDonald, *Environmental Racism and Neoliberal Disorder in South Africa*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* 255, 270–74 (Robert D. Bullard ed., 2005); Daniel R. Faber & Deborah McCarthy, *Neo-liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice*, in *JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD* 38, 40, 51 (Julian Agyeman et al. eds., 2003).

privatization becomes "[t]he [c]utting [e]dge of [a]ccumulation by [d]ispossession."<sup>143</sup>

Rapid urban growth triggered by globalized economic circuits, along with diminished state capacities and resulting civil strife, is the recipe for mushrooming slums in the global South.<sup>144</sup> The unprecedented urban expansion fueled by deregulated financial capital produced another bout of "[c]reative [d]estruction"<sup>145</sup> where the marginalized and underprivileged bear the brunt. Destruction of traditional rural economies, restructuring of the agricultural sector, and deeper penetration of market forces into rural societies, accelerated migration of uprooted rural farmers to urban areas.<sup>146</sup> As interests of global finance capital took precedence over survival needs of the poor, the impact on the vulnerable was quick, and the "main single cause of increases in poverty and inequality during the 1980s and 1990s was the retreat of the state."<sup>147</sup> A United Nations Human Development Report found that "[a]n unprecedented number of countries saw development slide backwards in the 1990s. In forty-six countries people are poorer today than in 1990. In twenty-five countries more people go hungry today than a decade ago."<sup>148</sup> While "burdens of survival" increased for all poor, "those of women are even greater."<sup>149</sup>

<sup>143</sup> HARVEY, THE NEW IMPERIALISM, *supra* note 79, at 157–58.

<sup>144</sup> For a detailed study of rapid urbanization over the last thirty years, see Frederick van der Ploeg & Steven Poelhekke, *Globalization and the Rise of Mega-Cities in the Developing World*, 1 CAMBRIDGE J. REGIONS, ECON. & SOC'Y. 477, 484–85 (2008).

<sup>145</sup> See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82–84 (4th ed. 1952).

<sup>146</sup> See LORI ANN THRUPP WITH GILLES BERGERON & WILLIAM F. WATERS, BITTERSWEET HARVESTS FOR GLOBAL SUPERMARKETS: CHALLENGES IN LATIN AMERICA'S AGRICULTURAL EXPORT BOOM 1–5 (1995); JOHN MADELEY, HUNGRY FOR TRADE: HOW THE POOR PAY FOR FREE TRADE 2–4 (2000); Terence J. Byres, *Neoliberalism and Primitive Accumulation in Less Developed Countries*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 83, 83–90; JAN BREMAN, FOOTLOOSE LABOUR: WORKING IN INDIA'S INFORMAL ECONOMY 1–2 (1996); JAN BREMAN & ARVIND N. DAS, DOWN AND OUT: LABOURING UNDER GLOBAL CAPITALISM 8 (2000); JAN BREMAN, WAGE HUNTERS AND GATHERERS: SEARCH FOR WORK IN THE URBAN AND RURAL ECONOMY OF SOUTH GUJARAT 8–9 (1994); Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 602 (2007).

<sup>147</sup> UN-HABITAT, THE CHALLENGE OF SLUMS, *supra* note 10, at 43.

<sup>148</sup> UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004 132 (2004).

<sup>149</sup> See Sumati Nair & Preeti Kirbat with Sarah Sexton, *A Decade After Cairo: Women's Health in a Free Market Economy*, THE CORNER HOUSE (June 16, 2004), <http://www.thecornerhouse.org.uk/resource/decade-after-cairo>; U. Kalpagam, *Coping with Urban Poverty in India*, 17 BULL. OF CONCERNED ASIAN SCHOLARS 18 (1985); Fantu Cheru, *Debt, Adjustment and the Politics of Effective Response to HIV/AIDS in Africa*, 23:2 THIRD WORLD Q. 299, 300–01 (2002); Jeemol Unni, *Gender and Informality in Labor Market in South Asia*, 36:26 ECO. & POL. WKLY. 2360, 2360–63 (2001).



Liberalization and deregulation of economies have also accelerated urban occupational marginality, with the result that those engaged in the informal sector now constitute two-fifths of the economically active population of the developing countries.<sup>150</sup> “The International Labour Organization estimates that informal workers comprise over half the workforce in Latin America, over 70 per cent in Sub-Saharan Africa and over 80 per cent in India . . . .”<sup>151</sup> Across the global South, mega-slums “have become a dumping ground for a surplus population working in unskilled, unprotected and low-wage informal service industries and trade.”<sup>152</sup> Rural and urban areas are being sutured in production networks to accelerate siphoning of value.<sup>153</sup> As outsourcing and flexible production shrink the regulated formal economy, the informal shadow economy becomes the only hope and source of livelihood for the urban poor. The explosive expansion of the unregulated informal sector, with its particular burdens on women is “a direct function of liberalization.”<sup>154</sup> Over the last twenty years, both the informal economies and the number of slum-dwellers have grown exponentially.<sup>155</sup> In India, as in most of the global South, significant employment growth has resulted from subcontracting at a global scale and the use of casual or

<sup>150</sup> UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 10, at 46, 103–04 (2003). Note here that many working in the informal sector are a hidden workforce of the formal economy. Outsourcing and subcontracting networks enable the value created by the informal sector to be funneled into the profit margins of the formal sector, while any expectation of “upward mobility” in the informal sector remains a “myth inspire by wishful thinking.” JAN BREMAN, *THE LABOURING POOR IN INDIA: PATTERNS OF EXPLOITATION, SUBORDINATION, AND EXCLUSION* 173–74 (2003).

<sup>151</sup> Jan Breman, *Myth of the Global Safety Net*, 59 *NEW LEFT REV.* 29, 29 (2009).

<sup>152</sup> UN-HABITAT, *THE CHALLENGE OF THE SLUMS*, *supra* note 10, at 46. Women make up ninety percent of the workers in Free Trade Zones, notorious for dismal working conditions, low wages, and absence of workers’ rights. *Id.* at 40; WOMEN’S EDGE COALITION, *THE EFFECTS OF TRADE LIBERALIZATION ON JAMAICA’S POOR: AN ANALYSIS OF AGRICULTURE AND SERVICES* 31 (2004). Privatization and erasure of trade barriers led to widespread deindustrialization and decimation of formal-sector jobs that traditionally employed men. This has increasingly forced poor women into unregulated and low-paying informal sector as pieceworkers, vendors, and providers of low-end services. See Caroline O. N. Moser, *Adjustment from Below: Low-Income Women, Time and the Triple Role in Guayaquil, Ecuador*, in *‘VIVA’: WOMEN AND POPULAR PROTEST IN LATIN AMERICA* 173, 180–82 (Sarah A. Radcliffe & Sallie Westwood eds., 1993); Nazneen Kanji, *Gender, Poverty and Economic Adjustment in Harare, Zimbabwe*, 7 *ENV’T & URBANIZATION* 37, 37, 39, 46–48 (1995).

<sup>153</sup> See PETER J. TAYLOR, *WORLD CITY NETWORK: A GLOBAL URBAN ANALYSIS* 60–61 (2004); John Friedmann, *Where We Stand: A Decade of World City Research*, in *WORLD CITIES IN A WORLD-SYSTEM* 21, 21, 33, 41 (Paul L. Knox & Peter J. Taylor eds., 1995); Julie Skurski & Fernando Coronil, *Country and City in a Postcolonial Landscape: Double Discourse and the Geo-Politics of Truth in Latin America*, in *VIEWS BEYOND THE BORDER COUNTRY: RAYMOND WILLIAMS AND CULTURAL POLITICS* 231, 232–33 (Dennis L. Dworkin & Leslie G. Roman eds., 1993).

<sup>154</sup> UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 10, at 40.

<sup>155</sup> *Id.* at 6, 11.

self-employed workers” in the informal sector.<sup>156</sup> By curtailing the already anemic role of the state in housing supply, neoliberal policies have proven to be “an inevitable recipe for the mass production of slums.”<sup>157</sup> Analysts also find that “mega-slums are . . . functional to neoliberal global capitalism and a product not just of its turmoil but of its turmoil as organized by its banking and financial market system.”<sup>158</sup> As the warehouses of workers of the informal sector, mega-slums facilitate “flexible production,” a hallmark of neoliberal global economy.

If accumulation through dispossession—an enduring ontological feature of capitalism—and its byproducts, the reserve army of labor and the informal sector, produce and sustain modern urban slums and slum-dwellers, what accounts for the genesis of the spatial zones of their existence?

## B. Cities of Capital and Liminal Zones

The spatial production of slums is a symbiotic companion of urbanization under capitalism that has followed two models, unplanned and planned growth, with differing measures of overlap. Historically, the unplanned urban growth model unfolded parallel with industrialization and produced spaces where labor and capital came together and goods and services circulated rapidly. The process was far from orderly. The “creative destruction” of capitalism forced rapid relocations of habitation as rural populations moved to emerging centers of extraction, manufacturing, and commerce.<sup>159</sup> As urban centers grew in a *laissez faire* regime, so did slums as the abode of the destitute and the lumpenproletariat—the surplus humanity.<sup>160</sup> Dublin,<sup>161</sup> Manchester,<sup>162</sup> London,<sup>163</sup> and Naples<sup>164</sup> furnished

<sup>156</sup> Patralekha Chatterjee, *Shadow Lives: Urban India's Informal Economy*, 5 HABITAT DEBATE 19, 20 (1999).

<sup>157</sup> UN-HABITAT, THE CHALLENGE OF SLUMS, *supra* note 10, at 11.

<sup>158</sup> Christopher Rude, *The Role of Financial Discipline in Imperial Strategy*, in THE EMPIRE RELOADED 82, 105 n.10 (Leo Panitch & Colin Leys eds., 2004).

<sup>159</sup> SCHUMPETER, *supra* note 145, at 83; Josef Gugler, *Introduction*, in CITIES IN THE DEVELOPING WORLD 109, 109 (1997).

<sup>160</sup> The first published definition of a slum in 1812 held it synonymous with “racket” or “criminal activity.” JACINTA PRUNTY, DUBLIN SLUMS 1800–1925: A STUDY IN URBAN GEOGRAPHY 2 (1998). By late nineteenth century, a slum was characterized as an area of “dirty back streets, especially such streets as are inhabited by a squalid and criminal population.” CARROLL D. WRIGHT, THE SLUMS OF BALTIMORE, CHICAGO, NEW YORK, AND PHILADELPHIA 11–13 (1970). The definition adopted by the United Nations is restricted to the “physical and legal characteristics of the settlement,” and eschews the more difficult-to-measure “social dimensions.” UN-HABITAT, THE CHALLENGE OF SLUMS, *supra* note 10, at 12–13.

<sup>161</sup> See PRUNTY, *supra* note 160.

<sup>162</sup> See STEVEN MARCUS, ENGELS, MANCHESTER, AND THE WORKING CLASS 3, 10–11, 184–85 (1974).

early examples of this model of urban growth and the emergence of slums.

Planned urbanization proves particularly attractive to finance capital because this unavoidably state-sponsored and debt-financed activity gives speculative capital security of accumulation without getting directly involved with the politically volatile terrain of industrial production. The first prototype of planned urban development under capitalism was furnished by the rebuilding of Paris in the 1850s and 1860s under Georges-Eugene Haussmann.<sup>165</sup> As a consequence of state-sponsored urban reconstruction, Paris emerged as a center of commerce and bourgeois life, and its emerging slums were removed from the heart of the city to its outer rim.<sup>166</sup> While Haussmann's designs "transform[ed] the capital city into the city of capital,"<sup>167</sup> they also demonstrated that "the root cause of urban slumming seems to lie not in urban poverty but in urban wealth."<sup>168</sup>

The Haussmann model was replicated in the United States after World War II; first in New York under Robert Moses, and then in most metropolitan areas.<sup>169</sup> While predominantly white middle classes, ensconced in debt-financed suburbia, turned to the pursuit of individual accumulation, protection of property, and so-called family values, the darker under-classes and the marginalized had to contend with removals, blighted inner-city ghettos, and inhuman public housing projects. This phase of finance capital's deployment in urban reordering ended with the property-market crash of 1973, and bankruptcy of New York City in 1975, with global repercussions.<sup>170</sup> The recipe of neoliberalism

<sup>163</sup> GARETH STEDMAN JONES, *OUTCAST LONDON: A STUDY IN THE RELATIONSHIP BETWEEN CLASSES IN VICTORIAN SOCIETY* 209–10 (1971).

<sup>164</sup> FRANK M. SNOWDEN, *NAPLES IN THE TIME OF CHOLERA, 1884–1911* 38–40 (1995).

<sup>165</sup> For a detailed account, see MICHEL CARMONA, *HAUSSMANN: HIS LIFE AND TIMES, AND THE MAKING OF MODERN PARIS* 149, 151–52, 155–56 (2002).

<sup>166</sup> See *id.* at 9, 432–39; DAVID HARVEY, *PARIS, CAPITAL OF MODERNITY* 95–99 (2003).

<sup>167</sup> Derek Gregory, *Introduction: Troubling Geographies*, in DAVID HARVEY: A CRITICAL READER, *supra* note 101, at 13.

<sup>168</sup> VERMA, *supra* note 55, at xix.

<sup>169</sup> See Kenneth T. Jackson, *Robert Moses and the Rise of New York: The Power Broker in Perspective*, in ROBERT MOSES AND THE MODERN CITY: THE TRANSFORMATION OF NEW YORK 67, 70–71 (Hilary Ballon & Kenneth T. Jackson eds., 2007). In the process, the scale and scope of urbanization was transformed by re-engineering not just existing cities but whole metropolitan regions through suburbanization, highway systems, and infrastructural transformations. Finance capital found a new outlet in public and private debt, while urban geography and demography reconfigured class and race divides.

<sup>170</sup> See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 615–16, 618–19, 795, 899–900, 902–04 (1974); Roger E. Alcala & Helen Bodian, *New York's Fiscal Crisis & the Economy*, in *THE FISCAL CRISIS OF AMERICAN CITIES* 30, 30–33 (Roger E. Alcala & David Mermelstein eds., 1977).

emerged, in good measure, in response to this crisis of finance capital.<sup>171</sup>

The reconfigurations of Paris and New York City furnished two alternative models of urban development for the modern city across the global North: the "donut-shaped" American cities, with mostly poor people of color and immigrants "concentrated in derelict cores and inner-city," and "European 'saucer' cities, with immigrant and unemployed populations marooned in high-rise housing on urban outskirts."<sup>172</sup> In the global South, urban growth has been a hybrid of both these models, turning urban real estate into a high-profit sector "where political corruption, capitalist development, and international finance [intersect]."<sup>173</sup> Concentration of real-estate ownership and slum growth are the dominant result.<sup>174</sup> In this progression, "[t]he word 'infrastructure' is the new code word for the unceremonious clearance of the fragile shelters of the poor."<sup>175</sup> As a result, fringes of mega-cities in the global South are "marked by unrelenting cycles of settlement, eviction, and resettlement."<sup>176</sup> Counterintuitive as it may be, the poor in most mega-cities of the global South have come to dread high-profile international events like conferences, festivals, and visits by dignitaries, as the attendant "clean-up" and "beautification" drives target slums and slum-dwellers.<sup>177</sup> Hiding poverty behind Potemkin-like facades tends to graduate into sustained policy.<sup>178</sup> Given these machinations, "[t]o date,

<sup>171</sup> See WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS* 120, 122–24 (1982); Lapavistas, *supra* note 125, at 30–33.

<sup>172</sup> DAVIS, *PLANET OF SLUMS*, *supra* note 39, at 31.

<sup>173</sup> Caglar Keyder, *The Housing Market from Informal to Global*, in ISTANBUL: BETWEEN THE GLOBAL AND THE LOCAL 143, 153 (Caglar Keyder ed., 1999).

<sup>174</sup> For example, in sixteen Southeast Asian cities fifty-three percent of the land is owned by the top five percent of landowners. HANS-DIETER EVERS & RÜDIGER KORFF, *SOUTHEAST ASIAN URBANISM: THE MEANING AND POWER OF SOCIAL SPACE* 180 (2000). In India, three-quarters of urban space is owned by "6% of urban households," and ninety-one people control the majority of all vacant land in Mumbai. ROBERT-JAN BAKEN & JAN VAN DER LINDEN, *LAND DELIVERY FOR LOW INCOME GROUPS IN THIRD WORLD CITIES* 13 (1992). For the drain on national savings, see KWADWO KONADU-AGYEMANG, *THE POLITICAL ECONOMY OF HOUSING AND URBAN DEVELOPMENT IN AFRICA: GHANA'S EXPERIENCE FROM COLONIAL TIMES TO 1998* 120–23 (2001); JEFFREY A. NEDOROSCIK, *CITY OF THE DEAD: A HISTORY OF CAIRO'S CEMETERY COMMUNITIES* 42 (1997).

<sup>175</sup> JEREMY SEABROOK, *IN THE CITIES OF THE SOUTH: SCENES FROM A DEVELOPING WORLD* 267 (1996).

<sup>176</sup> Ananya Roy, *The Gentleman's City: Urban Informality in the Calcutta of New Communism*, in *URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA* 147, 159 (Ananya Roy & Nezar AlSayyad eds., 2004) [hereinafter *URBAN INFORMALITY*].

<sup>177</sup> See BEN OMIYI, *THE CITY OF LAGOS: TEN SHORT ESSAYS* 48 (1995); Erhard Berner, *Poverty Alleviation and the Eviction of the Poorest*, 24 *INT'L J. URB. & REG'L RES.* 557, 559 (2000).

<sup>178</sup> See ANN-MARIE BROUDEHOUS, *THE MAKING AND SELLING OF POST-MAO BEIJING* 162 (2004); MONIQUE SKIDMORE, *KARAOKE FASCISM: BURMA AND THE POLITICS OF FEAR* 84–85, 159–60 (2004).

states have been far more effective in the destruction of mass housing than in its construction.”<sup>179</sup>

Parallel with the neoliberal reordering of global production and accumulation, cities are becoming a primary arena of the convergence between the domains of economy and culture.<sup>180</sup> Accordingly, a confluence of reconfiguration of urban space and commodification of symbolic forms is underway.<sup>181</sup> A remarkable feature of post-Fordist production systems is the increasing significance of production and consumption of cultural products.<sup>182</sup> In the new economic geography of capital accumulation, Fordist mass production is increasingly moved to low wage areas, usually away from urban centers, both globally and nationally.<sup>183</sup> As a result, the city becomes exclusively a zone of the service and consumption economy, and urban space itself turns into a cultural commodity to be consumed along market principles.<sup>184</sup> Skills suitable for the service sector and/or the capacity to consume what this space has to offer become the only grounds for eligibility to be in the city. Deindustrialization and flight of the ineligible often leave in their wake “dead zones” that become “developers’ utopias” or “privatopias.”<sup>185</sup> The ineligible who choose to stay back are eventually confined to the informal economy and deprived of secure shelter. The commodification of urban space, with culture and aesthetics at a premium, disciplines the ineligible and the dispossessed through a range of legal and architectural measures. These include “secure architecture,” “zero tolerance policing,” and “preemptive crime control,” in the neoliberal “post-justice” city.<sup>186</sup>

<sup>179</sup> Berner, *Learning from Informal Markets*, *supra* note 38, at 295.

<sup>180</sup> For transformative impacts of neoliberal globalization on urban spaces around the world, see Swapna Banerjee-Guha, *Introduction*, in ACCUMULATION BY DISPOSSESSION: TRANSFORMATIVE CITIES IN THE NEW GLOBAL ORDER 1, 1–5 (Swapna Banerjee-Guha ed., 2010) [hereinafter ACCUMULATION BY DISPOSSESSION]; William Sites, *Primitive Globalization? State and Locale in Neoliberal Global Engagement*, 18 SOC. THEORY 121, 128 (2000).

<sup>181</sup> For a thoughtful survey, see generally Allen J. Scott, *Capitalism, Cities, and the Production of Symbolic Forms*, 26 TRANSACTIONS OF THE INST. BRIT. GEOGRAPHERS 11 (2001), available at <http://onlinelibrary.wiley.com/doi/10.1111/1475-5661.00003/abstract>.

<sup>182</sup> *Id.* at 16.

<sup>183</sup> Douglas S. Massey, *Social Structure, Household Strategies, and the Cumulative Causation of Migration*, 56 POPULATION INDEX 3, 14–17 (1990), available at <http://www.jstor.org/stable/3644185>.

<sup>184</sup> See generally Timothy A. Gibson, *Selling City Living: Urban Branding Campaigns, Class Power and the Civic Good*, 8 INT’L J. CULTURAL STUD. 259 (2005).

<sup>185</sup> Gordon MacLeod et al., *Negotiating the Contemporary City: Introduction*, 40 URB. STUD. 1655, 1656 (2003) (citation omitted). See also Henry W. McGee, Jr., *Seattle’s Central District, 1990–2006: Integration of Displacement?*, 39 URB. LAW. 167, 169–71 (2007).

<sup>186</sup> See Don Mitchell, *Postmodern Geographical Praxis? The Postmodern Impulse and the War Against Homeless People in the ‘Post-justice’ City*, in POSTMODERN GEOGRAPHY: THEORY AND PRACTICE 57, 77, 82 (Claudio Minca ed., 2001); Don Mitchell, *The Annihilation*

In the midst of all of this, urban groups do manage to contrive cultural, economic, and political “spaces of escape,” or “counter spaces.”<sup>187</sup> Farmers markets, alternative lifestyle enclaves, and the “underground economy” are some examples of this phenomenon that engender “new identities and practices that disturb established histories.”<sup>188</sup> The resistive mode of these counter spaces can and does take overt political forms as demonstrated by the anti-WTO protests in Seattle in 1999, and replicated in many major cities around the world.<sup>189</sup> This phenomenon is of particular significance for policy and engagement options related to slums and slum dwellers.

Having laid out a theoretical framework of the historical evolution of urban slums, we turn to the issue of slums and slum-dwellers in India.

### III. SLUMS, COLONIALISM, AND POSTCOLONIALITY

#### A. The Colonial Legacy

The roots of urban slums in the global South go back to colonial policies aimed at reconfiguring existing cities, or establishing new ones, in forms suitable for assertion of control and incorporation of selected sections of the native society into administrative and productive ensembles sutured with the economies of empire.<sup>190</sup> In India, British colonial designs

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of *Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 305–06, 316–17 (1997); Jamie Peck, *Geography and Public Policy: Mapping the Penal State*, 27 PROGRESS HUM. GEOGRAPHY 222, 225, 228 (2003) (citation omitted); MacLeod et al., *supra* note 185, at 1665.

<sup>187</sup> MacLeod, et al., *supra* note 185, at 1657.

<sup>188</sup> James Holston, *Spaces of Insurgent Citizenship* (1995), reprinted in MAKING THE INVISIBLE VISIBLE: A MULTICULTURAL PLANNING HISTORY 37, 48 (Leonie Sandercock ed., 1998). See also SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 17 (2006); Regina Austin, “An Honest Living”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2120–23 (1994). See generally Regina Austin, “A Nation of Thieves”: *Securing Black People’s Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (1994).

<sup>189</sup> See, e.g., NAOMI KLEIN, NO LOGO: NO SPACE, NO CHOICE, NO JOBS (10th ed., 2009); GLOBALIZATION AND THE POLITICS OF RESISTANCE 3 (Barry K. Gills ed., 2000); DAVID FEATHERSTONE, RESISTANCE, SPACE AND POLITICAL IDENTITIES: THE MAKING OF COUNTER–GLOBAL NETWORKS 2, 121 (2008).

<sup>190</sup> For fruitful engagements with the question, see Ronald J. Horvath, *In Search of a Theory of Urbanization: Notes on the Colonial City*, 5 E. LAKES GEOGRAPHER 69, 75 (1969); ANTHONY D. KING, COLONIAL URBAN DEVELOPMENT: CULTURE, SOCIAL POWER, AND ENVIRONMENT 281–84 (1976); ANTHONY D. KING, URBANISM, COLONIALISM, AND THE WORLD-ECONOMY: CULTURAL AND SPATIAL FOUNDATIONS OF THE WORLD URBAN SYSTEM (1990); JAN MORRIS, STONES OF EMPIRE: THE BUILDINGS OF BRITISH INDIA 62–71 (1994). It is useful to note here that ancient cities of India dating 2500 B.C., particularly those in the Indus Valley, show detailed and functional urban planning including elaborate sanitation systems. See VINCENT A. SMITH, THE OXFORD HISTORY OF INDIA 28–32 (Percival Spear ed., 3rd ed. 1958).

reconfigured selected urban areas to serve these ends.<sup>191</sup> A defining feature of the designed colonial cities was the spatial divide between the centers of gravity of colonial presence and the native quarters. Zoning and institutionalized governance whose jurisdiction is coextensive with the territory of the city, the hallmarks of a modern city, were but rarely extended to the native quarters.<sup>192</sup> Natives not recruited into colonial security, administrative, and commercial regimes, remained at or beyond the spatial and social margins of reconfigured urban areas.<sup>193</sup> Colonizers' fears of racial contamination, dilution of imagined tribal and ethnic divides, and the threat of anti-colonial solidarities resulted in restrictions on urban land ownership, pass laws, vagrancy ordinances, criminalization of urban migration, and racially zoned areas.<sup>194</sup> When vigorously enforced encroachment laws targeted squatting and street vending, municipal authorities removed so-called "plague spots" from better residential and commercial areas, thereby enforcing restrictive zoning around areas where the colonizers and gradually enfranchised native elites lived.<sup>195</sup> A policy of neglect toward even minimal water and sanitation needs of native neighborhoods graduated into a *de facto* housing policy of reliance on local elites who built overcrowded and unsanitary, but highly profitable, tenements that still house a bulk of urban dwellers.<sup>196</sup> For the story of Dharavi, it is important to note that Mumbai, historically a coastal fishing village, emerged as an urban center under colonial rule; a development rooted in the colonial control of opium production and trade.<sup>197</sup> The new city was carefully segregated to separate colonial masters, the native

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<sup>191</sup> See generally MARIAM DOSSAL, *IMPERIAL DESIGNS AND INDIAN REALITIES: THE PLANNING OF BOMBAY CITY, 1845–1875* (1991); WILLIAM J. GLOVER, *MAKING LAHORE MODERN: CONSTRUCTING AND IMAGINING A COLONIAL CITY* (2008); NARAYANI GUPTA, *DELHI BETWEEN TWO EMPIRES, 1830–1931* (1981); YASMIN LARI & MIHAIL S. LARI, *THE DUAL CITY: KARACHI DURING THE RAJ* 58 (1996).

<sup>192</sup> LARI & LARI, *supra* note 191, at 60–68 (1996).

<sup>193</sup> KING, *supra* note 190, at 37–39.

<sup>194</sup> See, e.g., Swati Chattopadhyay, *Blurring Boundaries: The Limits of "White Town" in Colonial Calcutta*, 59 J. SOC'Y ARCHITECTURAL HISTORIANS 154, 157, 172–73 (2000); Narayani Gupta, *Military Security and Urban Development: A Case Study of Delhi 1857–1912*, 5 MOD. ASIAN STUD. 61, 64–66 (1971); A. J. Christopher, *Urban Segregation Levels in the British Overseas Empire and Its Successors, in the Twentieth Century*, 17 TRANSACTIONS INST. BRIT. GEOGRAPHERS 95, 95–102 (1992).

<sup>195</sup> See NANDINI GOOPTU, *THE POLITICS OF THE URBAN POOR IN EARLY TWENTIETH-CENTURY INDIA* 74, 82–88 (2001).

<sup>196</sup> See *id.* at 91–102.

<sup>197</sup> See AMAR FAROOQUI, *OPIUM CITY: THE MAKING OF EARLY VICTORIAN BOMBAY* xi–xiii (2006).

rich and emerging middle classes, and the dispossessed natives.<sup>198</sup>

#### B. Postcolonial Developmental State

After decolonization in the global South, postcolonial elites inherited and often reinforced the physical footprints and exclusionary geographies of segregated colonial cities.<sup>199</sup> They became the custodians of the colonial designs of urban exclusion and social divides, and rushed to embrace trickle-down development models that were ubiquitous in the 1950s and 1960s, whereby “the poor were denied a place in civic life and urban culture, and were seen as an impediment to progress and betterment of society.”<sup>200</sup> Postcolonial growth of slums in India was first triggered by the greatest mass migration in recorded history following the partition of colonial India, which drove millions into urban slums of India.<sup>201</sup> The slum-based refugees quickly became dependent on corrupt political party machines, and slum growth became notoriously synchronized with election cycles.<sup>202</sup> Subsequently, the fate of the slums reflected different development models put in place and cycles of growth and stagnation.

In India, as elsewhere, economic development entails reallocation of resources and is thus a “conflictual process.”<sup>203</sup> The critical role of the state in allocating and channeling resources sets the parameters of political economy.<sup>204</sup> In India, the national capitalists, the rich farmers, and the bureaucracy, instituted a “one-party democracy” under the umbrella of the Congress Party,<sup>205</sup> and claimed the moral high ground of national

<sup>198</sup> Navtej Nainan, *Building Boomers and Fragmentation of Space in Mumbai*, 45 ECON. & POL. WKLY. 29, 29–32 (2008).

<sup>199</sup> A study of the slums of Mumbai finds that “the inequalities that defined Bombay as a colonial port town have continued. Investment is always available to beautify the already well-endowed parts of the city. But there is no money to provide even basic services to the poorer areas.” SHARMA, *supra* note 37, at 8.

<sup>200</sup> GOOPTU, *supra* note 195, at 421.

<sup>201</sup> Over seventeen million migrated as a result of the partition. Mumbai’s population that had grown at less than two percent in the last decades of colonial rule, doubled in less than ten years after partition. Sujata Patel, *Bombay’s Urban Predicament*, in BOMBAY: METAPHOR FOR MODERN INDIA XIII, XVI (Sujata Patel & Alice Thorner eds., 1995). See also OSKAR VERKAAIK, MIGRANTS AND MILITANTS: FUN AND URBAN VIOLENCE IN PAKISTAN 1–2 (2004).

<sup>202</sup> BAKEN & VAN DER LINDEN, *supra* note 174, at 30–31.

<sup>203</sup> MATTHEW MCCARTNEY, INDIA—THE POLITICAL ECONOMY OF GROWTH, STAGNATION AND THE STATE, 1951–2007 5 (2009). See also ATUL KOHLI, DEMOCRACY AND DISCONTENT: INDIA’S GROWING CRISIS OF GOVERNABILITY 25–26 (1990); BOB ROWTHORN, CAPITALISM, CONFLICT AND INFLATION: ESSAYS IN POLITICAL ECONOMY 148 (1980).

<sup>204</sup> MCCARTNEY, *supra* note 203, at 22–23.

<sup>205</sup> STANLEY A. KOCHNANEK, THE CONGRESS PARTY OF INDIA: THE DYNAMICS OF ONE-PARTY DEMOCRACY 319–39 (1968).



interest, modernity, equity, justice, and efficiency.<sup>206</sup> Central planning and an industrial policy designed by a statistician, Prasanta Chandra Mahalanobis, aimed at rapid industrialization through import-substitution, and state control of heavy industry, banking, and infrastructure.<sup>207</sup> The prime object was “to contain class conflict within manageable dimensions, [and] to control and manipulate the many dispersed power relations in society to further as best as possible the thrust towards accumulation.”<sup>208</sup> The Nehruvite consensus sutured development with welfare. Poverty-alleviation was projected as the central concern of the state; indeed, its *raison d’être*.<sup>209</sup> A permanent bureaucracy, the inherited “steel frame” of colonial rule, was deployed to lead this project.<sup>210</sup>

This was the phase when the development model of modernization by diffusion enjoyed hegemony.<sup>211</sup> Even though

<sup>206</sup> For details, see Sudipta Kaviraj, *A Critique of the Passive Revolution*, 23 *ECON. & POL. WKLY.* 2429, 2431–36 (1988); PRANAB BARDHAN, *THE POLITICAL ECONOMY OF DEVELOPMENT IN INDIA* 33–34 (1984); ACHIN VANAIK, *THE PAINFUL TRANSITION: BOURGEOIS DEMOCRACY IN INDIA* 3 (1990); LOYD I. RUDOLPH & SUSANNE HOEBER, RUDOLPH, *IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE* 127–29 (1987).

<sup>207</sup> C. P. Chandrasekhar, *Aspects of Growth and Structural Change in Indian Industry*, in *INDUSTRIAL GROWTH AND STAGNATION: THE DEBATE IN INDIA* 318, 322–23 (Deepak Nayyar ed., 1994); M. Bronfenbrenner, *A Simplified Mahalanobis Development Model*, 9 *ECON. DEV. & CULTURAL CHANGE* 45, 45–46 (1960).

<sup>208</sup> PARTHA CHATTERJEE, *Development Planning and the Indian State*, in *STATE AND POLITICS IN INDIA* 270, 290 (1997).

<sup>209</sup> The Indian Constitution enshrined the national project of a welfare state charged with the protection of a wide array of political, social, and economic rights. Attention to the basic needs of the poor, even when deficient on account of limited resources, helped to create a political alliance between the governing elites and the poor among the predominantly rural population. This made for “one-party democracy” and uninterrupted governance by the Congress Party for over twenty-five years with the help of an inherited colonial bureaucratic frame. RUDOLPH & RUDOLPH, *supra* note 206, at 130–32. The political alliance broke down as the development model collapsed in the 1970s. *Id.* See also BARDHAN, *supra* note 206, at 38–39.; VANAIK, *supra* note 206, at 62–63; RAJNI KOTHARI, *STATE AGAINST DEMOCRACY: IN SEARCH OF HUMANE GOVERNANCE* 23–25, 74 (1988); O.P. DWIVEDI & R. B. JAIN, *INDIA’S ADMINISTRATIVE STATE* 215–16 (1985); B. B. MISRA, *GOVERNMENT AND BUREAUCRACY IN INDIA 1947–1976* 37–38 (1986).

<sup>210</sup> RUDOLPH & RUDOLPH, *supra* note 206, at 2–3.

<sup>211</sup> Viewing societies through the binary lens of modern/traditional, this model prescribed diffusion of modern technologies, laws, and ways of life as the panacea for underdevelopment. The resulting economic policies, crafted under the watchful eyes of experts from the global North, focused on growth of leading sectors of the economy whose trickle-down effect was supposed to, in time, take care of lagging sectors and poverty. The capacity for effective control rather than representative nature of the state was deemed the yardstick of an appropriate political order. See W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* 26–28 (1962); BRUCE HERRICK & CHARLES P. KINDLEBERGER, *ECONOMIC DEVELOPMENT* 68 (1983). For critiques of this model, see SAMIR AMIN, *UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM* 10 (Brian Pearce trans., 1976) (1973); SUSAN J. BODENHEIMER, *THE IDEOLOGY OF DEVELOPMENTALISM: THE AMERICAN PARADIGM—SURROGATE FOR LATIN AMERICAN STUDIES* 24–25 (1971); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 83–85

tempered by nationalism and a commitment to a “mixed-economy,” the result was a bloated state apparatus presiding over top-down economic growth in concert with international aid agencies.<sup>212</sup> The pervasive nationalist promises of the 1950s and 1960s to rebuild slums and create new housing faltered quickly, parallel with the early demise of plans to create an autonomous economy resistant to global economic pressures.<sup>213</sup> While mega-projects like hydroelectric dams, atomic energy, and heavy industry thrived, education, health, and housing needs of the poor and the marginalized got short shrift.<sup>214</sup> Often this development model led directly to the swelling of the ranks of the urban poor. For example, over fifty-six million, mostly “the poorest of the poor,” have been displaced in India by large hydroelectric dams.<sup>215</sup> By the late 1970s, any lingering faith in the development through state-led growth was shattered by poor growth rates, only marginal decline in poverty, and barely appreciable improvements in the quality of life.<sup>216</sup> As the nationalist development project derailed and took down with it the Nehruvite consensus, populist adjustments were attempted. *Gharibi hatao* (eliminate poverty), the slogan fashioned by Indira Gandhi in 1975 as a rationale for declaring Emergency, was an acknowledgement that benefits of development and growth had not “trickled down” and that poverty needed to be tackled through specific, dedicated programs.<sup>217</sup> Indira Gandhi’s Emergency symbolized “the definitive demise of the Nehruvian project . . . [and] the terminal crisis of the Nehruvian state.”<sup>218</sup>

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(1995). This model of development was an extension of colonial designs of social development. See VINAY GIDWANI, *CAPITAL, INTERRUPTED: AGRARIAN DEVELOPMENT AND THE POLITICS OF WORK IN INDIA* 84 (2008). It was in this context that the “law and development” project emerged as part of the ensemble of prescribed legal designs far removed from the culture, practices and material needs of the vast populations of the global South. See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 7–9 (1980); Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 7 *GLOBAL JURIST* 1, 1–3 (2007). See generally Issa G. Shivji, *Law’s Empire and Empire’s Lawlessness: Beyond Anglo-American Law*, 1 *SOC. JUST. & GLOBAL DEV. J.* (2003).

<sup>212</sup> GIDWANI, *supra* note 211, at 84.

<sup>213</sup> See GEORGE ROSEN, *WESTERN ECONOMISTS AND EASTERN SOCIETIES: AGENTS OF CHANGE IN SOUTH ASIA 1950–1970* 15, 227 (1985).

<sup>214</sup> See ROBERT-JAN BAKEN, *PLOTTING, SQUATTING, PUBLIC PURPOSE AND POLITICS: LAND MARKET DEVELOPMENT, LOW INCOME HOUSING AND PUBLIC INTERVENTION IN INDIA* 56–59, 305–10 (2003).

<sup>215</sup> AMITAVA KUMAR, *BOMBAY, LONDON, NEW YORK* 52 (2002).

<sup>216</sup> See Surendra J. Patel, *Goals of Planning in the Seventies: A Note*, 6 *ECON. & POL. WKLY.* 1565, 1567–68 (1971).

<sup>217</sup> See James P. Grant, *Development: The End of Trickle Down?*, 12 *FOREIGN POL’Y* 43, 43–44 (1973), available at <http://www.jstor.org/stable/1148094>; Vijay Prashad, *Emergency Assessments*, 24 *SOC. SCIENTIST* 36, 38, 53 (1996).

<sup>218</sup> Ajaz Ahmad, *Debating the Current Conjuncture*, in *CONTESTED TRANSFORMATIONS*, *supra* note 35, at 34, 43–45.

However, declining growth rates, escalating fiscal crisis of the state, and fragmentation of the legitimacy of political elites ruled out the implementation of refurbished welfare policies.

As the development project faltered in India, as elsewhere in the global South, the World Bank started to question the accumulation- and growth-centric approaches to development and turned toward alleviation of poverty as a goal distinct from growth.<sup>219</sup> Funding patterns were recalibrated to target agriculture, education, infrastructure, and low-cost housing.<sup>220</sup> In the new approach, the developmental state was to address poverty by direct intervention.<sup>221</sup> Kalyan Sanyal argues that as a result there emerged “governmentalization” of the state in India—management of the social body through direct intervention of the state in terms of rationally-designed efficient technologies of administration aimed at promoting the welfare of society.<sup>222</sup> This was combined with the rise of “entitlements”—a relation connecting one set of ownership to another through certain rules of legitimacy.<sup>223</sup> In the sixth Five Year Plan of 1980, “a number of poverty eradication measures were introduced.”<sup>224</sup> They proved easier to design than to implement. Sanyal claims that the blows of primitive accumulation were softened during this period by the emergence of “welfarist governmentality.”<sup>225</sup> He acknowledges, however, the exponential growth of the informal sector and the fact that formal and informal economies “are locked in an asymmetric relation . . . of dominance and subordination,” which leaves the “need economy”

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<sup>219</sup> See ROBERT L. AYRES, *BANKING ON THE POOR: THE WORLD BANK AND WORLD POVERTY* 1 (1983).

<sup>220</sup> See *id.* The new approach

posed some serious challenges to the prevalent Bank ideology. The result was a somewhat ambiguous pastiche of concepts and approaches. . . . The result . . . was a rather tenuous gluing together of some markedly divergent approaches. Poverty-oriented emphasis sometimes seemed to have been pasted on the prevalent ideology, without, however, altering its fundamental slant.

*Id.* at 75.

<sup>221</sup> SANYAL, *supra* note 77, at 170.

<sup>222</sup> *Id.* at 170–73. Sanyal’s claim is that “in a simultaneous process, the dispossessed are rehabilitated through the ‘pastoral functions’ of international organizations and the development state, [and that] governmentality is actively engaged in forming a need-economy be reversing the process of dispossession.” *Id.* at 220.

<sup>223</sup> *Id.* at 178. Sanyal deploys Amartya Sen’s notions of entitlement that “refer to a set of alternative commodity bundles that a person can command in a society using the totality of rights and opportunities.” AMARTYA SEN, *RESOURCES, VALUES AND DEVELOPMENT* 497 (1984).

<sup>224</sup> SUKHAMOY CHAKRAVARTY, *DEVELOPMENT PLANNING: THE INDIAN EXPERIENCE* 36 (1987).

<sup>225</sup> SANYAL, *supra* note 77, at 221.

subordinate to the “accumulation-economy.”<sup>226</sup> In his rush to apply the Foucauldian construct to conditions of post-coloniality,<sup>227</sup> Sanyal elides the fact that at this stage the “one-party democracy” had disintegrated, and that the collapse of the developmentalist state combined with a backlash against proposed aggressive affirmative action had produced a revolt by the middle classes and religious fundamentalism in India.<sup>228</sup> The reordering of political power and deepening fiscal crisis of the state precluded any sustained attack on poverty. None of this was good news for the swelling ranks of the urban poor and their housing needs.

In India, as the postcolonial state entrenched itself, state largess focused on housing members of bureaucracies, the military, and the emerging professional class, while lip-service was paid to the needs of the marginalized.<sup>229</sup> In the 1970s, for example, public authorities promised the urban poor new homes and jobs in a modern twin-city opposite the Mumbai peninsula.<sup>230</sup> However, while local residents of the new site were displaced, the bulk of new housing went to civil servants and professionals.<sup>231</sup> A perceptive commentary noted:

Ultimately, the grand conception of urban transformation was whittled down and domesticated to meet the immediate interests of the propertied classes. Instead of unfolding as idealistic projects of social regeneration, the town planning schemes evolved as avenues to further the interests and aspirations of the propertied and the instrument of the growing marginalization of the poor. The war against slums came dangerously close to being a battle to control the settlement and habitation of the poor, and indeed an offensive against the poor themselves.<sup>232</sup>

<sup>226</sup> *Id.* at 220–21.

<sup>227</sup> See MICHEL FOUCAULT, *Governmentality*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 87–104 (Graham Burchell et al. eds., 1991).

<sup>228</sup> MANDAL COMMISSION, RESERVATION FOR BACKWARD CLASSES: MANDAL COMMISSION REPORT OF THE BACKWARD CLASSES COMMISSION 255 (1980) (recommending that the quota for “Scheduled Castes and Tribes” and “Other Backward Classes” in public employment and universities be increased from 27% to 49.5%). Steps toward implementation of these recommendations triggered a backlash. See NEVEDITA MENON & ADITYA NIGAM, POWER AND CONTESTATION: INDIA SINCE 1989 15–16 (2007); Jeemol Unni, *Contours of Conflict and Coalition: Rise of the Intermediate Classes and Castes*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 257; Pradip Kumar Datta, *Hindutva and the Re-Formation of the Indian Middle-Class Subject*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 270–71.

<sup>229</sup> DAVIS, PLANET OF SLUMS, *supra* note 39, at 66.

<sup>230</sup> *Id.* at 65–66.

<sup>231</sup> *Id.*; JACQUEMIN, *supra* note 29, at 196–97 (indicating that the development of the New Bombay area led to the loss of land, jobs, and incomes to the majority of local residents, which explained why the new housing went to civil servants and professionals).

<sup>232</sup> GOOPTU, *supra* note 195, at 84.

### C. The Neoliberal Reordering

In this general context, India took a turn to neoliberal restructuring in the early 1990s, ushering in an era of “liberalisation-privatisation-globalisation,”<sup>233</sup> marking “a fundamental transformation of India’s economic strategy.”<sup>234</sup> It was envisaged that the economy “would be transformed in its basic orientation in a matter of a few years.”<sup>235</sup> This entailed rapidly instituted deregulation, privatization, curtailment of food subsidies, cost recovery of public services, and liberalization of trade.<sup>236</sup> Indian markets were opened up to an influx of capital, goods, and services. Foreign capital investment soared, as did the stock market and the real estate market. High, though doubtful, growth rates, based largely on performance of the service sector were sustained.<sup>237</sup> A thorough empirical study finds that these rates of growth are not associated with liberalization of the domestic economy and international trade, but are a case of sustained growth that began a decade earlier.<sup>238</sup> This presents “an important counterexample to the dominant orthodoxy.”<sup>239</sup> In addition, accelerated remittances by skilled and unskilled labor buoyed foreign exchange reserves.

With the neoliberal turn in public policies, corporate capital assumed political and moral sway over the social formation. This hegemony was deployed to influence governmental decisions “not through electoral mobilisation of political parties and movements but largely through the bureaucratic-managerial class, the increasingly influential print and visual media, and the judiciary and other independent regulatory bodies.”<sup>240</sup> The bureaucratic-managerial class now stands subordinated to corporate capital.<sup>241</sup> The latter is now in a position to set the terms of the political field to which other social groups are constrained to respond.

<sup>233</sup> Mary E. John & Satish Deshpande, *Theorising the Present: Problems and Possibilities*, 43 ECON. & POL. WKLY. 83, 84 (2008). See also Kamal Nayan Kabra, *Indian Planning and Liberalisation*, 31 ECON. & POL. WKLY. 2740, 2740–41 (1996); Kuldeep Mathur, *Neo-liberal Agenda and Study of Institutions*, 1 REV. OF DEV. & CHANGE 167, 175 (1996).

<sup>234</sup> Ashutosh Varshney, *Mass Politics or Elite Politics? India’s Economic Reforms in Comparative Perspective*, in *INDIA IN THE ERA OF ECONOMIC REFORMS* 222, 230 (Jeffrey D. Sachs et al. eds., 1999).

<sup>235</sup> Jeffrey Sachs et al., *Introduction*, in *INDIA IN THE ERA OF ECONOMIC REFORMS*, *supra* note 234, at 1, 13.

<sup>236</sup> *Id.* at 13–16.

<sup>237</sup> Prabhat Patnaik, *The Meaning of Contemporary Globalization*, in *CONTESTED TRANSFORMATIONS*, *supra* note 35, at 7.

<sup>238</sup> MCCARTNEY, *supra* note 203, at 236.

<sup>239</sup> *Id.* at 235.

<sup>240</sup> Partha Chatterjee, *Democracy and Economic Transformation in India*, 43 ECON. & POL. WKLY. 53, 57 (2008).

<sup>241</sup> *Id.* at 57–58.

The well-heeled took the position that “our second independence had arrived: we were going to be free from a rapacious and domineering state.”<sup>242</sup> The market emerged as the new messiah, and the welfare and development state went into a decisive retreat. Macroeconomic policy became obsessed with the specter of fiscal deficits.<sup>243</sup> The question of poverty and the poor went through a fundamental reframing. Any expressions of the state’s concern for the poor under the “current versions are clearly framed in minimalist and palliative terms . . . politically dictated afterthoughts forced on to the agenda by electoral compulsions.”<sup>244</sup>

During the same time, the number of paupers in the country increased by fifty-six million, and between 1991 and 1994 the deregulated price for food grain grew by fifty-eight percent.<sup>245</sup> Real wages of the poorest quintile in Delhi fell for the first time since 1947.<sup>246</sup> The assigned reasons are the increased cost and increased use of privatized services, reduced access to subsidized food supplies, and a simultaneous shift away from formal sector waged work to self-employment and casual labor in the informal sector.<sup>247</sup> The impact on slum-dwellers has been particularly acute.<sup>248</sup> In Bangalore, the storied capital of the neoliberal high-tech boom, slums grew twice as fast as the general population with an estimated two million poor squatting in one thousand filthy slums, and the city’s periphery became “the dumping ground for those urban residents whose labour is wanted in the urban economy, but whose visual presence should be reduced as much as possible.”<sup>249</sup> Urban dwellers are not the only “beneficiaries” of the neo-liberal “Shining India.” Between 1997 and 2007, as WTO-mandated agricultural policies took root, 182,936 Indian farmers committed suicide; growing debt burden

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<sup>242</sup> GURCHARAN DAS, *INDIA UNBOUND: FROM INDEPENDENCE TO THE GLOBAL INFORMATION AGE* xi (2002).

<sup>243</sup> The high watermark of this obsession was the Fiscal Responsibility and Budget Management Act of 2003, which binds the government to reduce the revenue deficit to zero by 2009–2010. Mihir Shah, *Structures of Power in Indian Society: A Response*, 43 *ECON. & POL. WKLY.* 78, 80 (2008).

<sup>244</sup> John & Deshpande, *supra* note 233.

<sup>245</sup> DAVIS, *PLANET OF SLUMS*, *supra* note 39, at 171; SEABROOK, *supra* note 175, at 46.

<sup>246</sup> Gautam Bhan, “*This Is No Longer the City I Once Knew*”: *Evictions, the Urban Poor and the Right to the City in Millennial Delhi*, 21 *ENV’T & URBANIZATION* 127, 136 (2009).

<sup>247</sup> *Id.*

<sup>248</sup> See generally KALYANI MENON-SEN & GAUTAM BHAN, *SWEPT OFF THE MAP: SURVIVING EVICTION AND RESETTLEMENT IN DELHI* (2008); A. Iyer and Gita Sen, *Health Sector Changes and Health Equity in the 1990s in India*, in *HEALTH AND EQUITY: TECHNICAL REPORT SERIES* (2000). See also Minar Pimple & Madhuri Kamat, *Struggle for People’s Housing*, 59 *INDIAN J. SOCIAL WORK* 357, 358–59 (1999).

<sup>249</sup> Schenk-Sandberg, *supra* note 46, at 131.

and the switch to cash-crops are cited as the primary reasons.<sup>250</sup> In 2007, the Planning Commission candidly admitted that WTO “compulsions” had induced removal of tariffs and subsidies for the agriculture sector resulting in a “major crisis” in the 1990s.<sup>251</sup> Indeed, Bertolt Brecht had observed accurately that “famines do not simply occur; they are organised by the grain trade.”<sup>252</sup>

How does neoliberalism gain legitimacy in the face of its track record? This is accomplished through “infiltration of market logic into politics,”<sup>253</sup> and the deployment of “an economic logic in defining, evaluating, and protecting certain categories of subjects and not others.”<sup>254</sup> In this transition, the neoliberal project is framed as “government of free individuals who are then induced to self-manage according to market principles of discipline, efficiency, and competitiveness.”<sup>255</sup> Neoliberalism is about “*self-responsibilization*.”<sup>256</sup> Responsibilities and capacities of the states, save perhaps for war and internal security, are shrunk. Historic popular expectations from the state are folded. Self-contained individuals, now “freed” from the state, are to take *responsibility* to provide for themselves, optimize their participation in the “free” market, and not look to the state for any assistance or protection.<sup>257</sup> For the wealthy, this may lead to more wealth and consumption, but for the poor this just adds another burden, the burden of responsibility, without any change in their capacity to shoulder it. Inequality is naturalized, and the differentiated opportunities of life that come with it are deemed an inevitable part of the “free” market.

How do the Indian ruling elites square the heralded economic miracle with increased vulnerability of the vulnerable? How does neoliberalism displace historical commitments and expectations of a caring and patrimonial state, particularly when

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<sup>250</sup> P. Sainath, *Neo-Liberal Terrorism in India: The Largest Wave of Suicides in History*, COUNTERPUNCH (Feb. 12, 2009), <http://www.counterpunch.org/sainath02122009.html>.

<sup>251</sup> In the 1990s, the rate of growth fell below the rate of population growth for the first time since the 1960s. Shah, *supra* note 243, at 80. The rate of growth of dryland crops that were grown and consumed by the poorest sections of the population dropped below zero. *Id.*

<sup>252</sup> Susan Marks, *Introduction*, in INTERNATIONAL LAW ON THE LEFT, *supra* note 135, at 1, 13. See also AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 78–81 (1983); MIKE DAVIS, LATE VICTORIAN HOLOCAUSTS: EL NIÑO FAMINES AND THE MAKING OF THE THIRD WORLD 26–27(2001).

<sup>253</sup> AIHWA ONG, NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY 6 (2006).

<sup>254</sup> *Id.* at 16.

<sup>255</sup> *Id.* at 4.

<sup>256</sup> See NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 45 (1999).

<sup>257</sup> *Id.* at 142.

these stand enshrined in the Constitution? This is accomplished by reconfiguring the social contract between the state and the subject, by reconstituting the grounds of eligibility for full citizenship, by redrawing expectations of collective responsibility, and by changing the composition of the political power-bloc. In India, as in many other places, over the last two decades corporate capital has secured dominance of the ruling power-bloc.<sup>258</sup> Representing the interests of elites and professionals of the formal economy, the reconfigured power-bloc now holds moral-political hegemony—“the capitalist class ... has ... acquired a position to set the terms to which other political formations can only respond.”<sup>259</sup> To achieve such domination and hegemony in India, a polity that is a representative democracy and has a historical political alliance between the poor and the nationalist elite, required recalibration of the democratic process.

This recalibration entailed turning electoral representative democracy into a “free market democracy.” For example, between two and ten billion dollars were spent in the 2009 general election in India, ninety percent of independent candidates lost, and the ruling coalition won a resounding mandate to continue on the path of neoliberalism by securing thirty-seven percent of the votes cast which work out to 10.3% of the country’s population.<sup>260</sup> Elections in India have been turned into “heavily-sponsored, TV-friendly spectator sports ... [whereby] an electorate has been turned into a market, voters are seen as consumers, and democracy is being welded to the free market. Ergo: those who cannot consume do not matter.”<sup>261</sup> In line with exhortations of neoliberalism, governance was increasingly turned into a matter of administration rather than politics, with a government that is run by technocrats rather than political representatives. At play here is the production of a distinction between the concept of citizens and that of populations. While the concept of citizen carried the notion of participating in sovereignty of the state, now the population is supposed to be a passive target of policies designed and implemented by government functionaries. As part of this process, an ideological reconstruction of poverty and inequality

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<sup>258</sup> See PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* 136–44 (2004).

<sup>259</sup> Partha Chatterjee, *Democracy and Economic Transformation in India*, *supra* note 240, at 61.

<sup>260</sup> ARUNDHATI ROY, *FIELD NOTES ON DEMOCRACY: LISTENING TO GRASSHOPPERS* 14–15 (2009).

<sup>261</sup> *Id.* at 17. For a case study of political marketing in the 1989 parliamentary election in India, see DILIP M. SARWATE, *POLITICAL MARKETING: THE INDIAN EXPERIENCE* 110–201 (1990).



unfolded that furnishes the ethical grounds for the disavowal of the rights of the poor. The Indian judiciary played a critical role in this enterprise.

#### IV. "CITIZENS" TO "ENCROACHERS": PUBLIC INTEREST AND THE INDIAN JUDICIARY

##### A. Slums, Citizens, and Human Rights

The record of the Indian judiciary regarding slums and housing needs of the urban poor is a checkered one. It demonstrates that the law is a historical force that has both emancipatory and oppressive potential.<sup>262</sup> Judges play their role in cultivating the hegemony of the dominant social forces by "creating a social conformism which is useful to the ruling group's line of development."<sup>263</sup> Judges help the law become an effective social force by cementing society and economy together and binding subordinate groups to the will of the dominant. They emerge as "organic intellectuals" by constructing social domination as an articulation of the public interest or common sense.<sup>264</sup>

During the nationalist development phase, slum-dwellers, squatters, and other marginalized groups had some expectation of state protection. These expectations were grounded in an amalgamation of claims based on needs, rights of citizenship, and a recognition of the value of their participation in the economy—expectations endorsed by stated public policy and pronouncements of the courts.<sup>265</sup> For a brief period, the courts tempered the violence of evictions and demolitions, ever-present dangers for slum-dwellers, by requiring adequate resettlement

<sup>262</sup> This is best captured by Gramsci who postulates the immanent unity of material and ideational conditions. Law is seen here as operating dialectically, both coercively as the arm of the state and consensually within civil society, "turning necessity and coercion into 'freedom.'" ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 242 (Quintin Hoare & Geoffrey Nowell Smith trans. & eds., 1971). For a detailed treatment of Gramsci's conception of the "double face of the law," see Maureen Cain, *Gramsci, the State and the Place of Law*, in LEGALITY, IDEOLOGY AND THE STATE 95, 98 (David Sugerman ed., 1983). For the tension between "determinate" and "responsive" impulses of modern law, see PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 70–71 (2001).

<sup>263</sup> A. Claire Cutler, *Gramsci, Law, and the Culture of Global Capitalism*, 8 CRITICAL REV. INT'L SOC. & POL. PHIL. 527, 527 (2005).

<sup>264</sup> See CHANTAL MOUFFE, *Hegemony and Ideology in Gramsci*, in GRAMSCI AND MARXIST THEORY 168, 187 (1979).

<sup>265</sup> Holston terms the grounds of such expectations of the state a "hybrid of special treatment rights, contributor rights, and text based rights." JAMES HOLSTON, INSURGENT CITIZENSHIP 253 (2008). For a detailed analysis of such expectations and their recognition, see MENON & NIGAM, *supra* note 228, at 74; PARTHA CHATTERJEE, THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD 135–37 (2004).

schemes.<sup>266</sup> The neoliberal turn triggered a rupture, leading to a redefinition of poverty and the rights of the poor. Over the last two decades Indian courts have cast aside any considerations of humane treatment and adequate resettlement of squatters and have adopted a discourse of the illegality of slums and squatting.<sup>267</sup> The link between public interest, urban development, and housing for the poor has been reconstituted by the erasure of any public responsibility for housing the urban poor.

In the landmark *Pavement Dwellers Case* (1985), the Supreme Court of India located the right to shelter within the ensemble of fundamental rights while allowing the state to clear streets and other urban spaces in the interest of order.<sup>268</sup> It held that “no person has a right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear-marked for a public purpose.”<sup>269</sup> However, it also recognized that the loss of “the pavement or the slum is to lose the job,” and because the right to livelihood is an important facet of the right to life, “the eviction of the [pavement dwellers] will lead to deprivation of their livelihood and consequently to the deprivation of life.”<sup>270</sup> Significantly, the Court argued that the urban poor do not “claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honorable.”<sup>271</sup> The Court also noted that it was the failure of the state to implement master plans for cities that had caused the problem in the first place.<sup>272</sup> The Court approved removals on the grounds that there was no absolute prohibition on the deprivation of life or liberty as long as the procedure established by law was followed.<sup>273</sup> However, it articulated empathy for slum and pavement dwellers, and a desire to minimize the harm in the process of relocation.<sup>274</sup> It instructed the government to provide alternative settlement sites for slums that had existed for twenty years or more, and

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<sup>266</sup> MENON & NIGAM, *supra* note 228, at 74–80.

<sup>267</sup> *Id.* at 75–80.

<sup>268</sup> *Olga Tellis v. Bombay Mun.*, (1985) 1 S.C.C. 545 (India). This case along with most of the other cases discussed in this section involving eviction, demolition, and resettlement, concerned Delhi, the capital of India. For detailed empirical data on the subject, see generally MENON-SEN & BHAN, *supra* note 248.

<sup>269</sup> *Olga Tellis v. Bombay Mun.*, (1985) 1 S.C.C. 545 (India).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

reminded the government of the plans for slum upgrading and low-income housing.<sup>275</sup>

In another decision, announced on the same day as the *Pavement Dweller's Case*, the Supreme Court mandated that alternative housing must be provided before evictions can take place, accepted a governmental assurance that "steps are being taken for the purpose of improving the slums and wherever they cannot be improved, alternative accommodation is provided to the slum-dwellers" and expressed confidence that "the government will continue to evince the same dynamic interest in the welfare of the pavement dwellers and slum-dwellers."<sup>276</sup> In 1990, the Supreme Court went a step further to state that "reasonable residence is an indispensable necessity" for human development and the fulfillment of the "right to life."<sup>277</sup> In 1996, the Court argued that the "right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter," and held that Article 21 of the Indian Constitution held within its ambit the right to shelter in order to make the right to life more meaningful.<sup>278</sup> The Court read the constitution in the light of all civil, political, social, and cultural rights enshrined in the Universal Declaration of Human Rights to hold that "[s]helter for a human being . . . is not a mere protection of his life and limb. It is a home where he has opportunities to grow physically, mentally, intellectually and spiritually."<sup>279</sup> In 1997, the Court defined human rights to include everyone's "right to a standard of living adequate for the health and wellbeing of himself and his family; it includes food, clothing, housing, medical care and necessary social services."<sup>280</sup> It held that the right to life is not confined to physical existence but includes the right to live with human dignity.<sup>281</sup> Other decisions continued to push the frontiers of fundamental rights to include, for example, the right to education,<sup>282</sup> the right to health and medical care,<sup>283</sup> and

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<sup>275</sup> *Olga Tellis v. Bombay Mun.*, (1985) 1 S.C.C. 545 (India).

<sup>276</sup> *K. Chandru v. State of Tamil Nadu*, (1985) 3 S.C.C. 536 (India), available at <http://www.judis.nic.in/supremecourt/citation1.aspx>.

<sup>277</sup> *Shantistar Builders v. Narayan Khimalal Gotame*, A.I.R. 1990 S.C. 630, 634 (India).

<sup>278</sup> *Chameli Singh v. State of Uttar Pradesh*, A.I.R. 1996 S.C. 1051, 1053 (India).

<sup>279</sup> *Id.*

<sup>280</sup> *Ahmedabad Municipal Corp. v. Nawab Khan Gulab Khan*, A.I.R. 1997 S.C. 152, 158 (India).

<sup>281</sup> *Id.* See generally *Maneka Gandhi v. Union of India*, A.I.R. 1981 S.C. 746 (India).

<sup>282</sup> *Mohini Jain v. State of Karnataka*, A.I.R. 1992 S.C. 1858, 1864–92 (India). See also *J. P. Unni Krishnan v. State of Andhra Pradesh*, A.I.R. 1993 S.C. 2178 (India), available at <http://www.Indiankanoon.org/doc/1775396/>.

<sup>283</sup> *Consumer Educ. & Research Ctr. v. Union of India*, A.I.R. 1995 S.C. 940 (India).

[t]he right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.<sup>284</sup>

Slum-dwellers and the marginalized had secured these protections during the boom years of public interest litigation (PIL) in India.<sup>285</sup> This device initially emerged as a vehicle to protect legal rights of a “person or determinate class of persons [who] by reason of poverty, helplessness or disability or social or economic disadvantaged position [are] unable to reach the court for relief.”<sup>286</sup> Dubbed “judicial activism,” and even “judicial excessivism,” PIL entailed dilution of the rules of standing, expansion of epistolary jurisdiction, and relaxation of adversarial procedural devices to provide access to those who by virtue of their “socially or economically disadvantaged position are unable to approach the court[s] for relief.”<sup>287</sup> PIL opened the door for anyone to approach the highest courts in matters of public interest to “espouse the cause of the poor and oppressed (representative standing) and those wishing to enforce performance of public duties (citizen standing).”<sup>288</sup> The Supreme Court of India saw itself as the “last resort for the oppressed and bewildered,”<sup>289</sup> assuming the mantle of a “Supreme Court for

<sup>284</sup> Francis Coralie Mullin v. Adm’r, Union of Territory of Delhi, A.I.R. 1981 S.C. 746, 753 (India).

<sup>285</sup> See generally Jamie Cassel, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 497 (1989); HANS DEMBOWSKI, *TAKING THE STATE TO COURT: PUBLIC INTEREST LITIGATION AND THE PUBLIC SPHERE IN METROPOLITAN INDIA* 58 (2001); SAMPAT JAIN, *PUBLIC INTEREST LITIGATION* 12 (2002); Jill Cottrell, *Courts and Accountability: Public Interest Litigation in the Indian High Courts*, 1992 THIRD WORLD LEGAL STUD. 199, 199–200 (1992).

<sup>286</sup> S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 (India), available at <http://indiankanoon.org/doc/1294854>. It should be noted that the PIL phase was ushered in only after the Indian judiciary yielded on its previously inflexible protection of private property rights and the blocking of important socio-economic legislations including amendments to the Constitution. It was only in 1973 that the Indian Supreme Court recognized that a constitution “is an organic document which must grow and must take stock of the vast socioeconomic problems.” *Bharati v. Kerala*, A.I.R. 1973 S.C. 1461 (India), available at <http://indiankanoon.org/dc/1294854>.

<sup>287</sup> S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149 (India), available at <http://indiankanoon.org/doc/1294854>. In this case, Justice Bhagwati elaborated the frameworks for “representative standing,” and “citizen standing.” *Id.* For further details, see S. P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 215 (2003); S. P. Sathe, *The Unfinished Agenda: The Constitution at the Crossroads*, 42 J. INDIAN L. INST. 171, 186 (2000).

<sup>288</sup> Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENV’T L. 93, 293 n.4 (2007).

<sup>289</sup> *Id.*

India.”<sup>290</sup> PIL emerged precisely at the moment of the collapse of the nationalist development project.

Progressive PIL decisions by the courts brought major changes in, among other things, the state of urban life. These actions included removal and relocation of large urban industries to outside city limits,<sup>291</sup> the conversion of all public transport and private commercial transport to the use of compressed natural gas,<sup>292</sup> ridding the River Ganges of effluents,<sup>293</sup> and removal of garbage from the cities.<sup>294</sup> The courts’ involvement extended into oversight of implementation of their directives.<sup>295</sup> Encouraged by judicial pronouncements, in 1990, the Indian Law Commission recommended a new law to give statutory basis to a right of slum-dwellers to resettlement, preceding destruction of their homes.<sup>296</sup> No such law was ever enacted. Similarly, an attempt to amend the Constitution to make the right to housing a fundamental right failed. Neoliberalism had arrived to change not only the rules of the game, but the game itself.

#### B. Encroachers in the Showcase City

PIL may well have stayed on its path, had not the global rules of the game changed so markedly with the neoliberal turn. In its new iteration, PIL was used by the courts to assume the role of policy maker and policy enforcer with the backing of the urban professional-managerial classes, who, under the spell of ideologies of corporate capital, have turned away from the state as the primary orchestrator of change. The judiciary, the non-political branch of government, became an instrumentality to depoliticize political questions of distribution, equity, access, and opportunity.

As neoliberal deregulation of the economy, down-sizing of the public sector, and “free market” ideologies became entrenched, the courts took a dramatic turn. Judicial activism in the interest

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<sup>290</sup> Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geography of [In]justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156, 157 (S. K. Verma, Kusum & A.S. Anand eds., 2000) (emphasis added).

<sup>291</sup> M. C. Mehta v. Union of India, Petition No. 13381 (*Taj Trapenzium Case* 1984).

<sup>292</sup> M. C. Mehta v. Union of India, Petition No. 13029 (*Dehli Vehicular Pollution Case* 1985).

<sup>293</sup> M. C. Mehta v. Union of India, Writ Petition No. 3727 (*Ganges Pollution Case* 1985).

<sup>294</sup> Almitra Patel v. Union of India, Writ Petition No. 888 (*Garbage Removal Case* 1996).

<sup>295</sup> See Rajamani, *supra* note 288, at 315. In this regard, the courts were not only the arbiters of law and justice, but also functioned as parallel administrative and executive bodies in matters of urban affairs.

<sup>296</sup> LAW COMMISSION OF INDIA, ONE HUNDRED THIRTY-EIGHTH REPORT ON LEGISLATIVE PROTECTION FOR SLUM AND PAVEMENT DWELLERS 26 (1990).

of the marginalized, seen as “chemotherapy for the carcinogenic body politic,”<sup>297</sup> quickly turned lethal. With the neoliberal turn, the pace of evictions and demolitions of extra-legal settlements accelerated dramatically.<sup>298</sup> Significantly, these eviction and demolitions were not mandated by any public planning directive or state action. Rather, they were ordered by the courts in response to PIL actions initiated by trade and non-poor resident welfare associations. In a dramatic switch, PIL, a weapon designed for the marginalized, was now wielded by the privileged.<sup>299</sup> The privileged could use PIL because questions at hand, on their surface, involved use of public lands and did not implicate the protection of privately held property or the violation of any individual right.<sup>300</sup> Evictions and demolitions were sought in public interest in urban solid waste management and the enforcement of urban master plans.<sup>301</sup> Indian courts now turned PIL into a tool to monitor and direct the exercise of state power in tune with the neoliberal schema; the “free market” was to address the substantive interests of the poor and the marginalized.<sup>302</sup> By a reconstruction of “public interest,” a process of “dispossession by law”<sup>303</sup> at the service of accumulation by dispossession<sup>304</sup> was set in motion. An analyst summarized the trend:

There was a time when courts would provide relief from the harsh and arbitrary actions of the executive reflected, in say the grant [of] stay of demolition of slums on the grounds of the lack of a rehabilitation plan

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<sup>297</sup> Upendra Baxi, *Preface*, in JUDICIAL ACTIVISM IN INDIA ix, xvi (S. P. Sathe ed., 2d ed. 2002).

<sup>298</sup> For example, in Delhi, while between 1990–2003, 51,461 dwellings were demolished under “slum clearance schemes,” between 2004 and 2007, more than 45,000 dwellings were demolished. Bhan, *supra* note 246, at 128. Less than twenty-five percent of those evicted in the latter period received alternative resettlement sites. *Id.*

<sup>299</sup> Analysts view the “clique” of public interest litigators and petitioners who filed hundreds of PIL petitions covering almost every aspect of collective life, as being “public spirited” and as bringing “a distinct view based on particular sensibilities.” Rajamani, *supra* note 288, at 305–06.

<sup>300</sup> It has been rightly observed that after the neoliberal turn, the Indian courts “emerge[d] as the standard bearers of a whole new transformation of common sense. . . . [seeking] to reduce democracy, rather, to redefine it, as a set of abstract rules sans politics and people.” MENON AND NIGAM, *supra* note 228, at 13.

<sup>301</sup> *Okhla Factory Owners’ v. Gov’t of Nat’l Capital Territory of Delhi*, CWP No. 4441/1994 (Nov. 29, 2002), available at <http://indiankanoon.org/doc/>; *Pitampura Sudhar Samitii v. Gov’t of Nat’l Capital Territory of Delhi*, CWP 4215/1995 (Nov. 29, 2002), available at <http://indiankanoon.org/doc/1927946>; Bhan, *supra* note 246, at 134.

<sup>302</sup> See Radha D’Souza, *The ‘Third World’ and Socio-legal Studies: Neo-Liberalism and Lessons from India’s Legal Innovations*, 14 SOC. & LEGAL STUD. 487, 504–06 (2005).

<sup>303</sup> MENON & NIGAM, *supra* note 228, at 69.

<sup>304</sup> See *supra* notes 79–107 and accompanying text.

or the hardship of monsoons or school examinations. Today, demolitions of slums are being directed on the orders of the courts.<sup>305</sup>

How did the courts accomplish this sharp turn in a very short span of time? This was accomplished by deploying the whole array of neoliberal values, priorities, and prescriptions related to urban policy. Having mandated resettlement and alternate housing for those evicted in earlier decisions, when again faced with the question the Supreme Court articulated a newfound interest in fiscal responsibility of the state, and linked it with implied irresponsibility of the urban poor.<sup>306</sup> In 1993, the Supreme Court expressed a concern that “the public exchequer has to be burdened with *crores* [tens of millions] of rupees for providing alternative accommodation to [those] who are trespassers on public land,” and directed that where resettlement was done, the resettled should not be given new land on leasehold, but on license.<sup>307</sup> The short rope of a revocable license would keep the “irresponsible” disciplined and controlled.

The next step was to braid fiscal responsibility with a desire for a clean city, and graduate the “irresponsibility” of the poor into criminality. In 1996, the Supreme Court ordered that hazardous industries be moved outside the city limits and that cities be cleaned up.<sup>308</sup> The Delhi High Court was quick to fall in line and ordered eviction of all squatters in Delhi because it “is a *show window to the world of our culture, heritage, traditions and way of life. It cannot be allowed to degenerate and decay.*”<sup>309</sup> The Supreme Court picked up the pace in 2000, bemoaning that while Delhi was a “*showcase of the country,*” yet “no effective initiative of any kind” had been taken for “*cleaning up the city.*”<sup>310</sup> The Court characterized slums as “large areas of public land . . . *usurped for private use free of cost,*” and a plan to provide the free land for resettlement was rejected as “a proposal which attracts more *land grabbers*. Rewarding an *encroacher* on public land with an *alternative free site is like giving a reward to a pickpocket.*”<sup>311</sup> Giving garbage priority over the destitute, the

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<sup>305</sup> Rakesh Shukla, *Rights of the Poor: An Overview of Supreme Court*, ECO. & POL. WKLY. 3755, 3757 (2006).

<sup>306</sup> See Usha Ramanathan, *Illegality and the Urban Poor*, 41 ECO. & POL. WKLY. 3193, 3194 (2006).

<sup>307</sup> *Id.*

<sup>308</sup> M.C. Mehta v. Union of India, (1996) 4 S.C.C. 750, available at <http://www.nlsenlaw.org>; B.L. Wadhwa v. Union of India, (1996) 2 S.C.C. 594 (India), available at <http://www.ielrc.org/content/e960.pdf>.

<sup>309</sup> Samitii, CWP 4215/1995, at 128 (emphasis added).

<sup>310</sup> Almitra Patel v. Union of India, (2000) 2 S.C.C. 679, 684–85 (India) (emphasis added).

<sup>311</sup> *Id.* (emphasis added). The Delhi High Court endorsed this language: “*One cannot but use the expression as stated in the said [Almitra] judgment.*” Wazirpur Barton

Court, while castigating provision of adequate housing for the poor, mandated that public land be provided free of cost for garbage disposal.<sup>312</sup> In holding slums responsible for the solid waste problem, the Court completely ignored the fact that per capita solid waste generation in Delhi runs along class lines.<sup>313</sup> For good measure, the Court retreated from the supervisory role in urban affairs that it had aggressively assumed in the earlier phase.<sup>314</sup> The solid waste management rules adopted in response to the Court’s direction, while providing opportunities for private companies and incinerators, dealt a blow to the related informal sector.<sup>315</sup> In Delhi there are an estimated one million waste pickers, of which ninety-four percent belong to “backward and

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Normata Sangh v. Union of India, MANU/DE/2140/2002 C.W. 2112 of 2002, Order dated Nov. 29, 2002. The Supreme Court articulated the rationale:

Establishment or creating of slums, it seems, appears to be good business and is well organized. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land owning agencies and/or the municipal authorities. The promise of free land, at the taxpayers cost, in place of a *jhuggi* [shack], is a proposal which attracts more land grabbers . . . The department of slum clearance does not seem to have cleared any slums despite its being in existence for decades. In fact more and more slums are coming into existence. Instead of “Slum Clearance” there is “Slum Creation” in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. The authorities must realize that there is a limit to which the population of a city can be increased, without enlarging its size. In other words the density of population per square kilometer cannot be allowed to increase beyond the sustainable limit. Creation of slums resulting in increase in density has to be prevented. What the slum clearance department has to show, however, does not seem to be visible. It is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority.

*Almitra Patel*, 2 S.C.C. at 3–4 (emphasis added).

<sup>312</sup> *Patel v. Union of India*, A.I.R. 2000 S.C. 1256, 1260–61 (India).

<sup>313</sup> Per capita solid waste generation in Delhi is 420 grams for the high income group, 240 grams for middle income groups, 150 grams for lower middle income group, and 80 grams for those in slums and shacks. Rajamani, *supra* note 288, at 302. See also *Patel v. Union of India*, A.I.R. 2000 S.C. 1256, 1259 (India).

<sup>314</sup> The Court took the position that:

We believe it is not for this Court to direct as to how the municipal authorities should carry out their functions and resolve difficulties in regard to the management of solid waste. The Court, in fact, is ill-equipped to do so. Without doubt the governmental agencies including the local authorities have all the powers of the State to take action and ensure that the city remains clean. They only have to wake up and act.

*Patel v. Union of India*, A.I.R. 2000 S.C. 1629, 1633 (India).

<sup>315</sup> C.P. Jomit, *The Impact of Privatization of Solid Waste Collection and Transportation in Delhi: The Impact on the Informal Recycling Sector*, ARTICLESBASE, June 24, 2009, <http://www.articlesbase.com/education-articles/the-impact-of-privatization-of-solid-waste-collection-and-transportation-in-delhi-the-impact-on-the-informal-recycling-sector-990546.htm>.



tribal castes,” and an estimated fifty thousand are children.<sup>316</sup> The livelihoods of these workers, who provide “an *unacknowledged subsidy* to the waste producer, the consumer goods and packaging industry, and the legal waste owner—the municipal body”<sup>317</sup>—was severely impacted. In tune with the rapidly unfolding, “decisive embourgeoisement of the Indian city,”<sup>318</sup> a gentrified city, one that was pleasing to the eye with no garbage or slum-dwellers in sight, now stood as the judicially endorsed image of urban development.

Having removed “pickpockets,” the Supreme Court now put some content in the “show window to the world of our culture, heritage, traditions and way of life.”<sup>319</sup> It condoned the construction of the Akshardham religious theme park in Delhi on the Yamuna River floodplain that encroached on an area designated in the city’s master plan as an ecological zone.<sup>320</sup> In 2009, the Court cited this decision while approving the construction of Commonwealth Games Village adjacent to the Akshardham Temple, which the Delhi High Court had found “would affect ecological integrity of the ‘riverbed’ besides causing irreversible damage to the ‘flood plain.’”<sup>321</sup> Coincidentally, fire “broke out” in the slums adjoining the construction site gutting seven shanty clusters,<sup>322</sup> further clearing the grounds to facilitate global solidarity through the sports festival.

Responsibilities of the state and fundamental rights brought to light only a few years ago remained to be dealt with. In 2002, the Delhi High Court struck down a resettlement policy for squatters, and directed that they be removed expeditiously and that no alternative sites needed to be provided for removal of

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<sup>316</sup> RAVI AGARWAL ET AL., *RECYCLING RESPONSIBILITY: TRADITIONAL SYSTEMS AND NEW CHALLENGES OF URBAN SOLID WASTE IN INDIA* 35–37 (2002); Rajamani, *supra* note 288, at 306.

<sup>317</sup> AGARWAL ET AL., *supra* note 316, at 35.

<sup>318</sup> John & Deshpande, *supra* note 233, at 84.

<sup>319</sup> Almitra Patel v. Union of India, (2000) 226 S.C.C. 679, slip op. at 1632 (India), available at [www.elaw.org/system/files/JDESA-Part-4.doc](http://www.elaw.org/system/files/JDESA-Part-4.doc); Pitam Pura Sudhar Samiti v. Union of India & Ors., CWP 4215/1995, slip op. at 4 (India 2002), available at <http://indiankanoon.org/doc/842898/>.

<sup>320</sup> Charu Soni, *Killing Delhi's Lifeline*, TEHELKA, Sept. 9, 2010, [http://www.tehelka.com/story\\_main18.asp?filename=Cr081906Killing\\_Delhi.asp](http://www.tehelka.com/story_main18.asp?filename=Cr081906Killing_Delhi.asp); Sanjay Srivastava, *Urban Spaces, Disney-Divinity and Moral Middle Classes in Delhi*, 44 ECON. & POL. WKLY. 338, 338–39 (2009).

<sup>321</sup> D.D.A. v. Rajendra Singh & Ors., 161 D.L.T. 330, slip op. at 2 (India 2009), <http://www.nlsenlaw.org/water/case-laws/supreme-court/appellants-d-d-a-vs-respondent-rajendra-singh-and-ors-decided-on-30-07-2009-1/>; *No Bar on Games Work, Orders Supreme Court*, THE HINDU, July 31, 2009, available at <http://www.thehindu.com/2009/07/31/stories/2009073157570100.htm>.

<sup>322</sup> *Fire in Delhi Slum near Commonwealth Games Village*, HINDUSTAN TIMES, Jan. 9, 2010, available at <http://www.hindustantimes.com/StoryPage/Print/495495.aspx>.

those squatting on public land.<sup>323</sup> While recognizing the “duty of the Government authorities to provide shelter to the under-privileged,” it argued that the failure to do so does not mean that the state should be required to take up an “arbitrary system of providing alternative sites and land to encroachers on public land.”<sup>324</sup> The judicially recognized fundamental right to adequate housing evaporated into thin air. Now the Court told squatters facing imminent removal: “[I]f you are occupying illegal land, *you have no legal right, what to talk of fundamental right*, to stay there a minute longer.”<sup>325</sup> The specter of anarchy and breakdown of order was raised to deny any relief to squatters: “If encroachments on public land are to be allowed, *there will be anarchy*.”<sup>326</sup>

To guard against the specter of anarchy, the courts started to cast a shadow on citizenship rights of the urban poor and slum-dwellers. Two classes of citizens emerged—those rightfully entitled to protections of the law, and those who had surrendered such rights on account of being poor. Now courts distinguished between slum-dwellers who were designated “unscrupulous citizens,” and the “honest citizens who have to pay for land or a flat.”<sup>327</sup> And, of course, finance capital and developers were to be given a complete run of the field. In 2006, the Delhi High Court, while refusing to stop slum-demolitions without any alternative site for resettlement, argued that the land had “*other uses that cannot be denied*,” and expressed the frustration that the more extra-legal settlers are removed, the “*more they come*.”<sup>328</sup> Deploying a discourse of epidemics and pathology to characterize squatters and slum-dwellers, the Court argued that “their” numbers were “*growing and growing*,” and hence urgent steps must be taken to “*deal with the problem*.”<sup>329</sup> The ultimate prescription was rather simple: “*If they cannot afford to live in Delhi, let them not come to Delhi*.”<sup>330</sup>

Then there are those who can “afford” it all and merit deference by the law and the courts. In the middle of demolition and clean-up drives, the Supreme Court allowed the construction of a shopping mall, which was being built illegally, to continue.<sup>331</sup>

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<sup>323</sup> Okla. Factory Owners’ Ass’n v. Gov’t of Nat’l Capital Territory of Delhi & Ors., 108 D.L.T. 517, slip op. at 13 (India 2002), <http://www.indiankanoon.org/doc/1143856/>.

<sup>324</sup> *Id.* at 11.

<sup>325</sup> Ramanathan, *supra* note 306, at 3197 (emphasis added).

<sup>326</sup> *Id.* (emphasis added).

<sup>327</sup> Bhan, *supra* note 246, at 135 (emphasis added).

<sup>328</sup> *Id.* (emphasis added).

<sup>329</sup> *Id.* (emphasis added).

<sup>330</sup> *Id.* (emphasis added).

<sup>331</sup> ROY, *supra* note 260, at 134.

The rationale for disparate treatment of corporate capital was articulated:

Had such parties inkling of an idea that such clearances were not obtained by DDA [the builders], they would not have invested such *huge sums of money*. The stand that wherever constructions have been made unauthorizedly [sic] demolition is the only option cannot apply to the present cases . . . [especially] when they . . . are *corporate bodies and institutions and the question of their having indulged in any malpractices in getting the approval or sanction does not arise*.<sup>332</sup>

The Supreme Court also used the “huge sums of money” rationale in the *Vedanta Group Case*, where bauxite mining operations in Niyamgiri, Orissa, an environmentally fragile area home to indigenous tribal groups, were approved despite multiple irregularities and strong objections of residents of the area.<sup>333</sup>

Emboldened by this judicial posture, the Delhi Laws (Special Provisions) Act 2006 was adopted, which provides for demolition of unauthorized structures, “whether in pursuance of Court orders or otherwise.”<sup>334</sup> This Act gave license for the removal of slums where “clearance of land is required for specific public projects,” and “the Central Government may, from time to time, issue such directions to the local authorities as it may deem fit, for giving effect to the provisions of this Act and it shall be the duty of the local authorities to comply with such directions.”<sup>335</sup> The end result of judicial, legislative, and executive actions is increased “segregation of economic classes” in Delhi.<sup>336</sup> A “development pornography”<sup>337</sup> has flourished where slum-dwellers and squatters are held responsible for “pressure on civic amenities, crime, social imbalances, economic exploitation,

<sup>332</sup> *Id.* (quoting the Writ Petition Against Vasant Junj Mall, Oct. 17, 2006, judgment of Justices Arijit Pasayat and S. H. Kpadia) (emphasis added). This pattern led to the observation that “it is members of the so-called civil society who break laws with impunity and who demand that the rules be waived for them, whereas members of political society strive to become legal, to gain recognition and entitlements from the state.” Amita Baviskar & Nandini Sundar, *Democracy versus Economic Transformation?*, 43 *ECON. & POL. WKLY.* 87, 88 (2008).

<sup>333</sup> Rahul Choudhary, *Environmental Clearance: A Farce Played by MoEF—The Vedanta Case*, *RADICAL NOTES JOURNAL*, Sept. 24, 2007, available at <http://radicalnotes.com/journal/2007/09/24/the-vedanta-case/>.

<sup>334</sup> The Delhi Laws (Special Provisions Act, 2006 (No. 22 of 2006)), available at <http://www.delhi.gov.in/DoIT/Finance/PDF/Acts%20and%20Rules/specialprovisionalAct.pdf>. See also Ramanathan, *supra* note 306, at 3197.

<sup>335</sup> The Delhi Laws (Special Provisions Act, 2006 (No. 22 of 2006)), available at <http://www.delhi.gov.in/DoIT/Finance/PDF/Acts%20and%20Rules/specialprovisionalAct.pdf>. See also Ramanathan, *supra* note 305, at 3197.

<sup>336</sup> Nikhil Joseph & Pascal Goodman, *On the Outskirts of Legality: Policy and Legal Aspects of Slum Resettlement in Delhi* 19 (2008) (unpublished working paper) (on file with the Centre for Civil Society), available at <http://ssrn.com/abstract=1325962>.

<sup>337</sup> Rotimi Sankore, *Behind the Image: Poverty and “Development Pornography”*, *PAMBAZUKA NEWS* (Apr. 21, 2005), <http://www.pambazuka.org/en/category/features/27815>.

unplanned growth, deterioration of city beautification, culture, environmental setback to city development in a planned manner etc.”<sup>338</sup> Abdication of public responsibility for housing today stands enshrined in the Delhi Master Plan 2021, which envisages private developers catering to the housing needs of the “urban poor and the economically weaker sections in the form of houses of two rooms or less.”<sup>339</sup> The turn from a welfare state to coercive facilitator of capital accumulation stands completed.<sup>340</sup> Slums and slum-dwellers were left at the turn, with profound implications for the place and role of the law.

The neoliberal transition did not only shape judicial philosophy of the Indian high courts regarding the questions of poverty and shelter, it also appears to have compromised the integrity of the judges. This is put into sharp relief by the still-unfolding corruption and conflict of interest scandal that erupted in 2007, and centered on Y. K. Sabharwal, Chief Justice of the Indian Supreme Court from 2000–2007.<sup>341</sup> Chief Justice Sabharwal took the lead role in the Supreme Court’s denial to

<sup>338</sup> Joseph & Goodman, *supra* note 336, at 13 (quoting *Detailed Project Report: Construction of Four Storied E.W.S. Housing for Slum Dwellers at Savdha Ghevara Phase III under INNURM*, Slum and JJ Department, Municipal Corporation of Delhi (Jan. 2008)).

<sup>339</sup> *Id.* at 19 (quoting *Master Plan for Delhi with the perspective for the year 2021*, Ministry of Urban Development (February 2007)).

<sup>340</sup> Evictions, removals, and demolitions of the housing and livelihood of the urban poor were not the only areas that were impacted by this judicial turn. In the area of workers’ rights, during the progressive PIL phase, the courts had set up principles of “equal pay for equal work,” “regularization of contract workers performing work of a permanent nature,” and “[r]einstatement with back wages.” *Randhir Singh v. Union of India*, A.I.R. 1982 S.C. 879 (India); *Shukla*, *supra* note 305, at 3757. With the neoliberal turn, the courts diluted the “equal pay” and “regularization” rules and adopted a posture of non-interference in cases of harsh and disproportionate punishments like dismissal of employees for minor infractions. *State of N.C.T. of Delhi v. Sanjeev*, A.I.R. 2005 S.C. 2080, 2084–87 (India); *D. P. S. Rural Regl Bank v. Munna Lal Jain*, A.I.R. 2005 S.C. 584, 589 (India). Concerns of irreparable environmental harm and dislocation of indigenous tribal communities were pushed to the side as the court approved the construction of a mega-dam as part of the largest river valley project in India. *Narmada Bachao Andholan v. Union of India & Ors.*, A.I.R. 2000 S.C. 3751, 3752–55, 3782 (India). “The dam is neither a nuclear establishment nor a polluting industry . . . [I]t will not be correct to presume that the construction of a large dam like Sardar Sarovar will result in ecological disaster.” *Id.* at 3753. As for the displacement of tribal communities, the court took the position that at the rehabilitation sites “there will be better facilities than in the tribal hamlets,” and the tribal communities will be “gradually assimilated in the mainstream of society.” *MENON & NIGAM*, *supra* note 228, at 74. In the *Networking of Rivers Case*, the Supreme Court used Public Interest Litigation to intervene in inter-state and federation-state relations, and tilted the balance of power in favor of the central government while brushing aside environmental and federalism concerns. *D’Souza*, *supra* note 302, at 488, 506.

<sup>341</sup> Sanjay Dubey, *Office for Profit: A Stink You Should Smell*, TEHELKA, Aug. 18, 2007, available at [http://www.tehelka.com/story\\_main33.asp?filename=Ne180807Officefor.asp](http://www.tehelka.com/story_main33.asp?filename=Ne180807Officefor.asp); Former Chief Justice of India Y.K. Sabharwal—Biography, <http://www.supremecourtfindia.nic.in/judges/bio/yks.htm> (last visited Sept. 18, 2010).

provide any relief against demolition and sealing of thousands of “illegal” commercial units operating in areas reserved for residential use by Delhi’s city plans.<sup>342</sup> The sealing impacted thousands of peoples’ lives, and violent protest erupted.<sup>343</sup> A bench headed by Chief Justice Sabharwal insisted that the sealing continue.<sup>344</sup> Within months of his retirement, an investigative report was published detailing that two sons of the Chief Justice, who ran three companies from their father’s house, made millions as a result of the sealing drive that forced scores of businesses to move to shopping malls and commercial complexes in which the sons had financial interests.<sup>345</sup> Corporate developers had rushed into partnerships with the sons as the sealing drive gathered speed.<sup>346</sup> While the Chief Justice suffered some embarrassment, the four journalists who published the account were found guilty of criminal contempt of court by the Delhi High Court.<sup>347</sup> This is not the only scandal to implicate India’s high courts.<sup>348</sup>

The Supreme Court of India had long recognized that, “it is an accepted fact of constitutional interpretation that the content of justiciability changes according to how the Judge’s value preferences respond to the multi-dimensional problems of the day.”<sup>349</sup> Indeed, the Court deemed “inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part” in their decision-making.<sup>350</sup> As for the “social philosophy” and “value preferences” of the judges, it has been argued that their shared class affiliation and residing in Delhi makes them sympathetic to the middle class sensibilities about urban issues.<sup>351</sup> This affiliation

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<sup>342</sup> For details of the affair, see ROY, *supra* note 331, at 1132. For details of the charges, see Prashant Bhushan, *Contempt of Judicial Power*, OUTLOOK INDIA, Sept. 19, 2007, <http://www.outlookindia.com/article.aspx?235601>.

<sup>343</sup> Arundhati Roy, *Scandal In the Palace*, OUTLOOK INDIA, Oct. 1, 2007, available at <http://www.outlookindia.com/printarticle.aspx?235689>.

<sup>344</sup> *Id.*

<sup>345</sup> Dubey, *supra* note 341.

<sup>346</sup> *Id.*

<sup>347</sup> Binod Ringania, *Journalists Sentenced for Uncovering Corruption*, WORLD PRESS, Sept. 25, 2007, <http://www.worldpress.org/Asia/2941.cfm>.

<sup>348</sup> Prashant Bhushan, *Judging the Judges*, OUTLOOK INDIA, Jan. 21, 2009, available at <http://www.outlookindia.com/article.aspx?239534>.

<sup>349</sup> Rajamani, *supra* note 288, at 301 (quoting *State of Rajasthan v. Union of India*, (1977) 3 S.C.C. 592, 648 (India)).

<sup>350</sup> *State of Madras v. V. G. Row*, (1952) 1957 S.C.R. 597, slip op. at 8 (India), <http://www.indiankanoon.org/doc/554839>.

<sup>351</sup> Rajamani, *supra* note 288, at 301. See also Partha Chatterjee, *Are Indian Cities Becoming Bourgeois at Last? Or, If You Prefer, We Could Exclaim: Are Indian Cities Becoming Bourgeois, Alas?*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 113, 113–14 (Mary E. John et al. eds., 2006); Janaki Nair, *‘Social Municipalism’ and the New Metropolis*, in CONTESTED TRANSFORMATIONS, *supra* note 35, at 125, 125.

and sympathy makes for not only substantive outcomes of these cases but also the modes of resolving them that signal a new modality of functioning of the state, whereby policy making increasingly becomes the preserve of professional and technocrats immune from political control. In the *Solid Waste Management Case*, the Court was quick to set up a committee of experts to design rules and guidelines for waste management.<sup>352</sup> This committee, like others the Court had set up for similar issues, for example, in the *Delhi Pollution Case*,<sup>353</sup> consisted of technocrats, bureaucrats, and representatives of NGOs, without any mechanism to represent the interests of those who would be impacted by the decisions—the squatters and slum-dwellers.<sup>354</sup> The process was not “structured to be participative” and was “neither consultative nor democratic.”<sup>355</sup>

Activists note the “technology focus” of the courts’ agenda and that the solutions devised and recommended were driven by a priority for “leaner municipalities and greater efficiency.”<sup>356</sup> Decisions about whom to consult were “*ad hoc* and discretionary . . . . Not all stake holders were identified and consulted, and no avenues for wider public consultation were explored.”<sup>357</sup> The non-participatory process resulted in the absence of equity, fairness, and justice.<sup>358</sup> In its new guise, PIL was unhinged from citizen mobilization and yoked with the interests of those with social power. A device fashioned to give access to the marginalized, now became a “tremendous practical hurdle[] limiting the access of the poor to the Court, and therefore restricting the range of views before the Court.”<sup>359</sup> The well-heeled groups are using “their leverage with the Court” to ensure conversion of “one strain of opinion into policy, while annihilating all others.”<sup>360</sup> Such machinations are dictated by the neo-liberalism whereby “in the current period, legitimate human rights can be defined only as that set of rights that require government abstention from acts that violate the individual’s freedom to innovate and to invest time, capital, and

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<sup>352</sup> Okla. Factory Owners’ Ass’n v. Gov’t of Nat’l Capital Territory of Delhi, (2002) 108 D.L.T. 517, slip op. at 4 (India), available at <http://www.indiankanoon.org/doc/1143856/>.

<sup>353</sup> M. C. Mehta v. Union of India, A.I.R. 2004 S.C. 4016 (India), available at <http://www.ihrc.org/content/e0409.pdf>.

<sup>354</sup> See generally Rajamani, *supra* note 288, at 296–301.

<sup>355</sup> *Id.* at 304.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 304–05.

<sup>358</sup> *Id.* at 305.

<sup>359</sup> *Id.* at 306.

<sup>360</sup> *Id.* at 305–06.

resources in processes of production and exchange.”<sup>361</sup> For example, in Mumbai, an emerging middle class has teamed up with property developers and select bureaucrats and politicians to create a “powerful neoliberal lobby [of] . . . building boomers.”<sup>362</sup> The emergence of the “upwardly mobile middle and elite class . . . [with an] anti-slum agenda is . . . one of the most significant changes in the Indian urban landscape.”<sup>363</sup>

With these neoliberal judicial pronouncements, extra-legality stands bifurcated: that of the “unscrupulous,” “pickpockets,” and “encroachers” and that of “honest citizens;” that of “who cannot afford to live in Delhi” and that of those with “huge sums of money.”<sup>364</sup> Law is supposed to discipline the extra-legality of the first set, while not even raising “the question” about the extra-legality of the latter. On the grounds of this divide, sovereignty emerges as a decision on the exception—setting up zones beyond the reach of the law.<sup>365</sup> This divide implicates the very concept of citizenship by reconstituting the grounds of recognition of a citizen. The characterizations deployed by the courts may well be essentialist categories reinforcing stereotypes, but “categories . . . are not meant to describe the world accurately but to organize and classify it symbolically.”<sup>366</sup> The language about slum and pavement dwellers that took hold of Indian judicial

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<sup>361</sup> Tony Evans, *Citizenship and Human Rights in the Age of Globalization*, 25 ALTERNATIVES 415, 416 (2000).

<sup>362</sup> Nainan, *supra* note 198, at 30.

<sup>363</sup> Amita Bhide, *Shifting Terrains of Communities and Community Organizations: Reflections on Organizing for Housing Rights in Mumbai*, 44 CMTY. DEV. J. 367, 375 (2009).

<sup>364</sup> Bhan, *supra* note 246, at 135–39.

<sup>365</sup> GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 19 (Daniel Heller-Roazen trans., 1998). Agamben takes as his point of departure Schmitt’s claim that “[s]overeign is he who decides on the exception.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Mass. Inst. of Tech. 1985). Agamben argues that the formation of a political community is based not on inclusion but on exclusion. See generally Jenny Edkins, *Sovereign Power, Zones of Indistinction and the Camp*, 25 ALTERNATIVES 3 (2000). He deploys the figure of *homo sacer* from Roman law to identify a zone where law suspends itself, rendering the zone not merely of exclusion but also of abandonment—the space of the exception. *Id.* For a critical reading, see generally Peter Fitzpatrick, *Bare Sovereignty: Homo Sacer and the Insistence of Law*, in *POLITICS, METAPHYSICS, AND DEATH: ESSAYS ON GIORGIO AGAMBEN’S HOMO SACER* 49 (Andrew Norris ed., 2005); GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., Univ. of Chicago Press 2005). Creation of a space on exception is a question of the boundaries and borders of law, in that the sovereign decision and the exception are “never decisively placed within or without the legal system, as they are precisely the moving border between the two.” Andrew Norris, *The Exemplary Exception*, in 119 RADICAL PHIL. 6, 10 (2003) (emphasis added). The critical result is that those placed in the zones of exception are included as objects of power but excluded from being subjects.

<sup>366</sup> TERESA P.R. CALDEIRA, *CITY OF WALLS: CRIME, SEGREGATION, AND CITIZENSHIP IN SAO PAULO* 33 (2000).

pronouncements since the 1990s, is that of illegality.<sup>367</sup> The courts appear mindful that in a constitutional liberal republic “in order, ethically, to justify denying a national citizen his text-based rights, it becomes necessary to make the informal settler into an ‘improper’ citizen.”<sup>368</sup> The courts have done just that by characterizing slum and pavement dwellers as dishonest, unscrupulous, polluters, and predatory encroachers. Rendered an “improper citizen,” the “encroacher” can now be denied the protections of rights of citizenship.<sup>369</sup> The political economy of slum production stands erased, the slum and the slum-dweller emerge as a space and a body without history, and responsibilities of the state stand vitiated. This is the legacy of neoliberalism in India.

Is there a way out for urban slums and slum-dwellers? We turn now to examine the prescriptions that hold the field.

#### V. “WHERE DO WE GO FROM HERE?”<sup>370</sup>

##### A. Slums and Remedial Prescriptions

By the 1970s it was apparent that in the global South, even in the face of persistent urban unemployment, rural-urban migration was accelerating and so was slum growth.<sup>371</sup> The urban bias of development plans, deeper penetration of the markets into rural areas, restructuring of the agricultural sector by WTO trade regimes, and increased capital-intensive nature of agricultural inputs combined to dispossess and uproot increasing numbers of rural farmers.<sup>372</sup> Actual and perceived wage differentials lure rural workers to urban centers, where they cannot all be absorbed in the sector with a “politically determined wage that is substantially higher than...[that of] the agricultural sector.”<sup>373</sup> Consequently, increasing numbers of the

<sup>367</sup> See Usha Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers*, in 4 KEY TEXTS ON SOCIAL JUSTICE IN INDIA 263, 281–82 (2009).

<sup>368</sup> Bhan, *supra* note 246, at 139.

<sup>369</sup> *Id.*

<sup>370</sup> I adopt this from MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1967), where Dr. King focuses on questions of class and poverty.

<sup>371</sup> John R. Harris & Michael P. Todaro, *Migration, Unemployment and Development: A Two-Sector Analysis*, 60 AM. ECON. REV. 126, 126 (1970). See also SANYAL, *supra* note 77, at 197.

<sup>372</sup> See Carlos Oya, *Sticks and Carrots for Farmers in Developing Countries: Agrarian Neoliberalism in Theory and Practice*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 108, at 127, 127–131; JAN BREMAN, *OF PEASANTS, MIGRANTS, AND PAUPERS: RURAL LABOUR CIRCULATION AND CAPITALIST PRODUCTION IN WEST INDIA* xvii, xx (1986); PETER M. ROSSET, *FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE* xv–xvii (2006); Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 TRANSNAT'L. L. & CONTEMP. PROBS 419, 470–71 (2004).

<sup>373</sup> SANYAL, *supra* note 77, at 197.



urban poor joined the informal sector set apart from the formal labor market, characterized by formal contracts and statutory regulations.<sup>374</sup> In little time it was recognized that:

[T]he informal sector now stands out 'as a potential provider of employment and incomes to millions of people who would otherwise lack the means of survival' or 'as a breeding ground for entrepreneurship on a mass scale' . . . . [T]he informal sector can significantly improve itself, practically in each aspect of its functioning, if only the past policy biases, under which it is denied access to the advantages (e.g., availability of credit, foreign exchange, and tax concessions) offered to the formal sector, are removed.<sup>375</sup>

Divergent views about the nature of the informal sector fall into three main schools of thought: the dualist school, the legalist school, and the structural school.<sup>376</sup> The dualist and legalist schools furnish the scaffoldings of mainstream prescriptions for the informal sector. Assumptions drawn from the Fordist era in the global North view the informal sector "as a waiting room, or temporary transit zone: newcomers could find their feet there and learn the ways of the urban labour market."<sup>377</sup> In the meantime, abysmal wages in the informal sector are expected to be mitigated by traditional support networks.<sup>378</sup> The informal sector, however, grew exponentially as neoliberal globalization gathered speed with flexible production, outsourcing, fiscal

<sup>374</sup> The vagueness and plurality of views of informality are so pervasive that, by one account, "formal and informal are better thought of as metaphors that conjure up a mental picture of whatever the user has in mind at that particular time." MARC BACCHETTA ET AL., GLOBALIZATION AND INFORMAL JOBS IN DEVELOPING COUNTRIES 40 (2009).

<sup>375</sup> INT'L LAB. ORG., JOB CREATION IN URBAN INFORMAL SECTOR IN INDIA: ISSUES AND POLICY OPTIONS 4 (A. S. Oberai & G. K. Chadha eds., 2001) (emphasis added).

<sup>376</sup> The *dualist* school posits that the informal sector is comprised of marginal activities—distinct from and not related to the formal sector—that provide income for the poor and a safety net in times of crisis. Chen, *supra* note 113, at 4, 6–7. Accordingly, the persistence of informal activities is due largely to the fact that not enough modern job opportunities have been created to absorb surplus labor, due to a slow rate of economic growth and/or to a faster rate of population growth. *Id.* The *legalist* school subscribes to the notion that the informal sector is comprised of microentrepreneurs who choose to operate informally in order to avoid the costs, time, and effort of formal registration. *Id.* It posits that microentrepreneurs will continue to produce informally so long as regulations in the formal sector are cumbersome and costly, and thus stifle private enterprise. *Id.* The *structuralist* school, one that is in tune with my position, sees the informal sector as subordinate economic units and workers that serve to reduce input and labor costs, and thereby increase the competitiveness of large capitalist firms. *Id.* In the structuralist model, in marked contrast to the dualist model, different modes and forms of production are seen not only to co-exist but also to be inextricably connected and interdependent. *Id.* According to this school, the nature of capitalist development, rather than a lack of growth, accounts for the persistence and growth of informal production relationships. *Id.*

<sup>377</sup> Breman, *supra* note 151, at 34.

<sup>378</sup> *Id.* at 35.

austerity, and structural adjustment of economies.<sup>379</sup> While the *Wall Street Journal* expected the informal sector to serve as "one of the last safe havens . . . a critical safety net as the economic crisis spreads,"<sup>380</sup> a detailed study finds that "incomes have declined, days of work available decreased, prices have fallen and livelihoods disappeared."<sup>381</sup>

World Bank prescriptions play a defining role in shaping the policies of governments, other development agencies, and technocratic consultants.<sup>382</sup> The new orthodoxy in urban policy speaks of improving rather than replacing slums. The prescription offered for housing needs of the poor is "self-help" in combination with privatization of housing supply across the board. The populist and seemingly benign mantra of "helping-the-poor-to-help-themselves" furnishes a smokescreen for the abandonment of the obligation of the states to relieve poverty and homelessness, and turns attention away from structural changes at the state and global levels necessary for sustainable urban and housing policies that may ensure secure housing with dignity for all.<sup>383</sup> Slogans like "people's participation" become thinly disguised euphemisms for the abdication by the state of its fundamental responsibilities toward its citizens. While some have demonstrated that "self-housing" is a myth as far as paid artisans and skilled labor is involved,<sup>384</sup> others have documented that due to "cost-recovery" provisions of World Bank lending for low-income housing, the bottom thirty to sixty percent of the population was unable to meet the financial obligations of such loans.<sup>385</sup> ILO's experts concluded that the World Bank's slum upgrading had failed to have any substantial impact.<sup>386</sup>

<sup>379</sup> BACCHETTA ET AL., *supra* note 374, at 40; Alan Gilbert, *Love in the Time of Enhanced Capital Flows: Reflections on the Links Between Liberalization and Informality*, in URBAN INFORMALITY, *supra* note 176, at 33, 33–34, 37; Patralekha Chatterjee, *Shadow Lives: Urban India's Informal Economy*, 5:3 HABITAT DEBATE (1999), [http://ww2.unhabitat.org/mdg/documents/asia/Vol5\\_No3\\_urban\\_indias\\_informal\\_economy.doc](http://ww2.unhabitat.org/mdg/documents/asia/Vol5_No3_urban_indias_informal_economy.doc).

<sup>380</sup> Patrick Barta, *The Rise of the Underground*, WALL ST. J., March 14, 2009, at W1.

<sup>381</sup> *We Are Self Employed*, SELF-EMPLOYED WOMEN'S ASSOCIATION OF INDIA (SEWA, Gujarat, India) May 15, 2009, available at <http://www.ifwea.org/news/2009/affiliateAnnounce/090604SEWAnewsletter.pdf>. In the case of waste collectors in Ahmedabad, the city used by the WSJ to draw examples, between April 2008 and January 2009 incomes fell to between thirty-seven and seventy percent. *Id.*

<sup>382</sup> See Ramin Keivani & E Werna, *Modes of Housing Provision in Developing Countries*, 55 PROGRESS IN PLANNING 65, 86 (2001).

<sup>383</sup> See SEABROOK, *supra* note 175, at 196–97.

<sup>384</sup> Kavita Datta & Gareth Jones, *From Self-help to Self-Finance: The Changing Focus of Urban Research and Policy*, in HOUSING AND FINANCE IN DEVELOPING COUNTRIES 3, 11–12 (Kavita Datta & Gareth Jones eds., 2000).

<sup>385</sup> See generally Lisa Peattie, *Affordability*, in 11 HABITAT INT'L 69, 69–76 (1987).

<sup>386</sup> OBERAI, *supra* note 5, at 122.

The “self-help” prescription is complemented by the World Bank’s calls for a “market-enabling” strategy: curtail direct public intervention in housing and lift restraints from private land and housing market to let commodity circulation penetrate into lower-income groups.<sup>387</sup> The prescription has simply not worked. Experts conclude that

the market-enabling approach neglects urban poor because it overemphasizes the formal market process to the detriment of other existing modes of provision, it lacks specific consideration of informal markets and their particular requirements and it fails to consider who benefits from the increased market efficiency.<sup>388</sup>

The market-enabling approach is inappropriate for housing needs of the urban poor in the global South because formal markets do not respond adequately to rapid urban growth, poverty, chaotic economic conditions, and the deficiencies of infrastructure and services.<sup>389</sup> More often the result is excessive speculation and monopoly behavior for maximizing profits, which drive up land and housing prices without significant access to mortgage or building finance by low-income groups.<sup>390</sup> One affected resident asks: “Whose problem does it solve?”<sup>391</sup>

At this juncture the myth of the informal worker as entrepreneur was born.<sup>392</sup> This was also the point of entry of the legalist school which viewed the informal sector as constituted by

<sup>387</sup> WORLD BANK, HOUSING: ENABLING MARKETS TO WORK 1–2 (1993); G. A. Jones and K. Datta, *Enabling Markets to Work: Housing Policy in the ‘New’ South Africa*, 5:3 INT’L PLANNING STUD. 393, 395–97 (2000); R. Harris and C. Giles, *A Mixed Message: The Agents and Forms on International Housing Policy, 1945-1973*, 27 HABITAT INT’L 167, 174, 176–78 (2003); WORLD BANK, URBAN POLICY AND ECONOMIC DEVELOPMENT: AN AGENDA FOR THE 1990S 6–7 (1991); A. Jones and P. E. Ward, *The World Bank’s ‘New’ Urban Management Program: Paradigm Shift or Policy Continuity?*, 18 HABITAT INT’L 33, 35 (1994).

<sup>388</sup> Ramin Keivani, Michael Mattingly and Hamid Majedi, *Public Management of Urban Land, Enabling Markets and Low-Income Housing Provision: The Overlooked Experience of Iran*, 45:9 URBAN STUDIES 1825, 1827 (2008) (internal citations omitted).

<sup>389</sup> See V. Mukhija, *Enabling Slum Redevelopment in Mumbai: Policy Paradox in Practice*, 16:6 HOUSING STUDIES 791, 791 (2001); V. Mukhija, *The Contradictions in Enabling Private Developers of Affordable Housing: A Cautionary Case from Ahmerabad, India*, 41 URBAN STUDIES 1, 3 (2004).

<sup>390</sup> See R. Keivani and E. Werna, *Modes of Housing Provision in Developing Countries*, 55 PROGRESS IN PLANNING 65, 69 (2001); R. Keivani and E. Werna, *Refocusing the Housing Debate in Developing Counties from a Pluralist Perspective*, 25 HABITAT INT’L 191, 201 (2001); R. BAKEN AND J. VAN DER LINDEN, LAND DELIVERY FOR LOW INCOME GROUPS IN THIRD WORLD CITIES 12, 45 (1992). See generally W. P. Strassmann, *Oversimplification in Housing Analysis, with Reference to Land Markets and Mobility*, 11 CITIES 377 (1994).

<sup>391</sup> See generally Priscilla Connolly, *Uncontrolled Settlements and Self-Built: What Kind of Solution? The Mexico City Case*, in SELF-HELP HOUSING: A CRITIQUE 141 (Peter M. Ward ed., 1982).

<sup>392</sup> See Rebecca B. Galemba, *Informal and Illicit Entrepreneurs: Fighting for a Place in the Neoliberal Economic Order*, 29:2 ANTHROPOLOGY OF WORK REVIEW 19, 19 (2008).

voluntary micro-entrepreneurs, who were a reservoir for future growth if only regulatory reforms would lower the cost of entry and operation in the formal sector. It was claimed that those who work in the informal sector do so “because they choose to be self-employed, using skills acquired in the formal sector to establish themselves as independent producers or traders.”<sup>393</sup> The premise is that they are there “not because they were redundant to the formal sector but because they chose to be self-employed.”<sup>394</sup> However, the reality is that far from choosing to do so, those in the informal sector are shut out or ejected from the formal sectors though a combination of global, national, and local impacts of neoliberal structuring of public policies and the introduction of “flexible production,” whereby capital seeks to engage labor located outside the regimes of formal contract, labor rights, and public regulation.<sup>395</sup> The result is “immiserisation of the laboring poor.”<sup>396</sup>

Given the rising value of increasingly scarce land in and around urban areas, squatting usually operates through an invisible and informal real estate market.<sup>397</sup> Calling informal subdivision settlements “extra legal rather than illegal,” analysts point out that often those shut out of the formal housing market buy lots from entrepreneurs who acquire tracts of undeveloped land and subdivide it without conforming to any regulations, and the area is incrementally upgraded, yielding ever-increasing returns for the land owners.<sup>398</sup> This model of privatized urbanization is also, in effect, the privatization of squatting. In some instances, owners of nonresidential tracts even encourage squatters to organize themselves as a land invasion in the expectation that the state may be forced to regularize the settlement and develop infrastructure.<sup>399</sup> In another model, squatters purchase the “right” to dwell on state-owned land from corrupt politicians and bureaucrats. Often it is middlemen who secure possession, provide protection against eviction, and supply

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<sup>393</sup> HAROLD LUBELL, *THE INFORMAL SECTOR IN THE 1980S AND 1990S* 112 (1991).

<sup>394</sup> *Id.*

<sup>395</sup> See Jan Breman, *An Informalized Labor System: End of Labor Market Dualism*, 36:52 *ECON. & POL. WKLY.* 4804, 4807 (2002); N. Neetha, *Flexible Production, Feminisation and Disorganisation: Evidence from Tiruppur Knitwear Industry*, 37:21 *ECON. & POL. WKLY.* 2045, 2049–51 (2002).

<sup>396</sup> Breman, *supra* note 395, at 4813.

<sup>397</sup> See generally Paul Baross, *Sequencing Land Development: The Price Implications of Legal and Illegal Settlement Growth*, in *THE TRANSFORMATION OF LAND SUPPLY SYSTEMS IN THIRD WORLD CITIES* 69 (Paul Baross & Jan van der Linden eds., 1990).

<sup>398</sup> RAKESH MOHAN, *UNDERSTANDING THE DEVELOPING METROPOLIS: LESSONS FROM THE CITY STUDY OF BOGOTA AND CALI, COLUMBIA* 152–53 (1994).

<sup>399</sup> DAVID KEELING, *BUENOS AIRES: GLOBAL DREAMS, LOCAL CRISES* 107–08 (1996).

water and transport facilities.<sup>400</sup> The result is an informal extra-legal economy and the commercialization of slums.<sup>401</sup>

The heralded guru of the legalist school, Hernando de Soto, posits that the solution for cities of the global South is the granting of property rights to slum-dwellers, which will turn their extralegal holdings into liquid capital thus alleviating the need for external capital investments for job creation.<sup>402</sup> He asserts that “trillions of dollars, [are] ready to be put to use if only the mystery of how assets are transformed into live capital can be unraveled.”<sup>403</sup> Citing the failures of the legal system in Peru, de Soto recommends legalization of extralegal landholdings coupled with deregularization of the economy including housing.<sup>404</sup> Contra to de Soto’s prescription about the injection of

<sup>400</sup> AKHTER HAMEED KHAN, ORANGI PILOT PROJECT: REMINISCENCES AND REFLECTIONS 72 (1996).

<sup>401</sup> Ayse Yonder, *Implications of Double Standards in Housing Policy: Development of Informal Settlements in Istanbul*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 55, 61–62 (Edesio Fernandes & Ann Varley eds., 1998) [hereinafter *ILLEGAL CITIES*].

<sup>402</sup> See HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 159–60 (1989) [hereinafter *DE SOTO, THE OTHER PATH*]; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 37 (2000) [hereinafter *DE SOTO, THE MYSTERY OF CAPITAL*]. Herald of capitalism were quick to endorse De Soto’s recipe. See *Why the Poor Need Property Rights: Want to Make the Poor Less Poor? Give Them Title to What They Own*, *ECONOMIST*, Mar. 31, 2001. The World Bank adopted his recommendations too. WORLD BANK, *WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE* (2004). De Soto’s career as a protégé of Friedrich Hayek, and his grooming and promotion by the Free Market Project at the University of Chicago, Mont Pelerin Society of neoliberal intellectuals, and the Atlas Foundation for Economic Research is well documented. See, e.g., Timothy Mitchell, *The Work of Economics: How a Discipline Makes its World*, in *XLVI:2. ARCHIVES EUROPEENNES DE SOCIOLOGIE* 297, 304–09 (2005) [hereinafter Mitchell, *The Work of Economics*]. At the urging of Hayek, the Atlas Foundation helped set up and fund de Soto’s Institute for Liberty and Democracy, one of the first neoliberal think tanks of the global South. While he grew up in Geneva, started his career at GATT, and was the head of the International Council of Copper Exporting Countries, his credibility came to depend on his identity as a neoliberal from the South. The Center for International Private Enterprise, set up by the Reagan Administration started funding de Soto’s Institute in the 1980s. De Soto became the principal political advisor for Peruvian president Alberto Fujimori in 1990 and presided over the drastic neoliberal restructuring of Peru’s economy that resulted in a deep recession whereby within two years wages fell by forty percent and the proportion of Peruvians living in poverty increased by fifty-four percent. See Kenneth M. Roberts, *Neoliberalism and the Transformation of Populism in Latin America: The Peruvian Case*, 48 *WORLD POLITICS* 82, 96 (1996). De Soto’s Institute started its pilot titling program in Lima. In 1996 the Peruvian government adopted a law on poverty formalization, and in 1998 the World Bank started funding the program. However, research funded by the World Bank showed that property titling had produced no increase in credit to the poor, the primary goal of the program. See Mitchell, *The Work of Economics*, *supra* note 402, at 308 (2005).

<sup>403</sup> DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 402, at 37. For a critical analysis of de Soto’s ideas, see Mitchell, *The Work of Economics*, *supra* note 402, at 299; Ann Varley, *Private or Public: Debating the Meaning of Tenure Legalization*, 26 *INT’L J. URB. & REGIONAL RES.* 449, 449–50 (2002).

<sup>404</sup> DE SOTO, *THE OTHER PATH*, *supra* note 402, at 177, 182, 255–58.

the law into the informal sector, the informal and extra-legal sector is not separate and apart from the formal and legal one. It is produced by operations of the market and the state that have the “power to determine . . . what is informal and what is not, and to determine what forms of informality will thrive and which will disappear.”<sup>405</sup>

De Soto’s claim that the global South is “exactly where Europe, Japan, and the United States were a couple of hundred years ago,”<sup>406</sup> utterly glosses over the colonial encounter and its impact. He ignores the “process of primitive accumulation that force[s] people into the cities,” and sidesteps questions about who owns capital now, and how it is deployed.<sup>407</sup> He seeks to research “folk conventions” around property rights to be incorporated into the modern property regimes.<sup>408</sup> Others also celebrate the multiplicity of informal legal norms that animate property relations in extra-legal urban housing.<sup>409</sup> But, all informal normative orders are not born equal. While some values and desires are inherent to a community, others are fashioned as tactical responses to threatening forces. Many customary norms in the global South emerged after initial separation of native peoples from the commons and colonial inventions of tradition.<sup>410</sup> Many norms of the informal sector emerged in response to predatory capitalist markets. While signifying ingenuity and resistance of impacted groups, these norms presuppose hostile and overarching legal regimes that dispossess and marginalize them. We must remain mindful that colonial and postcolonial coexistence of modes of production is not a horizontal articulation of different modes. Imperatives of capitalism demarcate the conditions of possibility of non-capitalist modes. As a result, the informal sector remains “locked in an asymmetrical relation” of “subordination” to the accumulation economy.<sup>411</sup> Recognition of porous legality and plurality of legal frames does not necessarily

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<sup>405</sup> Ananya Roy, *Urban Informality: Towards an Epistemology of Planning*, 71 J. AM. PLAN. ASS’N 147, 149 (2005). See also Ray Bromley, *Power, Property, and Poverty: Why De Soto’s “Mystery of Capital” Cannot Be Solved*, in URBAN INFORMALITY, *supra* note 176, at 271, 277–83.

<sup>406</sup> DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 402, at 181.

<sup>407</sup> Moore, *supra* note 92, at 98–99.

<sup>408</sup> DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 402, at 179.

<sup>409</sup> For a thoughtful analysis of the theoretical questions involved and examples of informal property norms, see Daniel Bonilla Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213, 214 (2009).

<sup>410</sup> See generally Terence Ranger, *The Invention of Tradition in Colonial Africa*, in THE INVENTION OF TRADITION 260–62 (Eric Hobsbawm & Terence Ranger eds., 1992) (discussing how traditions in Africa developed).

<sup>411</sup> SANYAL, *supra* note 77, at 220.

imply that resistive norms of the marginalized furnish adequate grounds for alleviation of their predicaments.

Evidence from the global South suggests that regularization of slum ownership without radical changes in larger public policies has marginal positive impact at best, and has more often aggravated the condition of slum-dwellers.<sup>412</sup> In tune with de Soto, the neoliberal apothecary, the World Bank's 2003 report prescribes private property as the answer to the land question.<sup>413</sup> However, even a World Bank working paper acknowledged that "it would be dangerous to promote formal titling as the sole solution necessary to solve the problems of the urban poor . . . . [W]here the capital markets are underdeveloped and a spectrum of ownership structures exist, titling alone will not 'unlock' capital."<sup>414</sup> De Soto claimed that in "developing countries much of the teeming mass does not consist of oppressed legal proletarians but of oppressed extralegal small entrepreneurs."<sup>415</sup> Labeling those marooned in the informal sector "entrepreneurs," however, does not change their condition of life. Most slum-dwellers are renters of land "owned" by powerful criminal and political interests. For such owners, regularization is a bonanza, but for tenants this often amounts to ejection from any form of housing. Tax collectors, municipal utility charges, fracturing of intra-slum solidarities and slums within slums quickly became visible as a result of commodification and real estate submarket consolidation that issues from deregulation.<sup>416</sup>

A recent study that interrogates de Soto's panacea of legalization of extra-legally occupied dwellings in the light of the experience of Bogota, finds claims about the dynamics of housing market informality and the benefits of formal title wanting.<sup>417</sup> The experience of other countries and cities confirms this

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<sup>412</sup> See Geoffrey Payne, unpublished report, quoted in ALAN GILBERT & ANN VARLEY, *LANDLORD AND TENANT: HOUSING THE POOR IN URBAN MEXICO* 4 (1991); Suzana Taschner, *Squatter Settlements and Slums in Brazil*, in *HOUSING THE URBAN POOR* 215, 216–19 (Brian Aldrich & Ravinder Sandhu eds., 1995).

<sup>413</sup> DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 402, at 67; KLAUS DEININGER, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* xvii–xxi (2003).

<sup>414</sup> Robert M. Buckley & Jerry. Kalarickal, *Shelter Strategies for the Urban Poor: Idiosyncratic and Successful, but Hardly Mysterious* 22–23 (World Bank Policy Research, Working Paper No. 3427, 2004), available at <http://papers.ssrn.com/sol3/Delivery.cfm/39291.pdf?abstractid=625305&mirid=1>.

<sup>415</sup> DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 402, at 216.

<sup>416</sup> Donald A. Krueckeberg, *The Lessons of John Locke or Hernando de Soto: What If Your Dreams Come True?*, 15 *HOUS. POL'Y DEBATE* 1, 3–4 (2004).

<sup>417</sup> Carmen G. Gonzalez, *Squatters, Pirates, and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis?*, 40 *U. MIAMI INTER-AM. L. REV.* 239, 239–51, (2009).

conclusion.<sup>418</sup> A landmark study of slums points out that the de Sotoian “semi-utopian view of the informal sector, however, grows out of a nested set of epistemological fallacies.”<sup>419</sup>

In tune with the recommendations of the legalist school, an adverse possession model has been attempted sporadically in some counties.<sup>420</sup> In the 1990s, Peru instituted this mode through the Formalization Commission of Informal Property (COFOPRI).<sup>421</sup> The model suffers from various problems. Squatters must continue to bear the costs of acquiring and occupying land that they do not own for a long time, giving rise to violence and protection rackets.<sup>422</sup> This model also does not address the fact that squatter settlements are often located on marginal and ecologically vulnerable lands.<sup>423</sup> Neither does it address provision of services and public health issues, or deter future squatting and continued cycles of remedial responses. It has marginal impact on wealth disparity between occupants of extra-legal settlements and legal property owners because titling, on average, increases value of untitled property by a mere

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<sup>418</sup> See Brian R. Roberts, *From Marginality to Social Exclusion: From Laissez Faire to Pervasive Engagement*, 39 *LATIN AM. RES. REV.* 195, 195–97 (2004); PETER WARD, *MEXICO CITY* 193 (1998); Taschner, *supra* note 412, at 217–19; Jean-Louis Van Gelder, *Tales of Deviance and Control: On Space, Rules, and Law in Squatter Settlements*, 44 *LAW & SOC'Y REV.* 239, 262 (2010).

<sup>419</sup> DAVIS, *PLANET OF SLUMS*, *supra* note 39, at 179. These include the failure to distinguish between micro-accumulation and sub-subsistence, and between informal petty bourgeoisie and informal proletariat. *Id.* at 180. “[M]ost participants of the informal economy directly or indirectly work for someone else.” *Id.* There is growing inequality within the networks of exploitation of the informal sector. *Id.* at 181. Informality increases the exploitation and abuse of women and children. *Id.* Rather than generating new jobs, the informal sector fragments existing work and subdivides incomes. *Id.* Gambling, lotteries, pyramid schemes, and even quasi-magical and spiritual promises of wealth proliferate in the informal sector. *Id.* at 183. Reform of the informal sector has little impact on structural inequities of the economy and resulting poverty. *Id.* Increased competition within the informal sector rapidly depletes the collective social capital of the marginalized and dissolves self-help networks and political solidarities among the urban poor. *Id.*

<sup>420</sup> Common law typically provides a statute of limitations “fixing the period of time beyond which the owner of land can no longer bring an action, or undertake self-help, for the recovery of his land from a person in possession of the land.” Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 *HARVARD INT'L L. J.* 433, 448 (2003) (quoting RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 91.01 (Michael Allen Woe ed., 2003)). For such a claim to be ripe, “the possession [must] be (1) actual, (2) open and notorious, (3) exclusive, (4) continuous, and (5) hostile under a claim of right.” *Id.* Most civil law jurisdictions have similar provisions; for example, *usucapiao* in Brazil and *prescripcion adquisitiva* in Peru. As opposed to common law, *usucapiao* or *prescripcion adquisitiva* can be used against vacant public land. *Id.* at 449. See also EDESIO FERNANDES, *LAW AND URBAN CHANGE IN BRAZIL* 118 (1995).

<sup>421</sup> King, *supra* note 420, at 449.

<sup>422</sup> *Id.* at 450.

<sup>423</sup> *Id.* See also JORGE E. HARDOY & DAVID SATTERTHWAITE, *SHELTER: NEED AND RESPONSE* 232–33 (1981).



23.5%.<sup>424</sup> Fearful that new owners will promptly sell their titles for profit, states often prohibit transfer of title and subdivisions for substantial periods of time or indefinitely.<sup>425</sup> Finally, requirement of public and notorious possession encourages settlements in ecologically vulnerable areas.<sup>426</sup>

Another legalization model grants titles on a case-by-case basis. This was done, for example, in Peru as a once-for-all regularization under a 1961 law, and in India and Mexico at various stages.<sup>427</sup> Ruling parties generally deploy this model close to elections to gain political support and votes.<sup>428</sup> The ad-hoc nature of the model and its dependence upon whims of political authorities makes this an unstable and unpredictable mode of regularization. Furthermore, it does not address issues of squatting costs, lack of services, environmental concerns, and intra-slum divides. The dominant result has been that “[s]peculative rises in the price of land and the costs imposed on residents both directly and indirectly (in the form of service charges and property taxes) lead to the displacement of the original population. Rather than increasing security of tenure, regularization actually diminishes it.”<sup>429</sup> Indeed, regularization is often misused by landowners to their profit by using squatters for their ends. The case of Lima is illustrative:

Very often landowners and private developers have manipulated the squatters into forcing portions of the land onto the real estate market, by obtaining from the authorities some urban infrastructure for the squatters, thus enhancing the land value and opening the way for profitable housing construction. In a second phase, the squatters are expelled from the land they have occupied and forced to start all over

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<sup>424</sup> Jean O. Lanjouw & Philip I. Levy, *Untitled: A Study of Formal and Informal Property Rights in Urban Ecuador*, 112 ECON. J. 986, 988 (2002). This data is based on a study of Guayaquil, Ecuador.

<sup>425</sup> King, *supra* note 420, at 446.

<sup>426</sup> See Lee J. Johnson et al., *A Model of Rural Conflict: Violence and Land Reform Policy in Brazil*, 4 ENV'T. & DEV. ECON. 135, 157–58 (1999); Arild Angelsen, *Playing Games in the Forest: State-Local Conflicts of Land Appropriation*, 77 LAND ECON. 285, 291 (2001).

<sup>427</sup> See Alain Durand-Lasserve, *Law and Urban Change in Developing Countries: Trends and Issues*, in *ILLEGAL CITIES*, *supra* note 401, at 157, 234; Kenneth A. Manaster, *The Problem of Urban Squatters in Developing Countries: Peru*, 1968 WIS. L. REV. 23, 42–43 (1968). In the case of Mexico this also involved extra-legal subdivisions and development of *ejodi* lands—a form of collectively owned communal property developed after the Mexican revolution. The community could not alienate its *ejido* property, nor lose it through prescription. The land was set aside for agriculture with strict restrictions on development. Antonio Azuela de la Cueva, *Low Income Settlements and the Law in Mexico City*, 11 INT'L J. URB. & REGIONAL RES. 522, 530–31 (1987).

<sup>428</sup> Antonio Azuela & Emilio Duhau, *Tenure Regularization, Private Property and Public Order in Mexico*, in *ILLEGAL CITIES*, *supra* note 401, at 157, 168; Azuela de la Cueva, *supra* note 427, at 526; Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, in *ILLEGAL CITIES*, *supra* note 401, at 172–75.

<sup>429</sup> Azuela & Duhau, *supra* note 428, at 163.

again on the frontier of a city which has expanded as a result of their efforts.<sup>430</sup>

A more productive model is the "state as developer" model,<sup>431</sup> with direct state planning, intervention, and investment in "sites and services" projects.<sup>432</sup> While this model was only marginally successful in Mexico and Peru,<sup>433</sup> there is the relatively successful and "[o]verlooked [e]xperience in Iran."<sup>434</sup> The revolutionary government of Iran inherited exploding urban growth, concentration of land ownership, and a choke-hold of landed interests over land and housing policies.<sup>435</sup> A series of laws introduced between 1979 and 1992 aimed to regulate the urban land market and urban housing with the objective of "acquisition of excess urban land above a defined limit and its direct allocation for housing [through public channels], co-operatives and the private sector."<sup>436</sup> Islamic law was deployed whereby the state could rightly acquire undeveloped land for distribution without compensation.<sup>437</sup> The impact on direct land

<sup>430</sup> MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* 191 (1983).

<sup>431</sup> King, *supra* note 420, at 458. This study used seven criteria for comparison between the various models utilized to deal with the problem of extra-legal settlements, and it found that "state as developer" model comparatively most effective. The criteria are: prevention of violence, prevention of the use of unsuitable land, public services, entry into the formal sector, rule of law, discourage further extra-legal settlements, increase of wealth, and viable alternative to extra-legal settlements. *Id.* at 447. This study also finds the model, as practiced in Iran, to be the most attractive alternative. *Id.* at 460–61, 466.

<sup>432</sup> Peter M. Ward, *Land for Housing the Poor: How Can Planners Contribute?*, in *LAND FOR HOUSING THE POOR* 34, 39 (Shlomo Angel et al. eds., 1983). Ward defines "sites and services" as state "sponsorship of land subdivisions in which a basic service network was installed from the outset." *Id.*

<sup>433</sup> See generally King, *supra* note 420, at 468; Ann Varley, *The Relationship Between Tenure Legalization and Housing Improvements: Evidence from Mexico City*, 18 DEV. & CHANGE 463 (1987).

<sup>434</sup> Ramin Keivani et al., *Public Management of Urban Land, Enabling Markets and Low-income Housing Provision: The Overlooked Experience of Iran*, 45 URB. STUD. 1825, 1848 (2008). A comprehensive comparative study also finds the "state as developer" model, as practiced in Iran, the most attractive alternative. King, *supra* note 420, at 458–61. See also Mohammad Mehdi Azizi, *The Provision of Urban Infrastructure in Iran: An Empirical Evaluation*, 32 URB. STUD. 507, 520–21 (1995); Mohammad Mehdi Azizi, *The User-Pays System in the Provision of Urban Infrastructure: Effectiveness and Equity Criteria*, 37 URB. STUD. 1345, 1348–49 (2000); Mohammad Mehdi Azizi, *Evaluation of Urban Land Supply Policy in Iran*, 22 INT'L J. URB. & REGIONAL RES. 94, 103 (2002); Mohammad Mehdi Azizi, *Provision of Urban Public Facilities through the Development of Public Commercial Land in Iran*, 19 HABITAT INT'L 269, 276–77 (1995) [hereinafter Azizi, *Provision of Urban Public Facilities*].

<sup>435</sup> Keivani et al., *supra* note 434, at 1832. In 1978, about eighty-five percent of land within Tehran belonged to the royal family and a few others. *Id.* Ninety percent of the eighty million square meters of land on the outskirts of Tehran belonged to ten percent of the landowners. *Id.* The land in Tehran increased by five hundred percent between 1971 and 1976. *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> See, e.g., Mehrdad Valibeigi, *Banking and Credit Rationing Under the Islamic Republic of Iran*, 25 IRANIAN STUD. 51, 64 (1992).

provision and the land market was dramatic.<sup>438</sup> Within a ten year period 85,557 hectares of urban land was acquired by the Urban Land Organization (ULO).<sup>439</sup> Seventy-seven percent of the land was allocated for housing, and the rest for commercial, industrial and public service purposes.<sup>440</sup> The land reserved for commercial projects was sold and thirty percent of the profit was given to municipalities to provide services, giving priority to green spaces, schools, clinics, and health centers.<sup>441</sup> Until 1985, the focus was on the public sector provision of infrastructure to new residential areas.<sup>442</sup> The program was expensive and was plagued with inefficiency. In 1985, a revised plan aimed at addressing the problem *ex ante*.<sup>443</sup> The state acquired land close to cities, laid out infrastructure—roads, electricity, and sewer systems—and allotted housing plots to applicants on a user-pay financing basis. The fees for the development were paid by future occupants either before or after occupation.<sup>444</sup> By selecting land for acquisition, urban migration was steered to mid-sized cities in addition to areas around large metropolises.<sup>445</sup> Cost recoupment ratio was satisfactory, and where payments exceeded development costs, the surplus was plowed back into additional services like hospitals and schools.

In a ten year period land was transferred to 422,864 families through direct allocation (234,000), housing cooperative societies (131,000) and public and private developers (58,000).<sup>446</sup> Between 1976 and 1986, the housing stock doubled, increasing from 2,377,586 to 4,685,666.<sup>447</sup> Even the World Bank was constrained to acknowledge that provision of public land had “play[ed] an important role in attracting developers to invest in low-income housing and in rental accommodations,” and that this approach “should be explored as part of a housing policy concerned particularly with provision of low-income housing.”<sup>448</sup> Analysts conclude that:

Iran substantially expanded the stock of low-income urban housing . . . by directly providing land . . . effectively by-passing urban land and housing markets and their shortcomings [through policies]

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<sup>438</sup> See Keivani et al., *supra* note 434, at 1833–40 (detailing the statistical data that evidences this impact).

<sup>439</sup> *Id.* at 1833.

<sup>440</sup> *Id.* at 1836.

<sup>441</sup> Azizi, *Provision of Urban Public Facilities*, *supra* note 434, at 273, 277.

<sup>442</sup> King, *supra* note 420, at 459.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

<sup>446</sup> Keivani et al., *supra* note 434, at 1825, 1836.

<sup>447</sup> Azizi, *Provision of Urban Public Facilities*, *supra* note 434, at 271.

<sup>448</sup> Keivani et al., *supra* note 434, at 1841.

designed specifically to benefit a large section of low and middle-income sectors that would otherwise be excluded land and housing markets.<sup>449</sup>

As practiced in Iran, the state as developer and sites and services models address the extra-legal settlement problem *ex ante*, and avoid social and human costs of squatting.<sup>450</sup> Planned selection of settlement sites helps preclude environmentally fragile and hazardous landscapes.<sup>451</sup> Provision of services before occupation avoids public health issues.<sup>452</sup> Land bearing legal title enters the market through the state, thus avoiding transaction costs of regularization.<sup>453</sup> Concerns remain that user-pay financing may keep such housing out of the reach of the destitute.<sup>454</sup> However, if the state were to subsidize the cost of occupation for the poor, this model can become an effective means of redistributing wealth and directing public resources to alleviate a critical social problem, i.e., housing for the urban poor. Sustained governmental foresight and a political commitment toward the urban poor are the key ingredients of this model.

The experience of Iran substantiates that housing for the urban poor is primarily a political problem, one that requires political will that issues from composition of the power-bloc. Note that the primary social base of political support for the revolutionary regime in Iran was provided by the urban poor and the lower middle classes.<sup>455</sup> Due to the early legitimacy of the revolution, any backlash from other interest groups toward the policy to house the urban poor was not powerful enough to derail the program.<sup>456</sup> As merchant groups gained ascendancy within the power-bloc in the 1990s Iran yielded to the pressures and temptations of neoliberal restructuring, and land and housing policy were increasingly influenced by supply-side policies.<sup>457</sup>

<sup>449</sup> *Id.* at 1848. Similar public interventions in the housing market have produced desirable results in Sweden. See S. S. Duncan, *House Building, Profits and Social Efficiency in Sweden and Britain*, 1 HOUS. STUDIES 11, 13 (1986); James Barlow, *Controlling the Housing Land Market: Some Examples from Europe*, 307 URB. STUD. 1129, 1133 (1992). See also MICHAEL BALL, HOUSING POLICY AND ECONOMIC POWER: THE POLITICAL ECONOMY OF OWNER OCCUPATION 4 (1983).

<sup>450</sup> Keivani et al., *supra* note 434, at 1848–49.

<sup>451</sup> *Id.* at 1827.

<sup>452</sup> King, *supra* note 420, at 450–51.

<sup>453</sup> Sheila R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AM. L. REV. 261, 278 (2008).

<sup>454</sup> Keivani et al., *supra* note 434, at 1844.

<sup>455</sup> See Charles Kurzman, *The Qum Protests and the Coming of the Iranian Revolution*, 27:3 SOC. SCI. HIST. 287, 299–300 (2003); NIKKI R. KEDDIE, MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION 232 (2006).

<sup>456</sup> Keivani et al., *supra* note 434, at 1849.

<sup>457</sup> *Id.* at 1832. Policies shifted toward commercial allocation and full cost recovery, reduction of individual land allocation, and increased reliance on mass housing provision by private developers. *Id.*

The negative impact was quick. The housing situation in urban areas worsened progressively, going through several cycles of boom and bust.<sup>458</sup> Housing prices escalated and, feeling political pressure, the government was recently forced to announce new measures of land allocation and subsidized housing in new housing projects.<sup>459</sup> Even with its substantial success, the challenge remains whether the “state as developer” model can be replicated in the global South beyond Iran. All social formations of the global South are not commensurable; certainly not in regard to their power-blocs. What is needed is an overarching conceptual principle that can guide suitable remedial strategies in diverse settings.

#### B. Toward the Right to the City

Injecting extreme competition in the already impoverished and exploitative informal sector as prescribed by neoliberalism is to “simply grease the skids to a Hobbesian hell.”<sup>460</sup> A promising path out of this Hobbesian hell may be the incipient right to the city. The concept, first introduced by Henry Lefebvre in the late 1960s,<sup>461</sup> and characterized as “one of the most precious yet most neglected of our human rights,”<sup>462</sup> is playing an influential role in urban politics in Latin America and international efforts to develop a “World Charter on the Right to the City.”<sup>463</sup>

Lefebvre saw the right to the city not as a natural or contractual right, but as one that issues from the entitlement to urban space “of the whole society and firstly of all those who *inhabit*.”<sup>464</sup> Lefebvre’s point of departure is that while the scope of human rights has expanded as a result of social movements and political struggles, the rights of the citizen largely remain the same as stipulated in the Declaration of the Rights of Man and Citizens of 1789.<sup>465</sup> Therefore, an expansion of the rights of

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<sup>458</sup> *Id.* at 1849.

<sup>459</sup> *Id.*

<sup>460</sup> DAVIS, PLANET OF SLUMS, *supra* note 39, at 185.

<sup>461</sup> See HENRI LEFEBVRE, WRITINGS ON CITIES 6 (Eleonore Kofman & Elibeth Lebas eds., 1996).

<sup>462</sup> Harvey, *The Right to the City*, *supra* note 60, at 23.

<sup>463</sup> Edesio Fernandes, *Constructing the ‘Right to the City’ in Brazil*, 16:2 SOC. & LEGAL STUD. 201, 201–02 (2007). For detailed explication of Lefebvre’s construct of the right to the city, see Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 GEOJOURNAL 99, 100 (2002); DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE 19 (2003); David Harvey, *The Right to the City: From Capital Surplus to Accumulation by Dispossession*, in ACCUMULATION BY DISPOSSESSION, *supra* note 180, at 17.

<sup>464</sup> HENRI LEFEBVRE, WRITING ON CITIES, *supra* note 461, at 158.

<sup>465</sup> The scope of international human rights has moved beyond civil and political rights to include economic and social rights and collective solidarity rights. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10,

the citizen is needed to address new relations between individuals and society in modern urban life. He linked reconfiguration of citizenship rights with democratic governance of cities, the primary zone of modern collective life.<sup>466</sup> Rather than rejecting classic liberal political rights, Lefebvre aimed to build upon them to include the right to information, the right to culture, the right to identity in difference and in equality, the right of democratic control of the economy and politics, the right to public services, and above all, the right to the city.<sup>467</sup> The right to the city consists of the right of all city-dwellers to fully enjoy urban life with all its services and advantages—the right to habitation, as well as playing a direct role in the management of cities. This calls for an emphasis on use value of all things urban in order to redress the social imbalances that issue from excessive emphasis on exchange value, the hallmark of the production of urban space under capitalism. Besides a claim upon adequate urban services and management, it includes full use of space by those who inhabit the city, including the right against segregation and expulsion from social life. Most importantly, it seeks an active participatory role in “all circuits of decision-making leading to the control and development of the organization of social space,” in order to resist the control of space by the state and capital.<sup>468</sup>

The right to the city can compliment constructs of political citizenship with a broader notion of “urban citizenship.”<sup>469</sup> It signals legitimization of collective struggles to transform the “power relations that underlie the production of space, fundamentally shifting control away from capital and the state and toward urban inhabitants.”<sup>470</sup> It not only expands the eligibilities of those traditionally considered members of the

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1948); Int'l Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); Int'l Covenant on Economic, Social, and Cultural Rights, GA Res. 2200, 21 UN GAOR Supp. No. 16, UN Doc. A/6316 (1966).

<sup>466</sup> See LEFEBVRE, WRITINGS ON CITIES, *supra* note 461, at 140–41. This is in tune with his general theory about the mutually constitutive role of space and the social, he argues that “[g]roups, classes or fractions of classes cannot constitute themselves, or recognize one another as ‘subjects’ unless they generate (or produce) a space.” HENRY LEFEBVRE, THE PRODUCTION OF SPACE 416 (Donald Nicholson-Smith trans., 1991).

<sup>467</sup> Liette Gilbert & Catherine Phillips, *Practices of Urban Environmental Citizenships: Rights to the City and Rights to Nature in Toronto*, 7 CITIZENSHIP STUD. 313, 317 (2003).

<sup>468</sup> M. R. Martins, *The Theory of Social Space in the Work of Henry Lefebvre*, in URBAN POLITICAL ECONOMY AND SOCIAL THEORY 160, 183 (R. Forrest, J. Henderson & P. Williams, eds., 1982).

<sup>469</sup> See Eugene McCann, *Space, Citizenship, and the Right to the City: A Brief Overview*, 58 GEOJOURNAL 77, 78 (2002); ENGIN ISIN, *Democracy, Citizenship and the City*, in DEMOCRACY, CITIZENSHIP AND THE GLOBAL CITY 1, 14 (2000).

<sup>470</sup> Purcell, *supra* note 464, at 101–02.

political community, i.e., citizens, but could bring refugees, asylum seekers, and the undocumented within the zone of eligibilities and entitlements on account of their spatial presence.<sup>471</sup> Of course, we have to be mindful that “the number of rightless peoples also grows even as human rights norms and standards proliferate.”<sup>472</sup> We also have to note the critique of the classic discourse of rights for its formalism, questionable claims of universality, limited scope, and failures in implementation.<sup>473</sup> Furthermore, framing all issues and strategies in the language of rights may itself impede their realization.<sup>474</sup> The right to the city is amenable to readings that may restrict it and simply add to the portfolio of individual liberties best suited for the interests of the powerful political and economic elites. If it is to challenge hegemonic liberal political and neoliberal market constructs, this right has to be envisaged as more than an individual liberty to access urban resources, and seen instead as a collective right to reshape the process of urbanization. The right would be meaningful only if it entails democratic control over deployment of surplus, and management of urban development. It is imperative that counter-hegemonic social movements remain the drivers of this right which is essentially a solidarity right. Only then will it become an effective instrument to address the inequities of urban life. David Harvey has called for the adoption of the right to the city both as a slogan and a political project because

it focuses on the question of who commands the necessary connection between urbanization and surplus production and use. The democratization of that right, and the construction of a broad social movement to enforce its will is imperative if the dispossessed are to take back the control which they have for so long been denied, and if they are to institute new modes of urbanization.<sup>475</sup>

A productive model is furnished by the struggle for the right to the city as it has unfolded in Brazil.<sup>476</sup> It rests on the principle

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<sup>471</sup> See Chris Butler, *Sydney: Aspiration, Asylum and the Denial of the Right to the City*, in LAW AND THE CITY 205, 217 (Andreas Philippopoulos-Mihalopoulos ed., 2007).

<sup>472</sup> UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* viii (2002).

<sup>473</sup> See TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 148, 151–58 (2003).

<sup>474</sup> See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 101, 101 (2002).

<sup>475</sup> Harvey, *The Right to the City*, *supra* note 60, at 40.

<sup>476</sup> See LEONARDO AVRITZER & BELO HORIZONTE, *URBAN REFORM, PARTICIPATION, AND THE RIGHT TO THE CITY IN BRAZIL* 3 (2007). For social movements in Brazil, see Maria Helena Moreira Alves, *Sao Paulo: The Political and Social Transformations Wrought by the New Labor Movement*, in *WORLD CITIES BEYOND THE WEST: GLOBALIZATION, DEVELOPMENT AND INEQUALITY* 299, 300–01 (Josef Gugler ed., 2004). See also Ulrich Brand and Marcus Wissen, *Neoliberal Globalization and the Internationalization of Protest: A European Perspective*, 37 *ANTIPODE* 9, 10 (2005); AMORY

that regulation of urban development is a public matter that cannot be reduced to either individual or state interests. The right is then seen as an ensemble of rights of all residents of the city—the right to housing, the right to urban planning, the right to environmental preservation, the right to capture surplus value, and the right to regularize informal settlements. A landmark in this context was the enactment of Federal Law No. 10.257, entitled “City Statute,” in Brazil on July 10, 2001.<sup>477</sup> The statute aims to regulate the framework of urban policy introduced by the 1988 Federal Constitution that explicitly recognized a collective right to the city, affirmed a central role for local governments, and declared that representative democracy be reconciled with participatory political process.<sup>478</sup> The City Statute provides the frame of interpretation of the constitutional principle of the social function of urban property and the city, lays down a regulatory framework for the construction and financing of urban development by municipalities, prescribes the design of democratic management of cities, and identifies legal modalities for comprehensive regularization of informal settlements in private and public urban areas.<sup>479</sup>

Another promising development is the proposal for a “World Charter for Human Rights in Cities,” first proposed at the VI Brazilian Conference on Human Rights in 2001.<sup>480</sup> It was inspired generally by the international instruments on civil, political, social, cultural, and environmental rights, and in particular by the European Charter for Safeguarding of Human Rights in the City,<sup>481</sup> and by the Treaty for Democratic, Equitable and Sustainable Cities, Towns and Villages.<sup>482</sup> The World Social

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STARR, NAMING THE ENEMY: ANTI-CORPORATE MOVEMENTS CONFRONT GLOBALIZATION 88 (2000).

<sup>477</sup> THE POLIS INSTITUTE, THE STATUTE OF THE CITY: NEW TOOLS FOR ASSURING THE RIGHT TO THE CITY IN BRAZIL 11 (2002), available at [http://polis.org.br/obras/arquivo\\_163.pdf](http://polis.org.br/obras/arquivo_163.pdf).

<sup>478</sup> *Id.* at 28. For details, see EDESIO FERNANDES, LAW AND URBAN CHANGE IN BRAZIL 68 (1995).

<sup>479</sup> THE POLIS INSTITUTE, *supra* note 477, at 27.

<sup>480</sup> See Enrique Ortiz, *Towards a World Charter for the Right to the City*, HABITAT INTERNATIONAL COALITION, <http://www.hic-net.org/articles.php?pid=2296> (last visited Sept. 2, 2010). For English text of the World Charter, see DISABLED PEOPLE'S INTERNATIONAL, <http://v1.dpi.org/lang-en/events/details.php?page=124> (last visited Sept. 2, 2010).

<sup>481</sup> Leticia Osorio, *The World Charter on the Right to the City*, in INTERNATIONAL PUBLIC DEBATES: URBAN POLICIES AND THE RIGHT TO THE CITY 107, 107 (2005). This was presented in Saint-Denis in May 2000, and has since been adopted by over four hundred European cities. *Id.*

<sup>482</sup> *Id.* This was approved in 1992 at the World Environment Summit in Rio de Janeiro. *Id.*



Forum, the umbrella “movement of movements,”<sup>483</sup> has been the primary vehicle to elaborate the World Charter and to design strategies for its adoption by the United Nations.<sup>484</sup> In 2005, UN-HABITAT and UNESCO launched a joint initiative entitled “Urban Policies and the Right to the City” aimed at social mobilization for the World Charter.<sup>485</sup> The objective of the World Charter is to recognize and to establish legal mechanisms to enforce the right to the city in its social, economic, cultural, and political dimensions.<sup>486</sup> It seeks to redesign international norms of economic, social, cultural, and environmental rights in a more clearly defined framework of the right to the city.<sup>487</sup> If approved by the United Nations, the World Charter would confer legitimacy to social movements of the urban poor and slum-dwellers. It would help develop international legal norms for human rights to guide public, community, and private agents to ensure equitable and sustainable distribution and use of urban land and resources. In this role, it could serve as a useful instrument in the struggle of slum-dwellers and the urban poor.<sup>488</sup> The right to the city can facilitate recovering the original meaning of the city—the body of citizens, and the community. We have to recognize, however, that general declarations of rights are important but not sufficient. Effective social movements and *locus standi* for individuals and social movements to enforce those rights through the courts are essential for the realization of such a right. Even the enforcement of this right at the level of the cities may remain largely symbolic if international and national economic and

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<sup>483</sup> See A MOVEMENT OF MOVEMENTS: IS ANOTHER WORLD REALLY POSSIBLE? x (Tom Mertes ed., 2004).

<sup>484</sup> JEREMY BRECHER, *Global Self—Organization From Below*, ZNET (May 10, 2002), <http://www.zcommunications.org/global-self-organization-from-below-by-jeremy-brecher-1.pdf>. For a detailed exposition of the origins and career of the World Social Forum, see JACKIE SMITH ET. AL., GLOBAL DEMOCRACY AND THE WORLD SOCIAL FORUM 30, 131 (2008); Ahmed Allahwala & Roger Keil, *Introduction to a Debate on the World Social Forum*, 29 INT’L J. URB. & REG’L RES. 409, 409 (2005). See also GLOBALIZATION AND THE POLITICS OF RESISTANCE 9 (Barry K. Gills ed., 2001); WALDEN BELLO, DEGLOBALIZATION: IDEAS FOR A NEW WORLD ECONOMY 234 (2002); NEW SOCIAL MOVEMENTS IN THE SOUTH: EMPOWERING THE PEOPLE 234 (Ponna Wignaraja ed., 1993); JEREMY BRECHER, TIM COSTELLO & BRENDAN SMITH, GLOBALIZATION FROM BELOW: THE POWER OF SOLIDARITY 129 (2000).

<sup>485</sup> *Urban Policies*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/urban-development/urban-policies/> (last visited Sept. 2, 2010).

<sup>486</sup> OSORIO, INTERNATIONAL PUBLIC DEBATES URBAN POLICIES AND THE RIGHT TO THE CITY, *supra* note 481, at 108.

<sup>487</sup> *Id.*

<sup>488</sup> See MANFRED B. STEGER, GLOBALISMS: THE GREAT IDEOLOGICAL STRUGGLE OF THE TWENTY-FIRST CENTURY 102 (2009).

urban policies remain imprisoned in the straitjacket of the global rule of capital, particularly its neoliberal reincarnation.

#### CONCLUSION

The persistence and growth of slums is perhaps the most eloquent testimony of the failures of the capitalist world order. Machinations of global capital, managerial designs of global management, national policies imprisoned in bankrupt development models, and the absence of comprehensive social movements remain hurdles in any road to dignity and full participation in political and socio-economic life for marginalized populations. It is a particular burden of scholars to devise strategies to reverse this state of affairs. Correct diagnosis remains indispensable to productive prescriptions. The primary intellectual challenge is to cut through the ideological fog that envelops the operations and effects of socio-economic orders procreated by the rule of unbridled capital accumulation. We have to contest and interrogate propositions that phenomena like slums, urban poverty, and human misery are accidental, incidental, or a mandate of the natural scheme of things. The connection between accelerating urban poverty in the global South and global accumulation of capital has to be clearly understood, along with the supporting roles of global managers, national policy makers, and local administrators. Legal scholars face a particular challenge to interrogate the role of law in this context. Our theories of citizenship, class, identity formation, and social change must take into account the rhythms of lived experiences of the urban poor. Only then can transformative prescriptive designs be imagined and implemented. To address this historic agenda, we will do well to learn from and build upon the daily struggles and resistive ingenuities of slum-dwellers. In an evocative scene of *Slumdog Millionaire*, while torturing the slum-dweller protagonist, a police officer inquires: “What can a slumdog possibly know?” The protagonist responds: “The answers!”<sup>489</sup>

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<sup>489</sup> *Slumdog Millionaire*, *supra* note 13.