



Law, Property & Society

# Community, Home, and Identity

Edited by Michael Diamond  
and Terry L. Turnipseed

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*Edited by*

MICHAEL DIAMOND

*Georgetown University Law Center, USA*

TERRY L. TURNIPSEED

*Syracuse University, USA*

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Published by  
Ashgate Publishing Limited  
Wey Court East  
Union Road  
Farnham  
Surrey, GU9 7PT  
England

Ashgate Publishing Company  
Suite 420  
101 Cherry Street  
Burlington  
VT 05401-4405  
USA

[www.ashgate.com](http://www.ashgate.com)

#### **British Library Cataloguing in Publication Data**

Community, home, and identity. -- (Law, property and society)

1. Property. 2. Home ownership--Law and legislation.
3. Identity (Philosophical concept) 4. Sociological jurisprudence.

I. Series II. Diamond, Michael R. III. Turnipseed, Terry L.  
346'.04-dc23

#### **Library of Congress Cataloging-in-Publication Data**

Community, home, and identity / [edited] by Michael Diamond and Terry L. Turnipseed.  
p. cm. -- (Law, property and society)

Includes bibliographical references and index.

ISBN 978-1-4094-3854-0 (hardback) -- ISBN 978-1-4094-3855-7 (ebook)

1. Real property--United States. 2. Home ownership--Law and legislation--United States.
3. Real property--England. 4. Home ownership--Law and legislation--England. 5. Identity (Philosophical concept) 6. Sociological jurisprudence. I. Diamond, Michael R. II. Turnipseed, Terry L.

K736.C65 2012

343.42'025--dc23

ISBN 9781409438540 (hbk)

ISBN 9781409438557 (ebk – pdf)



Printed and bound in Great Britain by the  
MPG Books Group, UK.

# COMMUNITY, HOME, AND IDENTITY

# Law, Property and Society

Series Editor:  
Robin Paul Malloy

The Law, Property and Society series examines property in terms of its ability to foster democratic forms of governance, and to advance social justice. The series explores the legal infrastructure of property in broad terms, encompassing concerns for real, personal, intangible, intellectual and cultural property, as well as looking at property related financial markets. The series is edited by Robin Paul Malloy, and book proposals are welcome from all interested authors.

**Robin Paul Malloy** is E.I. White Chair and Distinguished Professor of Law, and the Kauffman Professor of Entrepreneurship and Innovation at Syracuse University College of Law, USA. He is Director of the Center on Property, Citizenship, and Social Entrepreneurism. He is also Professor of Economics (by courtesy appointment) in the Maxwell School of Citizenship and Public Affairs, Syracuse University. Professor Malloy writes extensively on law and market theory and on real estate transactions and development. He has authored eight books (one now in its third edition and another in its second edition), and edited seven additional books. He has also written more than 30 scholarly articles, and contributed to 12 other books. His recent books include: *LAW AND MARKET ECONOMY* (2000, in English and translated into Spanish and Chinese); *LAW IN A MARKET CONTEXT* (2004); and *REAL ESTATE TRANSACTIONS 3RD EDITION* (with James C. Smith, 2007).

## List of Contributors

**Susan Bright** is a Professor of Land Law at New College, Oxford University and Part-time Chair of the Residential Property Tribunal Service. In addition to writing in the broad area of landlord and tenant law, she has a particular interest in the way that property law interacts with the use of home.

**Michael Diamond** is a Professor of Law at the Georgetown University Law Center and is Director of Georgetown's Harrison Institute for Housing and Community Development. His research focuses on the intersection of law and poverty.

**Vincent Di Lorenzo** is a Professor of Law at St John's University School of Law and Senior Fellow at the Vincentian Center, St John's University.

**Andrew Hayward** is a Lecturer in Law at Durham Law School. He specializes in family property law and, specifically, the judicial application of trust principles to ownership disputes over the family home.

**Nicholas Hopkins** is a Professor of Law at the University of Southampton. He specializes in family property law and, specifically, the judicial application of trust principles to ownership disputes over the family home.

**Antonia Layard** is Professor of Law and Geography at Birmingham Law School, University of Birmingham. Her research interests are in law and geography, in particular investigating the construction of "the local" and place-making in law and society.

**David Reiss** is a Professor of Law at Brooklyn Law School. His research focuses on the secondary mortgage market.

**Allison Brownell Tirres** is an Assistant Professor at DePaul University College of Law where she teaches and writes in the areas of property, immigration, and legal history.

**Terry L. Turnipseed** is an Associate Professor of Law and an Associate Professor of Engineering and Computer Science (by courtesy appointment) at Syracuse University. His research focuses on Article I constitutional law, eminent domain, sexuality and the law, spousal property rights upon death, trust fiduciary law, transfer taxation, and the separation of church and state.

**Sarah Waldek** is a Professor of Law and the Robert Diab Scholar at Seton Hall University School of Law where she teaches estates and trusts and property. Her scholarship focuses on how the law influences behavior and shapes social and familial norms.

# Preface

Michael Diamond

Community. Home. Identity. These words evoke ideas that are central to any society. As such, they have concerned scholars from a variety of fields for some time. Legal scholars, sociologists, anthropologists, psychologists, and economists, among others, have studied the impacts of home and community on one's identity and how one's identity is manifested in one's home and in one's community. How does the law affect these essential societal issues? More fundamentally, how *should* the law, if at all, help to shape them? There are varying legal and public policy implications depending on the answers to these questions and on how the terms community, home, and identity, are interpreted.

In this book we present a compilation of several papers that were presented during a two-day conference at the Georgetown University Law Center. The conference, the first annual meeting of the Association for Law, Property, and Society, drew more than 140 scholars from around the world. The chapters in this volume have been updated and revised and present the work of some of the leading thinkers about the connections between community, home, and identity. Several chapters address how the law, and lawyers, contribute (or detract) from the creation and maintenance of community and, in some cases, to the conscious destruction of communities. Others examine the degree of protection offered to individual and group identities through rules related to the title of property and use of such concepts as "home" and "identity property."

The book begins with a look at how, upon the advent, in late nineteenth century, of technological modernization that would affect local growth and property values, lawyers used the law to reshape a longstanding community. In her historical essay, Allison Brownell Tirres takes us through the transformation of El Paso, after the coming of the railroad to southwest Texas. From its beginnings as a town with a mixed and integrated culture and politics, comprised of Anglo- and Mexican-American residents sharing space and power, Tirres points to the fact that "in the span of only twenty years, El Paso changed from a close-knit, multicultural frontier community to a burgeoning, increasingly racially-segregated border metropolis." This, according to Tirres, was the result not merely of demographic changes, but rather of a planned and carefully implemented transformation using the law, particularly property law, as the catalyst. As such, her narrative illustrates the pattern of much of the racial and ethnic separation that followed.

This theme is continued, in slightly different fashion and in modern times, in Antonia Layard's chapter concerning community autonomy in the United



Kingdom and the resulting “right to exclude.” Layard suggests that there is a current “vogue” in the UK for localism, as a result of a “rare cross-party consensus over devolving more power to town and county halls.” This vogue, designed to give localities greater authority in planning and in shaping their own communities, has, on the one hand, a decidedly communitarian aspect; the devolving of power from a distant, somewhat anonymous, central national or regional authority to locals to shape and preserve their neighborhoods. This same localism, however, also has the seeds of a more pernicious separatism—Layard’s right to exclude. She points out that “land use regulations can mean that ‘outsiders’ and ‘others’ find it difficult to live where they would otherwise choose,” and asks how the balance between exclusion and preservation ought to be struck in society today.

Michael Diamond approaches this theme from another perspective. He addresses the destruction of community, in his case, communities of highly concentrated poverty. The destruction takes place, at least nominally, in the service of assisting the poor residents of such communities by creating mixed-income communities on the sites of formerly high-concentration, low-income neighborhoods or by relocating low-income residents to existing mixed-income communities. After discussing the social problems associated with high concentrations of poor residents in a geographic area, Diamond looks at several federal programs designed to alleviate these problems and assesses their effectiveness. He points out “a certain irony” in the governmental efforts to de-concentrate poverty since he claims it was governmental policies that, at least in part, created the concentrations in the first instance. Diamond critiques the de-concentration programs on both practical and conceptual grounds, but is primarily concerned with “the social, cultural, and political ramifications of destroying existing communities.” After discussing the problems with the de-concentration policies currently in place, he offers alternatives to the destruction of high-concentration poor communities.

The next chapter examines affordable home-ownership in England. In doing so, Susan Bright and Nicholas Hopkins explore the methods and effects of subsidized homeownership under England’s “Right to Buy” regime that offers council tenants (the rough equivalent of public housing tenants in the United States) the opportunity to purchase their dwelling unit. Bright and Hopkins are concerned with “the twin policy objectives of delivering the benefits of homeownership to the individual whilst creating sustainable mixed communities.” They review the mechanics of providing subsidies, before turning to benefits of homeownership. In the case of individuals, they look not only at the possibility of wealth creation, but also at the sense of the new owner as having “arrived” and of having the “security of place.” They then expand their view to the community benefits of homeownership. They cite a government report pointing out that filling the “aspirations gap” of those who wish to own homes is not sufficient reason for the public subsidy. There must also be a benefit to society. The programs that result from benefit trade-offs between individual and society requires, according to Bright and Hopkins, a re-examination of the meaning of homeownership.

David Reiss returns the discussion of governmental housing policy to the United States where he attempts to make sense of a “bewildering array” of federal housing programs. He, too, points out a lack of clarity and contradiction in government housing policy. Reiss seeks to identify “first principles” in US housing policy, “because our muddled housing agenda has left debates surrounding housing policy confused and unproductive.” To do this, he has created a taxonomy of housing “ethics” and first principles, with a “goal of developing a more systematic approach to the evaluation of housing policy.” In this way, he believes, one can determine whether individual programs are consistent with the first principles and whether programs, in the aggregate, are coherent or working at cross purposes.

Ethics is used in a different sense by Vincent Di Lorenzo. His chapter focuses on the issue of consumer protection in mortgage lending. Di Lorenzo states that a nation’s “ethical viewpoint embraced by a society is frequently reflected in its laws.” Given this premise, he asks “whether U.S. society sanctions business practices involving residential property which extract profits from individuals who are unable to protect themselves?” He answers this question in the negative and points to a long history of consumer protection for what he calls “an essential public good,” one’s home. Nevertheless, Di Lorenzo points out a “schism” between Congress and the federal agencies that regulate banks, with Congress recognizing the need for governmental intervention while the agencies rely on “market discipline” to address abusive lending practices. While it is possible that the agencies have failed to effectuate Congressional intent, Di Lorenzo believes that “the actions and viewpoints of Congress ... are a reflection of the ethical standards accepted by U. S. society, namely that business entities should not profit by inflicting significant financial injury on vulnerable individuals.”

In our penultimate chapter, Sarah Waldeck introduces her concept of “identity property” which, she says, “is personhood property ratcheted down.” Identity property is property that is “linked to one’s sense of self and family” and is valued for that reason rather than its economic worth. Waldeck is concerned when property of high economic value is left to several persons who value it also as identity property. She uses a family cottage as an example. While the traditional legal remedy for co-owners of property who cannot agree on its use or disposition has been partition, Waldeck criticizes this remedy as being far too blunt. She believes the law is an inadequate discipline for the resolution of disputes between co-owners of identity property. She seeks ways for the law to foster cooperation between disputing co-owners of identity property and asks us to consider, for example, “what might unfold between co-tenants if partition actions involving identity property had three potential remedies instead of just two: a partition in kind, a partition by sale *and* temporal partition.”

Andrew Hayward continues the theme of relational property by providing an English perspective on issues concerning the family home. His chapter revolves around the meaning society attaches to the concept of “home.” The problem arises for Hayward in the context of “joint legal title disputes arising between cohabitants or platonic home-shares.” How should the property be allocated when

such relationships end acrimoniously? Or, if the relationship ends in death, who, between the former cohabitant who had no legal title or the heirs of the title-holding decedent, ought to have a stronger claim? Should, and if so, how ought, society distinguish between a home and a commercial enterprise? In attempting to answer these questions, Hayward analyzes the House of Lords' decision in *Stack v Dowden* in which Baroness Hale makes the home versus commercial enterprise distinction and claims that "in law 'context is everything.'" While Hayward praises the *Stack* opinion for "highlighting the need for reform ... of this notoriously complex area," he nevertheless criticizes the majority opinion for its "potential to confuse rather than clarify" the law.

As can be seen, the relationship between community, home, and identity is both broad and multilayered. The chapters in this book have carved out several areas of this fascinating inquiry and dug quite deeply into them. We hope the work will spur debate and further thought in the field.

# Acknowledgements

I would like to acknowledge the extraordinary research assistance of Jared Lamb and Thomas Davison. Without their tireless and exceptional efforts, this volume would not have been possible. I would also like to thank the Georgetown University Law Center for supporting the first annual conference of the Association for Law, Property, and Society, and Georgetown's Department of Academic Conferences and Continuing Legal Education for its efforts in making the conference a success.

MD

I would like to thank my mother, Dr. Jorja Turnipseed for her steadfast love and support, and my wonderful research assistant, Sherry Conaway, for her tireless efforts on this book.

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# Chapter 1

## Bordered Lands: Land Use, Legal Culture, and Community Development in the Nineteenth-Century Southwest

Allison Brownell Tirres

The county of El Paso, Texas, in the year 1870 was a quintessential frontier community. Located in the far western tip of Texas, it was difficult to reach from any major metropolis. Although officially a part of Texas, the lack of any railroad connection and the presence of hostile Indian tribes in this period made for a long, dangerous journey to and from other population centers in the region. El Paso was also a community on the borderline, bordered to the west by New Mexico, and to the south by Mexico.<sup>1</sup> The population of only 4,000 was predominantly of Mexican descent.<sup>2</sup> Many of its residents had lived in the region since before the Mexican-American War, when the US gained the El Paso area (and more than one-third of Mexico's northern territories) in the Treaty of Guadalupe-Hidalgo.<sup>3</sup> Due in large part to its isolation and its preexisting Mexican legal and cultural traditions, El Paso in 1870 was a hybrid place, where American law was present but practiced

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1 While we are accustomed to considering the Rio Grande a north-south divide between the United States and Mexico, in the El Paso region it is actually more accurately described as an east-west divide. What we today call El Paso County, Texas, developed out of the Spanish colonial town of El Paso del Norte (today's Ciudad Juárez, Chihuahua, Mexico) and its surrounding settlements. The primary settlement up until the 1880s was El Paso del Norte, on the west bank of the Rio Grande. Land on the east bank, where the city of El Paso, Texas, is now located, was, during the Spanish colonial period, only sparsely inhabited and used mostly as a source of firewood and pasture lands for residents on the other side of the river. The terminology becomes clearer after 1888, when El Paso del Norte was renamed Ciudad Juárez, after the Mexican President Benito Juárez, who lived for some time in the city that now bears his name. For the geography and development of the sister cities of Juárez and El Paso, see Milo Kearney & Anthony Knopp, *BORDER CUATES: A HISTORY OF THE US-MEXICAN TWIN CITIES* (1995).

2 J. Lawrence McConville, *A History of Population in the El Paso-Ciudad Juárez Area*, 76, 80 (1966) (unpublished master's thesis, The University of New Mexico) (on file with author).

3 Treaty of Guadalupe Hidalgo, Feb. 2, 1848, US-Mex., art. VIII, 9 Stat. 922. See RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* (1990).

in Spanish, where those of Mexican and American descent served side-by-side in the institutions that governed the county, and residents still celebrated Mexican Independence Day along with the Fourth of July.<sup>4</sup>

El Paso, Texas, in the year 1890 was a very different place. The population of the county had quadrupled, to more than 15,000. The city of El Paso saw even greater population growth, from a few hundred residents in 1870 to more than 10,000 in 1890.<sup>5</sup> The majority was still of Mexican descent, but now the population of those of Anglo-American descent was growing steadily.<sup>6</sup> Travelers could now reach El Paso by not one, but four different major railway lines, which connected the county not only to other parts of Texas, but also to San Francisco, St Louis, and Mexico City. These demographic changes had ramifications for legal culture. The old adobe courthouse, where those of Mexican and American descent had sat side-by-side to administer justice, was now replaced by an imposing brick edifice in a European style, where those who spoke only Spanish were no longer allowed to serve on juries as they had for decades before. By the end of the decade, juries were no longer a Mexican-American majority, trials were no longer conducted largely in Spanish, and residents were chastised for celebrating Mexican holidays. The balance of power had shifted from one racial/ethnic group to another. In the span of only 20 years, El Paso changed from a close-knit, multicultural frontier community to a burgeoning, increasingly racially segregated border metropolis.

El Paso County was not the only community to undergo dramatic change after the arrival of the railroads.<sup>7</sup> This is a familiar story in nineteenth-century history, of the ways that the railroads altered the character of the cities and towns they passed through, creating boom towns out of previously isolated enclaves.<sup>8</sup> The

4 See W.H. TIMMONS, *EL PASO: A BORDERLANDS HISTORY* 135–168, 175 (1990); Allison Brownell Tirres, *American Law Comes to the Border: Law and Colonization on the US/Mexico Divide, 1848–1890*, 1–20, 116–162 (2008) (unpublished Ph.D dissertation, Harvard University) (on file with author).

5 US Bureau of the Census, *Report on the Population of the United States, Eleventh Census, 1890* (1895), 31, 41–42, 241, 332.

6 OSCAR J. MARTINEZ, *BORDER BOOM TOWN: CIUDAD JUAREZ SINCE 1848*, 159 (1978); McConville, *supra* note 2, at 76, 80.

7 See DAVID HAMER, *NEW TOWNS IN THE NEW WORLD: IMAGES AND PERCEPTIONS OF THE NINETEENTH-CENTURY URBAN FRONTIER* 113–138 (1990); RICHARD WHITE, “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”: A NEW HISTORY OF THE AMERICAN WEST 298–327 (1991); Carol A. O’Conner, *A Region of Cities*, in *THE OXFORD ENCYCLOPEDIA OF THE AMERICAN WEST* 535–563 (Clyde A. Milner, II, Carol A. O’Connor & Martha A. Sandweiss, eds, 1994).

8 See, e.g., WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* (1999) (noting the transformation in southern towns once the railroads ended their isolation). There is an extensive historical literature on the development of the railroads in the nineteenth and twentieth centuries and their effects on urban growth. See, e.g., WILLIAM CRONON, *NATURE’S METROPOLIS: CHICAGO AND THE GREAT WEST* (1994); ROBERT REIGEL, *THE STORY OF THE WESTERN RAILROADS* (1926); WHITE, *supra* note 7, at 246–258. It is also important to note that the railroads did not just encourage the growth of small

scholarship tends to portray these things as inevitably linked: the railroads brought greater settlement, which changed the nature of formerly small towns, contributing to their modernization and urbanization. While there is truth to this general characterization, it is also clearly deficient.<sup>9</sup> We must go beyond demographic determinism if we are to understand the ways that communities change over time. It was not merely the arrival of more people that changed El Paso. These changes were the product of specific moves by local residents to reshape the area, particularly to whitewash its Mexican past while also promoting its transnational future as a cross-border trade hub.<sup>10</sup> Law and lawyers were key elements in the transformation of El Paso from an isolated, frontier community to a burgeoning border metropolis. The legal profession paved the way for the railroads' arrival by altering patterns of land use. As local politicians and merchants then sought to attract more settlers to the area, they targeted the area's unique legal culture as a problem, seeking to change not just the way land was used and owned—from communally to individually—but also to change the way law was practiced and enforced. This involved moving the county seat from a Mexican-American town to a predominantly Anglo-American one and tearing down the old adobe courthouse. These moves shifted the balance of power in the county, leading to greater segregation not just in the courthouse, but also in neighborhoods, schools, and social venues. Land ownership and patterns of land use were both reflections of and contributors to the creation of greater inequality in the community.

In many respects, this is a distinctly nineteenth-century story. It portrays community development in a particular era, when western land was still cheap and plentiful, the railroads were a major innovation, and racial hierarchies were firmly entrenched, if sometimes more fluid than we might expect. Yet there are remarkable overlaps with contemporary society. We continue to live in a world in

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towns and cities, but also supported the growth of major urban areas. As historian Keith L. Bryant, Jr, notes, “[T]he urbanization of the West reflected the coming of the railways, with cities as diverse as Dallas, Los Angeles, Tacoma, Spokane, and Denver largely owing their existence, and their growth, to the presence of railways tapping their hinterlands.” Keith L. Bryant, Jr, *Entering the Global Economy*, in *THE OXFORD ENCYCLOPEDIA OF THE AMERICAN WEST* (Clyde A. Milner, II, Carol O'Connor & Martha A. Sandweiss, eds, 1994), at 224.

<sup>9</sup> See, e.g., DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1886* 76 (1987) (“Facilitated by an expanding railroad network, the new settlements basically Americanized the old Spanish-Mexican towns of the region”); PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 62 (1988) (“In a variety of ways—huge grants to subsidize railroad construction, grants to states, the distribution of land warrants to veterans, the sale of tracts made available by further reductions of Indian reservations—much desirable land was taken from the reach of homesteaders”). I would argue that the passive voice in these examples is not just a stylistic choice, but also an indicator of how much more there is to understand about the people behind these processes of colonization in the west.

<sup>10</sup> See WILLIAM DEVERELL, *WHITEWASHED ADOBE: THE RISE OF LOS ANGELES AND THE REMAKING OF ITS MEXICAN PAST* (2005).



which technological change can spark shifts in wealth, equality and opportunity. We are not, despite some recent assertions to the contrary, in a post-racial era: *de facto* residential and educational segregation continues in many towns and cities in this country, El Paso included.<sup>11</sup> Urbanization and modernization—which today might be referred to as “gentrification”—bring decidedly mixed blessings, as they did in the 1880s and 1890s.<sup>12</sup> On the one hand, such changes in a community can bring greater prosperity and stability. On the other, they can bring greater racial stratification and socioeconomic inequality. As in the nineteenth century, law and lawyers continue to play a powerful role in these processes of change. The legal profession can be instrumental either in ensuring more egalitarian communities or in undermining them. The historical portrait discussed in this essay, of one community’s experience with rapid development, thus has things to tell us not only about the nineteenth-century borderlands, but also about pitfalls in urban planning and development today.

The chapter begins by tracing the involvement of local attorneys in shifting land-ownership patterns in the county, in anticipation of the arrival of the railroads. Lawyers played key roles in making sure the railroad would come through their particular locale. Transforming the community was not only about attracting the railroads, however, but also about encouraging greater settlement. The second part of this chapter describes how lawyers, politicians, and others sought to recreate the area’s legal culture, in the interest of attracting settlers as well as facilitating Anglo-American legal and political dominance. This change in legal culture was part of a broader shift towards Americanization and segregation. The third part of the chapter describes the ways that the built environment of the county changed, as well as the racial/ethnic make-up of its neighborhoods and public spaces. The railroads may have provided a catalyst for these dramatic changes, but it took individual actors to make such change actually happen in the community.

## Lawyers and Land

By 1884, not just one but four railroad lines met in El Paso, connecting the county to both coasts and to the interior of Mexico.<sup>13</sup> The arrival of these transcontinental

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11 See, e.g., Hua Hsu, *The End of White America?*, in *THE ATLANTIC*, Jan–Feb. 2009 (available at <http://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/7208/>) (last visited Aug. 19, 2011); Lydia Lum, *The Obama Era: A Post-racial Society?*, in 25 *DIVERSE: ISSUES IN HIGHER EDUCATION* 14–16 (2009). On the persistence of racial disparities, see William Julius Wilson, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2009) (exploring the persistence of racial inequality in education, housing, employment, and other areas, and the interactions of race and poverty).

12 See, e.g., *GENTRIFICATION, DISPLACEMENT, AND NEIGHBORHOOD REVITALIZATION* (J. John Palen & Bruce London, eds, 1984) (discussing various possible causes of gentrification).

13 Edward A. Leonard, *Rails to the Pass of the North*, 48 *PASSWORD* 11, 20–25 (2003).