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A WORLD OF DISTRUST

Timothy M. Mulvaney*

In District of Columbia v. Wesby, the Supreme Court determined that a prudent officer had probable cause to arrest attendees at a festive house party for criminal trespass without a warrant. While reactions from scholars of criminal law have begun to emerge, this Piece is the first to conceive of the decision through the lens of property theory. In this regard, the Piece offers two principal claims. First, on interpretive grounds, it contends that, in constitutionalizing these arrests based on evidence seemingly unrelated to whether the party attendees knew or should have known they were trespassing, Wesby generated a de facto reallocation of property interests. Specifically, the decision abolished (a) the right held by the general public to access without fear of arrest those properties to which they reasonably believe they are welcome and (b) the correlative duty of titleholders to respect reasonably mistaken access until the mistake is revealed. Second, on normative grounds, it questions the justificatory nature of this shift from an allocation that vindicates the trust one person has placed in another to an allocation that allows someone else to violate that trust. The Piece concludes that perceiving Wesby as a dispute over property interests will not only deepen the developing assessments of the decision by scholars of criminal law but more broadly prompt reflection on matters across the property spectrum as to the oft-concealed implications that allocative choices regarding property interests bring to bear on our ability to trust one another in the marketplace and in myriad social settings.

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INTRODUCTION

In response to a neighbor's noise complaint, six police officers arrived at a house party in our nation's capital.¹ Some of the twenty-one attendees asserted that a woman whom they believed to be a tenant had invited them, while others said they were invited by someone else.² The host admitted to the police that she had extended the invitations and encouraged others to do the same.³ She also confessed, however, that while she had been negotiating with the titleholder, the two had—allegedly unbeknownst to the attendees—not yet finalized a lease.⁴ Upon learning that the host was not actually a tenant and that the titleholder had not authorized the party, the police immediately arrested the attendees for criminal trespass and transported them to a local police station.⁵

In *District of Columbia v. Wesby*, the Supreme Court considered whether a reasonably prudent officer in these circumstances had probable cause to make such warrantless arrests.⁶ In holding that such an officer could have inferred that the attendees knew or should have known that they were trespassing, the Court pointed only to the following categories of evidence: the condition of the interior of the house; the attendees' conduct at the party, which was legal if, to some, immoral; the attendees' reactions to the officers; and the second-hand nature of some of the party invitations.⁷ Reactions to the decision from criminal law and procedure scholars—some consisting of praise and others critique—are beginning to emerge.⁸

1. See *Wesby v. District of Columbia*, 765 F.3d 13, 17 (D.C. Cir. 2014), rev'd, 138 S. Ct. 577 (2018).

2. *Id.* at 17.

3. *Id.* at 18.

4. See *Wesby v. District of Columbia*, 816 F.3d 96, 100 (D.C. Cir. 2016) (Pillard, J. & Edwards, J., concurring in the denial of rehearing en banc) (“[T]he owner told the officers he had not yet rented the house to [the host].”).

5. *Wesby*, 765 F.3d at 18. Under District of Columbia law, the crime of unlawful entry on property carries with it a possible jail sentence of up to 180 days and a fine of up to \$1,000. D.C. Code § 22-3302 (2020).

6. See 138 S. Ct. at 585–89.

7. See *id.* at 586–87.

8. See, e.g., Lawrence G. Albrecht, *Confronting Governmental Impunity and Immunity “From Below”*, 53 Val. U. L. Rev. 47, 59 (2018) (suggesting that *Wesby* converts the “probable cause” standard to an “arguable probable cause” standard, thereby “further unmoor[ing]” the doctrine of qualified immunity “from its original purpose of granting immunity only in *qualified* circumstances” (emphasis omitted)); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1928 n.262 (2018) (contending that *Wesby* contributes to a line of qualified immunity jurisprudence that effectively eliminates myriad civil rights claims); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405, 1414 & n.57 (2019) (citing *Wesby* as one of the Supreme Court's cases that offers questionably broad deference to the police under the doctrine of qualified immunity); Anthony J. Ghiotto, *Traffic Stop Federalism: Protecting North Carolina Black Drivers from the United States Supreme Court*, 48 U. Balt. L. Rev. 323, 352 & n.230 (2019) (citing *Wesby* as supportive of a “traffic stop framework” that generates racial disparities); Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances*

This Piece, however, is the first to supplement this burgeoning literature with an assessment of *Wesby* through the lens of property theory.

The Piece presents two original claims in this regard. First, on interpretive grounds, Part I contends that *Wesby* generated a de facto reallocation of property interests. This suggestion is, as a threshold institutional matter, quite jarring, for probable cause jurisprudence has long been tethered to the underlying criminal offenses for which the elements are generally determined by state law. It seems highly unlikely that the Court sought to create a pseudofederal common law rule of criminal trespass that would become the basis of constitutional analysis under the Fourth Amendment; more likely, the Court, in its zeal to protect the police, paid little care to the state property law defining the suspected crime for which the arrests were made here. Regardless of the Court's background aims, the decision—to draw on the terminological framework coined by Wesley Hohfeld⁹—effectively abolished (a) the right held by the general public in the District of Columbia

Search, 52 U. Mich. J.L. Reform 615, 626 & n.57 (2019) (suggesting that *Wesby* contributes to the confusion surrounding the distinction between findings of probable cause and reasonable suspicion); Joanna C. Schwartz, The Case Against Qualified Immunity, 93 Notre Dame L. Rev. 1797, 1836 (2018) (suggesting that any hopes of the Court reassessing its qualified immunity jurisprudence were dashed in *Wesby*); Paul David Stern, Tort Justice Reform, 52 U. Mich. J.L. Reform 649, 675 (2019) (describing how *Wesby* offers questionably broad deference to the police under the qualified immunity doctrine, thereby leaving victims without a tort remedy); Jordan Blair Woods, Policing, Danger Narratives, and Routine Traffic Stops, 117 Mich. L. Rev. 635, 706 (2019) (lauding Justice Ginsburg's concurrence in *Wesby* for questioning "whether [the] Court, in assessing probable cause, should continue to ignore why police in fact acted" in qualified immunity cases); Marcus R. Nemeth, Note, How Was *That* Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers, 60 B.C. L. Rev. 989, 1020 & n.211 (2019) (querying Justice Thomas's finding of qualified immunity in *Wesby* after his having critiqued qualified immunity jurisprudence in a separate case just one year prior as embodying "precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make" (internal quotation marks omitted) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring))); see also Robert Barnes & Ann E. Marimow, Supreme Court Rules for Police Officers in D.C. House Party Case that Involved Mystery Hostess Called 'Peaches', Wash. Post (Jan. 22, 2018), https://www.washingtonpost.com/local/public-safety/supreme-court-rules-for-police-officers-in-dc-house-party-case-that-involved-mystery-hostess-called-peaches/2018/01/22/87e5eb4a-fed3-11e7-bb03-722769454f82_story.html (on file with the *Columbia Law Review*) (quoting the D.C. Attorney General as remarking that "[*Wesby*] is an important ruling that means that police officers can continue to carry out their vital duty to protect public safety"); Rebecca M. Lightle, SCV: Totality of Circumstances Justified Vehicle Search, Va. Law. Wkly. (Aug. 3, 2018), <https://valawyersweekly.com/2018/08/03/totality-of-circumstances-justified-vehicle-search> (on file with the *Columbia Law Review*) (explaining the futility of a plaintiff's argument in challenging a search of his vehicle given *Wesby*'s rejection of an "attempt at a 'divide and conquer analysis' of the facts in . . . supporting the probable cause determination").

9. In a pair of highly influential articles published over a century ago, Wesley Hohfeld developed an analytical framework for understanding interests in property as relational pairs. See generally Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917); Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913). Under this framework, if one individual holds a specific entitlement (a right, privilege, power, or

(and, by logical extension, other jurisdictions with a comparable criminal trespass ordinance) to access without fear of arrest those properties to which they reasonably believe they are welcome and (b) the correlative duty of titleholders (and, in turn, the police) to respect reasonably mistaken access until the mistake is revealed. It replaced this right–duty pairing with a strengthened general right of titleholders to exclude others and the correlative duty of the public to avoid making even reasonable mistakes as to whether their invited entry onto another’s property actually is warranted.

Second, on normative grounds, Part II calls into question the justificatory nature of the shift from a property allocation that vindicates trust one person has placed in another to an allocation that allows someone else to violate that trust. In the world of distrust that *Wesby* creates, recipients of invitations are tasked with formally confirming their host’s occupancy rights, accepting invitations without such confirmation at the risk of arrest, or denying those invitations outright. The consequences of a person’s selecting any one of these options—respectively, breeding distrust, preying on vulnerabilities, and fostering social isolation—are disquieting, and the economic, privacy, personal responsibility, and pragmatic rationales offered for allowing them to persist ultimately wither under scrutiny.

The Piece concludes that perceiving *Wesby* as a property case not only will deepen the developing assessments of the decision by scholars of criminal law, but, more broadly, prompt reflection on matters across the property spectrum as to the oft-concealed implications that allocative choices bring to bear on our ability to trust one another in the marketplace and in myriad social settings.

I. REALLOCATING PROPERTY RIGHTS

Property law consists of state allocative choices made in the face of competing claims to access or exclude others from finite resources, such as land, water, or minerals.¹⁰ These choices establish the contours of con-

immunity), then the other person involved in that relationship holds the opposite of that entitlement (correlatively, a duty, no-right, liability, or disability). For a sample application, consider the well-known dispute in *Jacque v. Steenberg Homes, Inc.*, in which a residential construction company sought to drive across Jacque’s barren field to deliver a mobile home to Jacque’s neighbor. See 563 N.W.2d 154, 156 (Wis. 1997). The court found that Jacque held the *right* to exclude Steenberg Homes from accessing Jacque’s field, such that Steenberg Homes had a correlative *duty* not to interfere with Jacque’s exclusionary right (and whereby Jacque could file a lawsuit to enforce that right upon Steenberg Homes should the company breach that duty). See *id.* at 159–60. A pilot may, however, have the *privilege* of accessing Jacque’s airspace above a certain altitude, in which case Jacque would have *no right* to enforce against the pilot.

10. See Timothy M. Mulvaney, Non-Enforcement Takings, 59 B.C. L. Rev. 145, 169 (2018) (“If the state allocates to one party a right to control the use of land or to mine subsurface resources, it denies that right and those attendant to it to all others.”); Timothy M. Mulvaney, Property-as-Society, 2018 Wis. L. Rev. 911, 928–29 (outlining how property law is understood as a choice made by the state in allocating resources).

temporarily legitimate social and market relationships. In turn, they necessarily determine which of those relationships are considered subprime and, in select instances, even rise to the level of criminality. The first section below explains that, long before the house party at issue in *Wesby*, the District of Columbia required the state to prove that entrants knew or reasonably should have known that all lawful occupants opposed their entry in order to yield convictions. The second section concedes that the Court's conclusion that the arrests here did not violate the party attendees' Fourth Amendment right to be free of unwarranted seizure absent probable cause does not technically upset this allocative choice.¹¹ By deeming relevant to the attendees' reasonability determination only novel types of evidence that will significantly alter how individuals relate to one another, however, the decision amounts to a de facto reallocation of property rights.

A. *The District of Columbia's Allocative Choice*

Decades prior to the arrests at issue in *Wesby*, the District of Columbia—upon deciding to criminalize trespass—faced the option of either (a) allocating to lawful occupants the liberty to call on the police to arrest *all* unwanted entrants, or (b) allocating to entrants security from criminal liability if they do not bear a certain state of mind. It logically follows that a decision as to whether police officers' arrest of the party attendees here for criminally trespassing violated the attendees' Fourth Amendment right to be free of unwarranted seizure absent probable cause necessarily must be tied to the District's prior, underlying choice among these options.¹²

The District's criminal trespass ordinance states, in relevant part, that “any person who, without lawful authority, shall enter . . . any . . . property, against the will of the lawful occupant . . . shall be deemed guilty.”¹³ The ordinance, therefore, is not explicit as to the requisite mens rea. In a series of decisions beginning in the 1960s, however, the District's appellate courts set out what one panel recently described in *Ortberg v. United States* as the jurisdiction's longstanding “discernible” interpretation of the ordinance.¹⁴

11. An arrest is considered a “seizure” of a person, and thus triggers the Fourth Amendment's protections. See, e.g., *Payton v. New York*, 445 U.S. 573, 585 (1980).

12. See *Wesby*, 138 S. Ct. at 586. The Court also held that, even if it had decided that the officers did not have probable cause, the officers reasonably believed that they had probable cause and thus were protected from individual liability under the doctrine of qualified immunity. *Id.* at 591. For more on qualified immunity, see *infra* notes 82–86 and accompanying text.

13. D.C. Code § 22-3302 (2020). The District has adjusted the language of its criminal trespass ordinance on two occasions since the arrests at issue in *Wesby*, though neither set of adjustments is material for purposes of the theses advanced here. See Omnibus Public Safety and Justice Amendment Act of 2009, 56 D.C. Reg. 7413 (Sept. 11, 2009); Criminal Fine Proportionality Amendment Act of 2012, 60 D.C. Reg. 2064 (Jan. 23, 2013); *Wesby*, 138 S. Ct. at 583 (giving the date of the party as March 16, 2008).

14. 81 A.3d 303, 308 (D.C. 2013).

In *Ortberg*, the defendant, Adam Ortberg, entered an invitation-only fundraiser in a hotel ballroom for the purpose of protesting a congressional member's political stances.¹⁵ Mr. Ortberg contended that the District's criminal trespass ordinance required that the state prove that an entrant "knowingly or deliberately defied the wishes" of the lawful occupants.¹⁶ He claimed that the state failed to meet its burden in this case given that, at least in his own mind, the ballroom was not distinctly closed off to members of the public walking about the hotel's lobby.¹⁷ A District appellate panel rejected Mr. Ortberg's narrow interpretation of the criminal trespass ordinance's requisite mens rea; at the same time, however, the court noted that the legislature had not "signaled its intent to impose strict liability."¹⁸ Instead, said the court, the District long ago had struck a middle ground: To obtain a conviction, the state must prove that the defendant "knew or should have known" that his entry was unwanted" by all lawful occupants.¹⁹

On this standard, the lawful occupants' opposition to the entry need not be subjectively understood by the entrant, but instead may be "objectively manifest through either express or implied means."²⁰ Pre-*Ortberg* decisions had found such an objective manifestation *explicit* where the entry contravened "a prominently posted warning"²¹ or a "sign and . . . public announcement"²² and *implicit* where "at least some of the windows" of a home were "boarded over"²³ or a construction site was encircled by barbed-wire fencing and locked gates.²⁴ Where the lawful occupants' opposition to the entry is not subjectively understood by the entrant and such objective

15. *Id.* at 305.

16. *Id.* at 306.

17. See *id.* at 305–06.

18. *Id.* at 307. Missouri is the only state that explicitly designates criminal trespass as a strict liability offense. See Mo. Ann. Stat. § 569.150 (West 2017) ("A person commits trespass in the second degree if he or she enters unlawfully upon real property of another. This is an offense of absolute liability."). Several other state statutes, like the District ordinance at issue in *Wesby*, do not identify a mens rea requirement. See, e.g., Alaska Stat. §§ 11.46.320, 11.46.330 (2019); Idaho Code § 18-7008 (2019); Mass. Gen. Laws Ann. ch. 266, § 120 (West 2019); N.C. Gen. Stat. §§ 14-159.12, 14-159.13 (2019); Or. Rev. Stat. § 164.245 (2019); Tex. Penal Code § 30.05 (2019); Va. Code § 18.2-119 (2019). It is conceivable that courts in those jurisdictions could interpret those statutes as imposing strict liability. A Virginia court, though, decided against such an interpretation. See *Reed v. Commonwealth*, 366 S.E.2d 274, 278 (Va. 1988) ("As a penal statute, . . . the Virginia criminal trespass statute has been uniformly construed to require a willful trespass.").

19. *Ortberg*, 81 A.3d at 305 (emphasis added).

20. *Id.* at 308.

21. *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989).

22. *Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965).

23. *Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985).

24. *Smith v. United States*, 281 A.2d 438, 440 (D.C. 1971); see also *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967) (noting that "no one would contend that one may lawfully enter a private dwelling house *simply because* there is no sign or warning forbidding entry" (emphasis added)).

manifestations are absent, the entry is considered presumptively permitted on the theory that the lawful occupant has implicitly consented to it.²⁵

The property allocation *Ortberg* describes can be explained in the following Hohfeldian terms: Persons who reasonably—though mistakenly—trust, through interactions with others, that they are authorized to enter land titled in someone other than themselves “own” a right of temporary access to that land, which immunizes them from criminal prosecution so long as they withdraw as soon as their mistake is revealed.²⁶ In turn, the titleholder owns the power to call on the police to seek the arrest and jailing of any entrant except in instances of an entrant’s reasonable mistake. At bottom, then, the ordinance allocates to all individuals the liberty to enter premises of another during the period that they do not know and should not reasonably be aware that all lawful occupants of those premises oppose the entry, and allocates to lawful occupants security against entry by the billions of individuals who know or should know that their entry is universally unwanted.

Of course, persons of interest to the police often, at least initially, present innocent accounts of suspicious behavior.²⁷ With this in mind, the Supreme Court long has interpreted the Fourth Amendment to require “only a probability or substantial chance of criminal activity, not an actual showing of such activity,” to support an arrest.²⁸ On this standard, mere circumstantial evidence that controverts an innocent account is sufficient to support a probable cause finding;²⁹ it need not even be preponderant

25. On implicit consent, see *infra* notes 76–80 and accompanying text.

26. On Hohfeld’s framework, see *supra* note 9 and accompanying text. Other jurisdictions apparently provide greater protections to entrants than does the District’s law. For instance, in some jurisdictions with statutes requiring that the state prove that entrants had knowledge that they were making an unwanted intrusion, courts have explicitly confirmed that mere proof that entrants should have known that their entry was unwarranted is insufficient to establish the requisite *mens rea*. See, e.g., *State v. Dansinger*, 521 A.2d 685, 689 (Me. 1987); *State v. Santiago*, 527 A.2d 963, 965 (N.J. Super. Ct. Law Div. 1986); *Commonwealth v. Sherlock*, 473 A.2d 629, 632 (Pa. Super. Ct. 1984); *State v. Fanger*, 665 A.2d 36, 38 (Vt. 1995).

27. See *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009) (“Rarely will a suspect fail to proffer an innocent explanation for his suspicious behavior.”).

28. *District of Columbia v. Wesby*, 138 S. Ct. 577, 584 (2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 & n.13 (1983)).

29. See, e.g., *Figueroa v. Mazza*, 825 F.3d 89, 102 (2d Cir. 2016) (noting that police officers were not required to accept defendant’s proffered innocent explanation of events on faith alone but were rather entitled to weigh it against other potentially inculpatory facts).

of guilt.³⁰ However, while this requirement “is not a high bar,”³¹ the “facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information”³² must be “sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense” as defined by the applicable state law.³³

From the foregoing discussion, it follows that assessing whether probable cause exists in a particular situation involves comparing (a) the “reasonably trustworthy information” available to the arresting officers with (b) the elements of the alleged offense.³⁴ Therefore, on the *Wesby* facts, a prudent officer in the responding officers’ shoes presumably must have had some evidence—not necessarily evidence of a weight and quality sufficient to garner a conviction, but *some* “reasonably trustworthy” evidence—that the attendees that officer chose to arrest for criminal trespassing possessed the state of mind required by the District’s criminal trespass law, i.e., that these attendees *knew or should have known* that their entry was unwanted by all lawful occupants.³⁵ As the following section sets out, how-

30. See, e.g., *Florida v. Harris*, 568 U.S. 237, 243–44 (2013) (noting that “[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the . . . decision” on whether officers had probable cause (internal quotation marks omitted) (quoting *Gates*, 462 U.S. at 235)); *Gates*, 462 U.S. at 235 (“[T]he term ‘probable cause’ . . . means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion.” (internal quotation marks omitted) (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813))); *Adams v. Williams*, 407 U.S. 143, 149 (1972) (asserting that probable cause “does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction”).

31. *Wesby*, 138 S. Ct. at 586 (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)); see also Maren J. Messing, *The Protective Sweep Doctrine: Reaffirming a Limited Exception*, 44 Colum. J.L. & Soc. Probs. 33, 64 (2010) (“[P]robable cause is equated with some amount of evidence”); Alexandra Natapoff, *Misdemeanors*, 11 Ann. Rev. L. & Soc. Sci. 255, 259 (2015) (“Police arrests require only probable cause—a very small amount of evidence.”).

32. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

33. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

34. See *Carr v. District of Columbia*, 587 F.3d 401, 410–11 (D.C. Cir. 2009) (stating that the arresting police officers needed to reasonably believe that “the protestors knew no permit was granted” in order to arrest them); *Wright v. City of Philadelphia*, 409 F.3d 595, 602 (3d Cir. 2005) (“Whether any particular set of facts suggest that an arrest is justified by probable cause requires an examination of the elements of the crime at issue.”); *United States v. Christian*, 187 F.3d 663, 667 (D.C. Cir. 1999) (stating that mere possession of a knife does not constitute an unlawful action without the possessor’s intent to use that knife in an unlawful manner).

35. The *Wesby* Court could have been far clearer in identifying the state law underpinning its decision on probable cause. The lone paragraph explicitly discussing the District’s criminal trespass law comes in the form of a critique of the lower court for relying on a single decision—*Smith v. United States*—to conclude that the “knew or should have known” standard is “settled law.” *Wesby*, 138 S. Ct. at 591 (citing *Smith v. United States*, 281 A.2d 438, 439–40 (D.C. 1971)). While the lower court could have cited to additional decisions eliciting this standard (as noted above, *Ortberg* surveys a litany of precedents in

ever, the considerations that the *Wesby* Court deemed relevant to an entrant's state of mind suggest that, for all practical purposes, the Supreme Court's decision effectively served to alter the District's initial allocative choice by regarding even reasonably mistaken entrants as strictly liable.

B. *Wesby's De Facto Reallocation*

The party host, to whom the record refers only as "Peaches," ultimately confessed that she did not have authority to extend invitations to the house party.³⁶ However, as all litigants conceded, there was no evidence in the record indicating that she shared this information with any of the attendees before the police arrived.³⁷ Indeed, common sense suggests that if Peaches actually wanted anyone to attend this party, she would have refrained from mentioning to her invitees that she and—thus, they—were not actually authorized to enter the house. Drawing on other evidence, though, the *Wesby* Court held that a rational officer in these circumstances could have made the "entirely reasonable inference"³⁸ that the attendees were "knowingly taking advantage of a vacant house as a venue for their late-night party."³⁹

In holding that a reasonable officer could have inferred that the attendees knew or should have known that they were trespassing, the Court pointed to three categories of evidence: the condition of the interior of the house, the attendees' conduct at the party, and the attendees'

this regard), that it did not do so does not make its conclusion on the operative mens rea requirement erroneous. Indeed, *Smith* seems a sufficient citation to support an explanation of the circumstances in which the District wanted there to be criminal punishment for the ordinarily civil offense of trespass. In *Smith*, a company that held title to the relevant parcel of land manifested its opposition to the entrant's access to that parcel by "post[ing] signs indicating . . . rightful control of the site." *Smith*, 281 A.2d at 440. The *Smith* court deemed the company's explicit act unambiguous, and therefore concluded that the entrant was not entitled to a jury instruction explaining that reasonable mistake is a defense to a criminal trespass charge. *Id.* at 439–40. *Smith* noted, though, that such an instruction *would be warranted* when an entrant's "bona fide belief" is grounded in "some reasonable basis." *Id.* at 439. In this regard, *Wesby* sits alongside other recent Fourth Amendment decisions by the Supreme Court that rest on what are, at best, underdeveloped depictions of the underlying state property laws. See *United States v. Jones*, 565 U.S. 400, 405 (2012) (assuming that, under Maryland law, touching the chattel of another without causing damage constitutes a trespass); *Georgia v. Randolph*, 547 U.S. 103, 120 (2006) (assuming that, under Georgia law, one lawful resident of a home can preclude another lawful resident from welcoming law enforcement officers into the home).

36. *Wesby*, 138 S. Ct. at 583–84. As for Peaches's given name, news reports identified her as Veronica Little, a woman who, friends said, earned her nickname as a result of her Georgian roots. See, e.g., Barnes & Marimow, *supra* note 8. Ms. Little, who died in 2016, "had been a popular fixture at a now-shuttered gentlemen's club in Northeast Washington and often recruited the club's dancers to perform at parties she organized." *Id.*

37. See *Wesby v. District of Columbia*, 765 F.3d 13, 21 (D.C. Cir. 2014), *rev'd*, 138 S. Ct. 577 (2018).

38. *Wesby*, 138 S. Ct. at 586 (internal quotation marks omitted) (quoting *Maryland v. Pringle*, 540 U.S. 366, 372 (2003)).

39. *Id.*

reaction to the officers' arrival and subsequent questioning.⁴⁰ Each is addressed, in turn, below.

1. *Condition of the Interior of the House.* — The Court found the interior of the premises in a state that showed what it deemed “few signs of inhabitation.”⁴¹ The Court found insufficient the following indicia of habitation: The house included chairs, a mattress, a refrigerator (stocked with food and drink) and other large appliances, multiple fixtures, blinds on the windows, toiletries in the bathrooms, and working electricity and plumbing.⁴² Justice Thomas, writing for his colleagues in the majority, articulated what he described as the “common-sense conclusion[.]”⁴³ that “[m]ost homeowners do not live in near-barren houses” of this sort.⁴⁴

If one assumes that this type of evidence is relevant to the requisite state of mind for criminal trespass in the District, one could well question the Court's conclusion that the weight and quality of this evidence here provides probable cause. The Justices' internal standard for what they asserted “most homeowners” would do to furnish and live in their properties demonstrates a disturbing lack of perspective on the throes of poverty, unemployment, and housing affordability that currently grip so many parts of the nation, including the locus of the *Wesby* dispute, which ironically sits just over three miles to the east of the Justices' chambers.⁴⁵ Furniture expenses are one of the first places the desperately poor look for savings in especially hard times.⁴⁶ Moreover, upon entering the house here, the attendees would have readily observed a number of the very items—lighting,

40. See *id.* at 586–87.

41. *Id.* at 586.

42. *Id.*

43. *Id.* at 587 (internal quotation marks omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

44. *Id.*

45. Driving Directions from the Supreme Court of the United States to Fort Dupont, D.C., Google Maps, <http://maps.google.com> [<https://perma.cc/T7VZ-V4NU>] (last visited Mar. 10, 2020) (follow “Directions” hyperlink; then search starting point field for “Supreme Court of the United States” and search destination field for “Fort Dupont, D.C.”); see also Perry Stein, As D.C. Families Get Richer, Staggering Disparities Persist, Report Finds, *Wash. Post* (Apr. 18, 2017), https://www.washingtonpost.com/local/as-dc-families-get-richer-staggering-disparities-persist-report-finds/2017/04/17/8fa41700-238a-11e7-b503-9d616bd5a305_story.html (on file with the *Columbia Law Review*) (noting the income disparity that exists between the District's wards east of Anacostia and the rest of D.C.).

46. See Tola Mbakwe, Christians Against Poverty Highlights Stats on People Who Don't Own Beds, *Premier Christian News* (June 14, 2017), <https://www.premier.org.uk/News/UK/Christians-Against-Poverty-highlights-stats-on-people-who-don-t-own-beds> [<https://perma.cc/FB2X-JEWM>]; Sarah Woolley, As Living Costs Rise, Furniture Poverty Grows Behind Closed Doors, *Guardian* (Mar. 2, 2016), <https://www.theguardian.com/housing-network/2016/mar/02/living-costs-rise-furniture-poverty-beds> [<https://perma.cc/R2U2-UDJ5>]; see also Chico Harlan, Rental America: Why the Poor Pay \$4,150 for a \$1,500 Sofa, *Wash. Post* (Oct. 16, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/10/16/she-bought-a-sofa-on-installment-payments-now-its-straining-her-life/?noredirect=on&utm_term=.1c61f1d05ee8 (on file with the *Columbia Law Review*).

seating, music, dance space, food, drink, and restrooms—that twenty-something-year-old invitees might hope to find at a party of this nature.

More significantly, though, the Court did not justify the assumption on which the discussion in the preceding paragraphs rests: Why should the condition of the interior of the house serve as the type of evidence that indicates that the attendees should have known that their host did not have authority to invite them in the first place?⁴⁷ The attendees did not break boards or windows on the house’s exterior to enter.⁴⁸ Instead, they were welcomed in through the front door.⁴⁹ Even if the furniture inside was sparse, that is unsurprising for newly rented units, particularly those occupied by the young and poor. Should the attendees have found the condition of the interior of the house undesirable for a party, they could have left on arrival (and, indeed, some invitees may have done so and fortuitously avoided being swept up in the mass arrest that followed). But whether or not individuals find the condition of the interior of the house suitable enough for the purpose for which they received the invitation does not seem germane to whether those individuals knew or should have known that their entry was opposed by all lawful occupants.

2. *Conduct at the Party.* — In terms of the attendees’ conduct at the party, the Court pointed to the fact that the music was “so loud that it could be heard outside” past one o’clock in the morning.⁵⁰ The Court also noted that select officers varyingly alleged that they smelled marijuana, saw beer bottles and cups of liquor, and found the floor unclean.⁵¹ Further, the Court asserted that officers observed some of the attendees reveling in a “living room [that] had been converted into a makeshift strip club” and found male guests upstairs with a “naked woman” and a “used condom.”⁵²

If these considerations are relevant to a police officer’s determination as to whether people should have known that all lawful occupants opposed their entry, then entrants necessarily must have these same considerations

47. In other words, if the Court’s discussion is understood to concentrate on the *weight* of the evidence that is relevant to the requisite state of mind for criminal trespass in the District, it would seem that the decision has nothing to say about the substantive content of the underlying criminal trespass offense. If, however, the Court’s discussion is understood—to concentrate on *types* of evidence that are relevant to the requisite state of mind for criminal trespass in the District, the decision can be interpreted to effectively, if implicitly, alter the substantive content of that underlying offense by adjusting the state of mind requirement.

48. See *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 32 (D.D.C. 2012), *aff’d*, 765 F.3d 13 (D.C. Cir. 2014), *rev’d*, 138 S. Ct. 577 (2018).

49. *Id.*

50. *Wesby*, 138 S. Ct. at 586–87.

51. *Id.* at 587. The Court’s reference to marijuana is surprising, given the appellate court’s assessment: “[T]he arrest report says that Officer Parker recovered marijuana inside the house, but he acknowledged in his deposition that he smelled—but did not find—marijuana. Moreover, nothing in the record indicates that any of the officers observed any drug-related activity.” *Wesby*, 765 F.3d at 17 n.1.

52. *Wesby*, 138 S. Ct. at 587.

in mind when they step onto property for which they do not hold title. Yet the Court did not explain why loud music or the late hour should be considered the type of evidence that would indicate to attendees that they should have known that their host did not have authority to extend the party invitation. After all, countless lawful occupants commit noise nuisances or stay up late across the country on a daily basis. If anything, attendees at what they know or should know to be an unauthorized party might be inclined to keep the decibel level more and more discrete the later it gets. Likewise, the Court did not explain why people who upon arrival at a party smell marijuana, detect dirty floors, observe others drinking alcohol or dancing exotically, or find the remnants of protected sex in a bedroom should immediately leave the home on the thought that all lawful occupants must have opposed their entry.⁵³ The Court asserted that “most homeowners do not invite people over” to engage in these types of activities without acknowledging that some, of course, do.⁵⁴ The Court’s silence on these matters seemingly amounts to an implicit moral critique of what are all legal behaviors, which the opinion buttressed by explicitly describing the goings-on at the party as “debauchery.”⁵⁵ The Court drew on this critique to make the insupportable deduction that, since these persons were acting immorally, they must have known that their invitation to the party—their alleged property right—came from an unauthorized source.

3. *Reaction to the Officers’ Arrival and Questioning.* — As for the attendees’ reaction to the officers’ arrival and subsequent questioning, the Court pointed to evidence indicating that many of the attendees did not reference Peaches by name when explaining to the police which person

53. The opinion is riddled with conclusory assertions of the following nature: “[T]he officers could consider the drug use inside the house as evidence that the partygoers knew their presence was unwelcome.” See *id.* at 586–87 & n.5; see also Elura Nanos, Justice Thomas Wrote About Thongs, Strippers and Lap Dances and His Opinion Only Gets Better, *Law & Crime* (Jan. 23, 2018), <https://lawandcrime.com/uncategorized/justice-thomas-wrote-about-thongs-strippers-and-bras-and-his-opinion-only-gets-better> [<https://perma.cc/946K-6NDV>] (“Justice Thomas brought a level of pragmatism to this case that’s tough to dispute. When cops come upon a scene that so clearly indicates likely criminal activity, their suspicion isn’t—and shouldn’t be—negated just because someone is presenting what *might be* an innocent explanation.”). But see Transcript of Oral Argument at 29, *Wesby*, 138 S. Ct. 577 (No. 15-1485) (documenting Justice Kagan’s remark that “it just is not obvious that the reasonable partygoer is supposed to walk into this apartment and say: Got to get out of here.”); *Wesby*, 765 F.3d at 17 n.1 (explaining that, on the appellate court’s reading of the record, none of the police officers actually observed any drug-related activity on the premises); see also Richard Re, Fourth Amendment Fairness, 116 *Mich. L. Rev.* 1409, 1420–21 (2018) (advocating a “perspectival reorientation” of current Fourth Amendment jurisprudence from a focus on “whether *an officer* is reasonable in performing the search or seizure at issue” to a focus on “whether police actions are morally acceptable to rights holders”).

54. See *Wesby*, 138 S. Ct. at 586–87 & n.5.

55. *Id.* at 583. See also *id.* at 588, 591 (describing the attendees as treating the house as if their host were not a lawful occupant, despite the fact that the attendees did not damage the property in any way); *id.* (critiquing the lower court for “brush[ing] aside the drinking and the lap dances,” despite the fact that drinking and lap dances are undeniably legal activities).

had invited them to the party.⁵⁶ It is unsurprising, though, that some attendees would receive an invitation from Peaches herself and that others would receive it second hand.⁵⁷ The Court also referenced one officer's testimony that select attendees "scattered" up the stairs when the officers entered the property.⁵⁸ Yet while one could imagine a person running upstairs in an attempt to escape a number of charges (e.g., running upstairs to dispose of illegal narcotics), it seems counterintuitive to suggest that one who is trying to escape a trespass charge would run up the stairs given that whether a person is upstairs or downstairs is immaterial to whether that person committed the crime. Moreover, while evidence of flight can be considered in deciding whether probable cause exists to make an arrest when "coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime,"⁵⁹ longstanding Supreme Court precedent makes clear that it is "not necessarily indicative of ongoing criminal activity."⁶⁰ Documented disproportionate targeting of racial minorities by police—and every person in attendance at this party was African American—suggests that flight "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity."⁶¹

56. *Id.* at 583, 587–88.

57. Even accepting as appropriate the unjustified assumption that select attendees' failure to identify Peaches by name could be considered among the types of evidence that are probative of whether those attendees knew or should have known that they were on the property against the will of all lawful occupants, such a failure, of course, is not relevant to the attendees who did identify her by name. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 86 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

58. *Wesby*, 138 S. Ct. at 583, 588. This officer's testimony sat alongside that of others, who testified that one of the attendees voluntarily opened the door when the officers knocked and that many others remained seated in the living room upon the officers' entry. *Id.* at 583.

59. *Sibron v. New York*, 392 U.S. 40, 66–67 (1968).

60. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

61. *Commonwealth v. Warren*, 58 N.E.3d 333, 340 (Mass. 2016); see also Erwin Chemerinsky, Transcript of Keynote Speech, 54 *Idaho L. Rev.* 287, 290 (2018) ("I grew up on the south side of Chicago. My guess is a lot of people on the south side of Chicago, and especially African-American and Latino men, have every reason to go in the other direction when they see the police."). Even accepting as appropriate the unjustified assumption that scattering up the stairs upon the sight of police officers could be considered among the types of evidence probative of the claim that select attendees knew or should have known that they were on the property against the will of all lawful occupants, scattering is not relevant to the large number of attendees who did not scatter but nonetheless were swept up in the mass arrest. See *Wesby*, 138 S. Ct. at 583, 588 (describing how select partygoers hid and scattered into different parts of the house when they saw the police officers); *Sibron*, 392 U.S. at 62–63 (suggesting that proximity to others who might be engaged in illegal activities is "simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security").

C. *Summary: Reallocating Property Rights*

Consider a situation in which, assuming all other facts remained unchanged, Peaches hosted this party under the good faith though mistaken impression that she *was* a lawful tenant. In such a situation, it seems implausible that a court would consider the condition of the interior of the house, the attendees' conduct at the party, select attendees' racing upstairs upon the officers' arrival, or information suggesting that some attendees received the invitation second hand as evidence that all attendees knew or should have known that all lawful occupants opposed their entry. It is unclear why Peaches's admission to the police that she did *not* have authority to host the party suddenly makes those considerations relevant.

For all practical purposes, the *Wesby* decision abolished the right held by the general public to access without fear of arrest those properties to which they reasonably believe they are welcome and the correlative duty of titleholders (and, in turn, the police) to respect reasonably mistaken access until the mistake is revealed. It replaced this right–duty pairing with a strengthened general right of titleholders to exclude others and the correlative duty of the public to avoid making even reasonable mistakes as to whether their invited entry onto another's property is actually warranted. At least until those jurisdictions that have adopted something akin to a “knew or should have known” mens rea requirement take affirmative steps to provide clarity on the types of mistakes that fall outside the reach of their criminal trespass laws, *Wesby* effectively entitles the police in these jurisdictions to operate—as a matter of constitutional law—on the assumption that trespassers are more likely than nontrespassers to accept second-hand invitations to attend late-night parties involving loud music, the smell of marijuana, alcohol consumption, protected sex, and exotic dancing in lightly furnished homes with dirty floors.

II. JUSTIFYING REALLOCATION

Property, as an institution socially crafted to benefit the public interest, exists in service of our democratic values. Indeed, it is *accountable* to these values. When justified in maintenance of such accountability, the state must reallocate property interests as social, economic, and moral perspectives on the content of these values—and perspectives on what might harm these values—evolve over time. The prior Part contends that *Wesby* effectively generated a reallocation in the sense that it converted a temporary access interest in reasonably mistaken entrants into a robust exclusionary interest in titleholders. In this Part, the first section portrays the consequences—the world of distrust—that *Wesby*'s reallocation, taken to its logical end, portends. The second section critically evaluates the available justifications, some articulated in the *Wesby* decision and others left unsaid, for allowing these consequences to persist.

A. *A New World of Distrust*

In the world *Wesby's* de facto reallocation creates, one can most comfortably protect oneself from the threat of criminal arrest only by adhering to the personal presumption that any person who claims to hold a property interest—even a close confidant—is deceitful. To eliminate this threat, the recipient of what reasonably appears to be a valid social invitation seemingly has three options.

One option would be to attempt to acquire formal proof of title. In some instances, this could involve performing a title search in the hall of records. In others—including in the many jurisdictions that do not require leaseholds of a year or less to be recorded, such as the District of Columbia—it likely would require confronting and demanding proof from the alleged host.

The downsides of this approach are plain enough. To check up on a friend or a new acquaintance kind enough to invite you to a social engagement may produce distrust on the inviter's part and the untoward result of spoiling that relationship. This possibility is especially pronounced in a situation akin to the circumstances underlying *Wesby*: Given that all of the evidence the Court deemed relevant to the attendees' knowing they were trespassing only could have been obtained once they arrived at the party, the attendees would have had to confront the host *face-to-face* about whether she really was who she said she was.⁶² Even if one were somehow able to verify an inviter's right to host a social engagement without the inviter's knowledge, one nonetheless may feel tormented about having done so and, in internalizing that torment, materially threaten the development of a relationship with the inviter.

For these reasons, some recipients will recoil at the thought of questioning the veracity of an inviter's representation of authority to extend an invitation. Persons in this position might select an *alternative option* of declining social invitations outright. This option, too, is rife with ill effects. The more one declines such invitations, the more one isolates oneself. Mounting contemporary research suggests that social isolation, in an objective sense—

62. The *Wesby* record indicates that the responding officers contacted the titleholder from the scene of the party by phone. However, it does not indicate whether and, if so, how they confirmed the titleholder's identity. It seems unlikely that they performed a formal title check or engaged in any other investigative work to confirm that the person with whom they were speaking was indeed the titleholder. *Wesby v. District of Columbia*, 765 F.3d 13, 18 n.2 (D.C. Cir. 2014), rev'd, 138 S. Ct. 577 (2018) ("The record does not make clear how Officer Parker obtained Hughes's contact information or whether, at the time of the arrests, the police had made any independent efforts to verify that Hughes was in fact the owner of the house."). The Court, though, seemingly expects this type of investigative work from the attendees.

that is, separate and apart from subjective feelings of loneliness⁶³—has critical emotional and physiological consequences.⁶⁴

63. It is possible for someone to be socially isolated and not lonely, just as it is possible for someone to feel lonely despite myriad social connections. Indeed, numerous studies have suggested that loneliness and social isolation are not significantly correlated. See, e.g., Caitlin E. Coyle & Elizabeth Dugan, Social Isolation, Loneliness and Health Among Older Adults, 24 *J. Aging & Health* 1346, 1347 (2012); Carla M. Persinotto, Irena Stijacic Cenzer & Kenneth E. Covinsky, Loneliness in Older Persons: A Predictor of Functional Decline and Death, 174 *Archives Internal Med.* 1078, 1078 (2012). For a prominent individual example, one of the world's most popular movie stars, Robin Williams, was regularly surrounded by family, acquaintances, and adoring fans, yet admitted to feeling lonely, and some analysts attribute Williams's suicide to his lonely state. See Andrew Solomon, Suicide, A Crime of Loneliness, *New Yorker* (Aug. 14, 2014), <https://www.newyorker.com/culture/cultural-comment/suicide-crime-loneliness> (on file with the *Columbia Law Review*).

64. On an emotional level, social engagement sits at the heart of well-being. We fundamentally need others in our lives with whom we have the opportunity to develop quality reciprocal relations, others on whom we can depend, and, in turn, others who can depend on us. See, e.g., John T. Cacioppo & William Patrick, Loneliness: Human Nature and the Need for Social Connection 5–8 (2008) (describing how chronic loneliness and social isolation disrupt humans' perceptions, behavior, physiology, and health outcomes). These relationships give life meaning. It is reaffirming for people to know that they have the capacity to find shared interests, understanding, and joy in circles in which their presence and contributions are valued. See Dhruv Khullar, How Social Isolation Is Killing Us, *N.Y. Times* (Dec. 22, 2016), <https://www.nytimes.com/2016/12/22/upshot/how-social-isolation-is-killing-us.html> [<https://perma.cc/9KEP-YKVG>]. When the social circles to which one has access shrink, that person experiences, whether consciously or not, what one physician terms a “sadness of . . . solitude.” *Id.*

On a physiological level, researchers have determined that social isolation impairs immune system functionality; increases inflammation (which, in turn, can increase the risk of many diseases, including heart disease (by twenty-nine percent) and stroke (by thirty-two percent)); produces higher levels of stress hormones; and elevates blood pressure. Nicole K. Valtorta, Mona Kanaan, Simon Gilbody, Sara Ronzi & Barbara Hanratty, Loneliness and Social Isolation as Risk Factors for Coronary Heart Disease and Stroke: Systematic Review and Meta-Analysis of Longitudinal Observational Studies, 102 *BMJ: Heart* 1009, 1012–14 (2016); see also, e.g., Bert N. Uchino, Social Support and Health: A Review of Physiological Processes Potentially Underlying Links to Disease Outcomes, 29 *J. Behav. Med.* 377, 377–87 (2006) (examining evidence linking social support to changes in cardiovascular, endocrine, and immune function). These detrimental effects are not confined to the elderly; socially isolated children have been found to face significantly poorer health twenty years later. Khullar, *supra*. Recent studies suggest that social isolation leads to an increased mortality rate that is comparable to and, in some cases exceeds, more commonly and well-accepted risk factors such as smoking a full pack of cigarettes per day, obesity, and breathing polluted air. See Julianne Holt-Lunstad, Timothy B. Smith, Mark Baker, Tyler Harris & David Stephenson, Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review, 10 *Persp. on Psychol. Sci.* 227, 235 (2015) (revealing that actual and perceived lack of social connection is statistically as harmful to human health as common risk factors for mortality); Julianne Holt-Lunstad, Timothy B. Smith & J. Bradley Layton, Social Relationships and Mortality Risk: A Meta-Analytic Review, *PLOS Med.*, July 2010, at 1, 14 (associating strong social relationships with a fifty percent reduced risk of early death). To reiterate a point noted in the text, these studies conclude that people who are socially isolated but *genuinely do not feel lonely* are at an increased risk of premature death. Moreover, there is evidence of a “dose-response” effect, such that for each level increase in social isolation there is an attendant increase in the risk of premature mortality. See Yang Claire Yang,

Those who are disinclined to acquire proof of title but seek to avoid social isolation—whether consciously or not—may pursue a *third option*: Accept the invitation at the risk of arrest. Risking arrest is significant for a number of general reasons. Arrests have a tendency to remain on one’s criminal record for extensive time periods even when the alleged crimes on which those arrests were based are never prosecuted.⁶⁵ An arrest record, even for relatively minor offenses, can make it difficult to find employment or housing, leading to derivative consequences in terms of poverty, hunger, homelessness, child support, and child custody arrangements.⁶⁶ An arrest also, of course, can trigger a review of the arrestee’s immigration status.⁶⁷

Courtney Boen, Karen Gerken, Ting Li, Kristen Schorpp & Kathleen Mullan Harris, *Social Relationships and Physiological Determinants of Longevity Across the Human Life Span*, 113 PNAS 578, 578–83 (2016). As Professor John Cacioppo notes, “For a social species, to be on the edge of the social perimeter is to be in a dangerous position.” Sanjay Gupta, *Why You Should Treat Loneliness as a Chronic Illness*, *Everyday Health*, <https://www.everydayhealth.com/news/loneliness-can-really-hurt-you> [<https://perma.cc/BM28-RC2L>] (last updated Aug. 4, 2015) (internal quotation marks omitted) (quoting John Cacioppo).

Social engagement also produces very practical, behavioral responses. Socially isolated persons do not have someone to check on them, take them to the doctor, recognize disease symptoms, or help them manage stress. See, e.g., Traci Watson, *The Dangers of Social Isolation*, *WIRED* (Mar. 26, 2013), <https://www.wired.com/2013/03/social-isolation> [<https://perma.cc/JX3W-VTXN>] (“There are plenty of people who are socially isolated but who are perfectly happy with that But even then we should be trying to make sure there’s enough contacts with them so that if something goes wrong . . . they’re going to be advised and supported.” (internal quotation marks omitted) (quoting Andrew Steptoe)). Recent studies also suggest that socially isolated persons are less likely to eat nutritiously, exercise, get adequate sleep, and take prescribed medications. See, e.g., M. Robbin DiMatteo, *Social Support and Patient Adherence to Medical Treatment: A Meta-Analysis*, 23 *Health Psychol.* 207, 207–14 (2004); M. Robbin DiMatteo, *Variations in Patients’ Adherence to Medical Recommendations: A Quantitative Review of 50 Years of Research*, 42 *Med. Care* 200, 200–08 (2004).

65. See, e.g., Tina Rosenberg, *Opinion, Have You Ever Been Arrested? Check Here*, *N.Y. Times* (May 24, 2016), <https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html> [<https://perma.cc/377N-45RU>].

66. See, e.g., James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 *Alb. L. Rev.* 719, 728 (2019) (“The arrest decision is momentous in its own right, and it carries potentially profound implications downstream in the criminal justice process.”); *Picking up the Pieces: A Minneapolis Case Study*, *ACLU* (Apr. 15, 2015), <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces?redirect=feature/picking-pieces> [<https://perma.cc/99N2-5DCW>] (quoting a state court judge explaining the cascading effect of a low-level arrest resulting in the arrestee losing his job for spending the night in jail, leading to a missed paycheck and child support payment, and the county subsequently holding him in contempt in an effort to encourage payment).

67. See, e.g., Jason G. Idilbi, *Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority?*, 86 *N.C. L. Rev.* 1710, 1717 (2008) (describing the process by which a correctional officer can conduct an investigation into an arrestee’s immigration status if there is a suspicion that the arrestee is undocumented).

For some, the risk of arrest is significant for more specific reasons: Namely, the risk of arrest is not distributed equally, particularly across racial lines.⁶⁸ Analysts have pointed to multiple drivers of racial disparities in criminal arrest statistics. Contemporary discriminatory motivations play a role, as do longstanding structural inequalities that can undergird police departments' decisions on where to position their officers.⁶⁹ The discretion afforded the police in making arrests matters, too, and may be especially meaningful when low-level crimes like trespassing (and disorderliness, lurking, spitting, "manner of walking," etc.) are at stake because these crimes are victimless and do not result in property damage.⁷⁰ Yet the extent to which racialized policing is attributable to certain variables more than others in a given jurisdiction is of little matter to individual persons of color who receive a social invitation. The task, in that moment, is to reflect on the reality that, if they accept the invitation, they may well be subjugated because of the color of their skin.

B. *Potential Justifications*

The preceding section suggests that, in *Wesby's* wake, the recipient of what reasonably appears to be a valid social invitation is, for all practical purposes, faced with

68. Though select incidents of racialized policing recently have gained national attention—perhaps most notoriously the unwarranted arrests of two African American men awaiting a business associate at a Philadelphia Starbucks—these incidents merely are symptomatic of the reality that racial minorities disproportionately are arrested (and convicted and subjected to more stringent sentences) on a routine basis in countless locales nationwide. See, e.g., Lynda Garcia, ACLU of N.J., *Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey 18–62* (2015), https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf [<https://perma.cc/7RC4-7RFB>] (recounting racially disparate enforcement in the New Jersey cities of Millville, Elizabeth, New Brunswick, and Jersey City); U.S. DOJ Civil Rights Div., *Investigation of the Baltimore City Police Department 12–19* (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/E5BT-G3SK>] [hereinafter *Baltimore Police Investigation*] (describing racially disparate enforcement in Baltimore, Maryland); Thomas Maier & Ann Choi, *Unequal Justice*, *Newsday* (Oct. 19, 2017), <https://projects.newsday.com/long-island/unequal-justice-part-1> [<https://perma.cc/AEB2-K4VJ>] (recounting racially disparate enforcement on Long Island, New York); Press Release, ACLU, *ACLU Commends Grand Rapids Police Decision to End Trespass Policy that Led to Disproportionate Arrest of African-Americans*, ACLU (June 29, 2017), <https://www.aclu.org/news/aclu-commends-grand-rapids-police-decision-end-trespass-policy-led-disproportionate-arrest> [<https://perma.cc/265S-9H2Z>] (recounting racially disparate enforcement in Grand Rapids, Michigan). The federal government's investigation of Baltimore's policing practices revealed some particularly horrific anecdotes. In one example, a shift commander's email to his subordinates included a template for documenting trespass arrests that pre-filled the race and gender of the arrestee with the phrase "black male" rather than leaving that space for completion by the arresting officer. *Baltimore Police Investigation*, *supra*, at 37.

69. See, e.g., Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 *Crime & Just.* 49, 68 (2015).

70. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1422 (2016) (internal quotation marks omitted) (quoting Max Ehrenfreund, *The Risks of Walking While Black in Ferguson*, *Wash. Post* (Mar. 4, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/04/95-percent-of-people-arrested-for-jaywalking-in-ferguson-were-black> (on file with the *Columbia Law Review*)).

the following three options: (a) accept the invitation only on proof of occupancy; (b) decline the invitation; or (c) accept the invitation without seeking proof of occupancy at the risk of arrest, a risk that is disproportionately distributed. The consequences of a person selecting one of these options—respectively, breeding distrust, fostering social isolation, and preying on vulnerabilities—are undoubtedly concerning. One must ask: What countervailing interests might be deemed sufficient to justify putting recipients of social invitations in such a precarious position?

The *Wesby* Court did not offer an especially clear answer to this inquiry. Reading between the lines, though, its decision rests on an ineffective combination of economic, privacy, personal responsibility, and pragmatic rationales. On the economic front, placing the onus of a title search—or the risk of proceeding without one—on a person who receives a social invitation has only marginal effects in terms of greasing the wheels of voluntary exchanges on the open market. A person who causes no damage to the premises and, upon learning that entry is unauthorized, is willing to depart immediately is unlikely to impact the titleholder's class of potential tenants in any meaningful way. For the same reasons, the impact on market exchanges seems minimal even if persons lied about the extent to which they believed their occupation was lawful, for only a very temporary, nontitled interest is at play here.

In terms of privacy, one must acknowledge that the titleholder in *Wesby* did not open his property up to third parties in the same manner that the titleholder did in the classic criminal trespass case of *State v. Shack*.⁷¹ The titleholder's choice in *Shack*—to commercially farm his land in the way that he did—resulted in a substantial sacrifice of his privacy interest on certain parts of his land, including within the barracks he built to house his farmworkers.⁷² Still, though, the unwitting host in *Wesby* was an

71. *State v. Shack*, 277 A.2d 369, 371 (N.J. 1971).

72. See, e.g., Gregory S. Alexander, *The Complex Core of Property*, 94 *Cornell L. Rev.* 1063, 1067 (2009) (describing how *State v. Shack* and its progeny resulted in a standard whereby the more private property is committed to public use, the more limited the owner's right to exclude). The U.S. Supreme Court decided in *Marsh v. Alabama* that, where a company effectively owned an entire town, a Jehovah's Witness's free speech was assured on the company's sidewalks. See 326 U.S. 501, 507 (1946); Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 *N.Y.U. L. Rev.* 633, 664 n.175 (1991). In its ensuing opinion in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* in 1968, the Court likened an enclosed shopping mall to the company town in *Marsh*, thereby protecting the First Amendment right to peacefully picket within the mall's "common" spaces. See 391 U.S. 308, 317–19 (1968), abrogated by *Hudgens v. NLRB*, 424 U.S. 507 (1976). The *Shack* court asserted that some large farms might look precisely like the company town in *Marsh* and its equivalent in *Logan Valley Plaza* but that it was not clear that the farm here necessarily expressed those characteristics. See *Shack*, 277 A.2d at 371. To decide the case on *Marsh* grounds, then, said the court, would require "an extension of *Marsh*." *Id.* at 371. While subsequent federal court decisions declined to extend *Marsh* to open air malls and critiqued *Marsh*'s "public function" test by contending that company towns were a relic of the past, see, e.g., *Hudgens*, 424 U.S. at 517; *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561 (1972), later compositions of the New Jersey Supreme Court took up *Shack*'s invitation to apply *Marsh*'s logic to myriad circumstances. See, e.g., *N.J. Coalition Against War in the Middle East v.*

absentee owner who was engaged in negotiations with the prospective tenant who invited the party attendees onto the property.⁷³ While these facts certainly are not sufficient to make the property unfailingly public, they support the argument that the unwitting host's privacy was not implicated in a significant way. Unlike, perhaps, an owner's personal interest in a residence,⁷⁴ the absentee owner's interest in a vacant unit is a fungible investment interest.⁷⁵ In these circumstances, when attendees are willing to depart at the request of the police without causing any harm to the premises, the impact on the owner's investment interest is trivial and, therefore, does not require accommodation here.

In terms of personal responsibility, titleholders may be of the mind that recipients of social invitations should take it upon themselves to perform the necessary legwork to decide whether an opportunity presented is one in which they should take advantage. To nonowners, though, those privileged to own property do so with the inherent responsibility of keeping

J.M.B. Realty Corp., 650 A.2d 757, 780 (N.J. 1994) (recognizing the ability of advocates against military intervention in the Persian Gulf to distribute antiwar leaflets in the common spaces of shopping malls when those malls had encouraged other nonshopping activities on their premises in the past); *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375–76 (N.J. 1982) (limiting casino's ability to expel a black jack patron engaged in legally permissible "card counting" that improved his advantage against the house); *State v. Schmid*, 423 A.2d 615, 623–24, 629 (N.J. 1980) (finding a state constitutional free speech right to distribute political leaflets on a private university campus in light of the fact that the university had welcomed abundant public uses of its facilities and resources in an effort to fulfill its educational ideals). While in *Community for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n* the New Jersey Supreme Court held that a homeowner's association had not sufficiently held its community open to the public to subject its lawn sign restrictions to a free speech challenge, see 929 A.2d 1060, 1073 (N.J. 2007), the general message of the *Schmid/Uston/J.M.B.* line of cases survives *Twin Rivers* wholly intact: "[T]he more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." *Uston*, 445 A.2d at 374 (internal quotation marks omitted) (quoting *Schmid*, 423 A.2d at 629).

73. *District of Columbia v. Wesby*, 138 S. Ct. 577, 584 (2018).

74. For contrasting perspectives on the extent to which homeowners establish non-reductive connections to their homes that are more pronounced than connections to other types of property, compare D. Benjamin Barros, *Home as a Legal Concept*, 46 *Santa Clara L. Rev.* 255, 276–77 (2006) ("The literature on the psychology of home . . . show[s] that homes are sources of feelings of rootedness, continuity, stability, permanence, and connection to larger social networks."), and Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 960 (1982) ("Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing.'"), with Stephen Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 *Stan. L. Rev.* 347, 364 (1993) (arguing that "people's involvement with their homes is nowhere near as simple and uncontroversial as Radin's presentation suggests"), and Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 *Mich. L. Rev.* 1093, 1110 (2009) (arguing that "contrary to claims in the property scholarship, the home is not a primary construct of self and identity").

75. Cf. Victoria A. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 *Harv. C.R.-C.L. L. Rev.* 179, 224–26 (1983) (distinguishing between owner occupancy interests and economic investment interests in property).

the community in which that property rests alive and functioning in a decent and just order.⁷⁶ There undoubtedly are social contexts in which perspectives differ on whether an owner should be considered to have implicitly consented to entry by nonowners. In adverse possession law, for instance, there is a jurisdictional split as to whether a nonowner's occupation is presumed unpermitted by the titleholder when the parties are related to one another.⁷⁷ But there also are, in the words of Joseph Singer, some real-world minimum standards that we should be able to "take for granted" in a modern constitutional democracy.⁷⁸ For example, there is general agreement that there is no criminal trespass infraction when one enters a store because the fact that the owner presented the building as a store means that the property is open to the public.⁷⁹ Similarly, unless homeowners put up signs in opposition to solicitation, they implicitly consent to nonowners knocking on their front doors to attempt to kickstart conversations on any number of issues, from political candidacies to the sale of cookies.⁸⁰ The suggestion that people should be wary of entering a private home *to which they have been invited* seems wholly inconsistent with these norms; indeed, it calls into question the continuing viability of implicit consent in any context at all.

The unconvincing nature of the economic, privacy, and personal responsibility rationales suggests that a sparsely veiled pragmatic preference toward protecting local police departments from fiscally ruinous damage awards in civil rights cases most likely steered the Court to its conclusion.⁸¹ Yet assuming that this interest is a legitimate one, it seems that several methods of serving that interest may have been available that did not involve reallocating property rights in a manner that authorizes the police to arrest people in places where they reasonably trusted in others that they were

76. See Lynda L. Butler, Property as a Management Institution, 82 Brook. L. Rev. 1215, 1220–21 (2017) (critiquing conceptions of property that lack "an outward-regarding perspective that encompasses a broader sense of responsibility for the impacts of property use on society and nature, and that recognizes the role of collective action in managing the exercise of property rights").

77. Compare *Totman v. Malloy*, 725 N.E.2d 1045, 1047–48 (Mass. 2000) (expressly declining to create a presumption that family membership between claimants to property renders prior use of that property permissive), with *Petch v. Widger*, 335 N.W.2d 254, 261 (Neb. 1983) ("[A]s between parties sustaining parental and filial relationships, the possession of land of one by the other is presumed to be permissive, not adverse.").

78. Joseph W. Singer, Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society, 2 Harv. L. & Pol'y Rev. 139, 150 (2008).

79. See, e.g., Jonathan D. Avila, *Food Lion and Beyond: New Developments in the Law of Hidden Cameras*, Comm. Law., Winter 1999, at 1, 21.

80. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 145–49 (1943) (concluding that door-to-door canvassers' speech interests and residents' interests in receiving information outweigh community interests in preventing crime and protecting against annoyance).

81. The District's appellate court had upheld a trial court judgment of \$680,000 in compensatory damages, plus attorney's fees. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 585 (2018).

permitted to be. For instance, the Court could have lowered the damage award or considered other remedies, such as an injunction, police training, or police discipline (including though not limited to suspension or separation of certain officers from the police force). Alternatively, it could have excused these specific officers from a suit for damages on qualified immunity grounds on the view that the statutory or constitutional unlawfulness of their conduct was not “clearly established at the time” they acted at the scene of this party.⁸² Such a course would have served the interest of protecting police departments from damage awards while treating neither set of actors—the attendees nor the police officers—as having done something wrong. Overturning the damages award on qualified immunity grounds would not critique the attendees for trusting that their inviters had authority to extend the party invitation; the Court would have had to conclude only that, in these “unique” circumstances,⁸³ the police officers were not “plainly incompetent”⁸⁴ or “knowingly violat[ing] the law”⁸⁵ when making the arrests on the belief that the attendees were not telling the truth about their invitations. A holding concentrating on immunity would have spared the Court from having to address the probable cause question—and, thus, the property interest allocation question—at all.⁸⁶

C. *Summary: Justifying Reallocation*

Post-*Wesby*, in those jurisdictions that subject to criminal trespass liability those persons who “knew or should have known” that their entry was unwanted by all lawful occupants, the recipient of what reasonably appears to be a valid social invitation has the option of (a) accepting the invitation only on proof of occupancy; (b) declining the invitation; or (c) accepting the invitation without proof of occupancy at the risk of arrest, a risk that is shared disproportionately by marginalized communities. The economic, privacy,

82. See *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (“Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.”).

83. See *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (recognizing that the “unique” facts and circumstances at hand indicated that the defendant officer’s conduct “did not violate clearly established law”).

84. See *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014).

85. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

86. Justices Sotomayor and Ginsburg each wrote separately to declare that they would have decided the case exclusively on these grounds. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 593 (2018) (Sotomayor, J., concurring in part and concurring in the judgment); *id.* at 593–94 (Ginsburg, J., concurring in the judgment in part). Justice Thomas’s opinion for the Court addressed both the probable cause and qualified immunity issues. This Piece does not take a normative position on the substance of current Supreme Court doctrine surrounding qualified immunity but, instead, only notes that this doctrine provided a pathway for the Court to resolve *Wesby* in favor of the police in a manner that did not result in a de facto reallocation of property interests. For a concise recent summary of the scholarly commentary on qualified immunity, see Crocker, *supra* note 8, at 1415–21.

personal responsibility, and pragmatic justifications for allowing these consequences to persist are, when subjected to critical evaluation, wholly unpersuasive. The decision denigrates what Rainer Forst calls the “basic right to justification” as to why we should operate under the assumption that other human beings are devious when they extend a social hand.⁸⁷

CONCLUSION: *WESBY* AND DISTRUST

Property law and criminal law are more intertwined than an initial glance might suggest. Property, as a social institution, requires that the state make allocative choices in the face of competing access and exclusionary claims to finite resources. For crimes involving theft of, intrusion onto, or interference with resources, these allocative choices establish the elements of the offense. Decades ago, the District of Columbia enacted a criminal trespass law that allocated property rights in the following manner: The general public held a right to access without fear of arrest those properties to which they reasonably believed they were welcome; in turn, titleholders held the correlative duty to respect reasonably mistaken access until the mistake is revealed.⁸⁸

In specifying the rights and duties of separate individuals who come into conflict with one another, this allocative choice helps to define the types of relationships that constitute us as necessarily intertwined social beings on equal terms.⁸⁹ It assumes that people have the right to have guests, the right to be guests on the property of others, and the right to trust others when they lead us to believe that they have a property right to extend an invitation. Requiring the state to demonstrate that entrants knew or should have known through some explicit or implicit objective manifestation that their entry was unwanted by all lawful occupants minimizes the risk that individuals would avoid availing themselves of associational opportunities out of fear that their conclusion that they are welcome onto another’s property, though reasonable under the circumstances, proves in error.⁹⁰

87. See Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice 2* (Jeffrey Flynn trans., 2012).

88. *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. Cir. 2013) (explaining how earlier appellate court decisions had interpreted the District’s criminal trespass ordinance to require that the state produce evidence disproving entrants’ contentions that they “had a reasonable bona fide belief in [their] right to enter” to garner a conviction).

89. In Jennifer Nedelsky’s words, the liberal tradition of associating individualism with rights is “not so much wrong as seriously and dangerously one-sided in its emphasis.” Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 *Rev. Const. Stud.* 1, 13 (1993).

90. Drawing on John Rawls’s “veil of ignorance” reasoning, see John Rawls, *A Theory of Justice* 136–42 (Harv. Univ. Press 2009) (1971), the District’s course reflects consideration of how one would want the criminal law to treat a nineteen-year-old child had the child attended a party on the good faith belief that the inviter had the authority to extend the invitation, when it ultimately turned out that this inviter had not yet formalized a lease, had overstayed a lease, or otherwise did not hold a sufficient interest in the property to host that party.

This Piece suggests that the Supreme Court's decision in *Wesby* operates to replace this right–duty pairing with a strengthened general right of titleholders to exclude others and the correlative duty of the public to avoid making even reasonable mistakes as to whether their invited entry onto another's property actually is warranted. The consequences of this de facto reallocation are not trivial. Post-*Wesby*, recipients of invitations face the choice of formally confirming their host's occupancy rights, which breeds distrust; accepting invitations without such confirmation at the risk of arrest, which preys on vulnerabilities; or denying those invitations outright, which fosters social isolation. The economic, privacy, personal responsibility, and pragmatic rationales for withstanding these disturbing consequences—which disproportionately will be borne by traditionally marginalized populations—are thin on their face and, in the final analysis, unconvincing. It will be incumbent on state and local governments to recognize the existence and impact of *Wesby*'s latent reallocation of property interests and, to the extent they are able within *Wesby*'s cramped confines, consider taking affirmative steps to reinstitute the prior allocation.

If there is a silver lining to *Wesby*, it may lie in its signaling that trust is an oft-concealed but keenly important value with which we must engage when reflecting on the various options facing state entities as they decide how to allocate property interests. Indeed, when framed in their full complexity, there are a vast number of disputes over resources or interests from all corners of property law—including, for instance, rules on receiving stolen goods,⁹¹ disclosing hidden defects in residential sales,⁹² distributing assets upon divorce or separation,⁹³ and acquiring land by adverse possession⁹⁴ or estoppel⁹⁵—in which one available choice allows a property claimant to violate trust that a competing claimant has placed in another person. Resolving these disputes, therefore, requires that the state decide whether it will establish an atmosphere that promotes trust or, in the pursuit of competing interests, one in which we must regularly question

91. See, e.g., *Jones v. Mitchell*, 816 So. 2d 68, 72 (Ala. Ct. App. 2001) (discussing circumstances in which an innocent purchaser of stolen property may retain possession in the face of a claim by the person from whom the property had been stolen).

92. See, e.g., *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) (suggesting that a seller should not benefit from a sale reaped solely through failing to disclose a known defect not readily discoverable by the buyer, for allowing so would instruct sellers that they can disregard a buyer's trust in entering the marketplace of residential sales in good faith).

93. See, e.g., *Watts v. Watts*, 405 N.W.2d 303, 313–15 (Wis. 1987) (recognizing the possibility of imposing a constructive trust on property accumulated throughout a relationship between unmarried partners to avoid unjust enrichment upon that relationship's dissolution).

94. See, e.g., *Reeves v. Metro. Tr. Co.*, 498 S.W.2d 2, 3–4 (Ark. 1973) (awarding ownership of a parcel to claimants who possessed the parcel on the good faith—if mistaken—belief that they owned it, while declining to award ownership of a second parcel about which the claimants conceded they knew did not belong to them).

95. See, e.g., *Burns v. McCormick*, 135 N.E. 273, 273 (N.Y. 1922) (addressing a situation in which the claimants did not secure in writing prior to a family member's passing the alleged promise from this family member that he would provide for them upon his death in exchange for their caring for him in his infirmity).

the motivations of others. In this sense, perhaps this Piece's critical evaluation of *Wesby* can serve as the foundation point for future explorations of the latent yet intimate connection between property—in and among all of its many forms—and trust.