

**LAND REDISTRIBUTION IN THE AFTERMATH OF THE  
COVID-19 PANDEMIC**

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#### ABSTRACT

*As the United States begins to emerge from the COVID–19 pandemic, there is a glaring need to redefine property law. Many who are concerned about the looming eviction and homelessness crisis are calling for policies that preserve “naturally occurring affordable housing” before they are sold to private developers and converted to market rate rentals. This Article explores policies that preserve affordable housing and redistribute surplus vacant properties to those in need.*

*Property theories that justify government-sponsored land redistribution assert that redistribution is necessary when the property system fails to provide a meaningful opportunity for the majority to own and enjoy adequate housing. In the midst of an unprecedented surge of homelessness that is sure to follow the lifting of eviction moratoria, this Article posits that self-help measures such as urban squatting should be tolerated in the absence of policies that achieve redistributive results. Historical examples of the legislature intervening to create redistributive policies, and to support squatter movements that defy property law, help support the conclusion that radical property reform is justified at this unique juncture, just as it was at various times since the founding of the United States.*

#### I. INTRODUCTION

As the United States begins to emerge from the COVID–19 pandemic, there is a glaring need to redefine property law. Many who are concerned about the looming eviction and homelessness crisis are calling for policies that prevent “naturally occurring affordable housing”<sup>1</sup> from being

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converted to market rate rentals, and for redistribution of surplus vacant properties<sup>2</sup> to those in need of housing. Utilitarian property theories have long justified using property in the most productive way for the benefit of society.<sup>3</sup> The pandemic has magnified the consequences of a substantial portion of the U.S. population living in substandard, overcrowded housing, in congregate homeless shelters, or even on the street, while surplus property holders keep their housing vacant. The pre-pandemic property system that allowed large real estate investment firms to accrue more property than could be adequately monitored<sup>4</sup> can no longer be supported after the COVID-19 pandemic. This Article argues that now is the time to envision new land configurations that redistribute surplus properties to those in need. This Article further posits that until widespread redistributive policies are passed, local governments must tolerate squatter movements that claim their right to housing in otherwise vacant property.

During the pandemic, we have seen the government intervene on an emergency basis in ways previously unimaginable. The term “essential shelter” acquired a new meaning, as property that was previously used for commercial purposes—like hotels—was temporarily repurposed for quarantining or housing those in need. Funding for these temporary measures came from the CARES Act and other COVID-related funding. When it became clear that COVID was a long-term, rather than a short-term, health crisis, the CDC emphasized the importance of finding permanent, rather than temporary, housing solutions for vulnerable

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1. Naturally Occurring Affordable Housing refers to residential rental properties that maintain low rents without federal subsidy. It is the most common affordable housing in the U.S. See NOAH IMPACT FUND, <https://noahimpactfund.com/#:~:text=Naturally%20Occurring%20Affordable%20Housing%20refers,affordable%20housing%20in%20the%20U.S> [<https://web.archive.org/web/20211106184512/https://noahimpactfund.com/>] (last visited Jan. 5, 2022).

2. For the purpose of this Article, a “surplus property” will be considered a vacant property that is intentionally kept vacant because neither the income generated from that property, nor the shelter provided by the housing, is essential to the owner.

3. See Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL’Y & L. 271, 282 (2012).

4. Tessa Davis, *Keeping the Welcome Mat Rolled-Up: Social Justice Theorists’ Failure to Embrace Adverse Possession As A Redistributive Tool*, 20 J. TRANSNAT’L L. & POL’Y 73, 100 (2011). Current property registration schemes and the ease of modern technology make monitoring of property for potential adverse possessors easier than centuries ago, when a person had to potentially visit their property long-distance to see if there was a trespasser living on the land. Today’s relative ease implies that those who fail to monitor their property and allow occupiers to live there for a much lesser statutory period exhibit negligence, leading to the inference that the property is surplus. This surplus status and careless exercise of ownership combine to lessen the title owner’s expectation of continued possession.

communities.<sup>5</sup> Several states and cities responded by innovating programs that would establish permanently affordable housing for the homeless in hotels previously used for temporary shelter,<sup>6</sup> contributing towards low-income communities' first home purchases,<sup>7</sup> or contributing state-owned land towards housing initiatives while funding their redevelopment.<sup>8</sup> The

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5. *Interim Guidance on People Experiencing Unsheltered Homelessness*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> [<https://web.archive.org/web/20220106021305/https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>].

6. See Press Release, *Governor Newsom Visits Project Roomkey Site in Bay Area to Announce "Homekey," the Next Phase in State's COVID-19 Response to Protect Homeless Californians*, OFF. GOVERNOR GAVIN NEWSOM (June 30, 2020), <https://www.gov.ca.gov/2020/06/30/governor-newsom-visits-project-roomkey-site-in-bay-area-to-announce-homekey-the-next-phase-in-states-covid-19-response-to-protect-homeless-californians> [<https://web.archive.org/web/20220108152054/https://www.gov.ca.gov/2020/06/30/governor-newsom-visits-project-roomkey-site-in-bay-area-to-announce-homekey-the-next-phase-in-states-covid-19-response-to-protect-homeless-californians/>] (discussing Governor Newsom's announcement of the transition from Project Roomkey, California's temporary measure to house the homeless in hotels, to Project Homekey, where hotels would be purchased for permanent housing for the homeless); see also Press Release, *Governor Newsom Signs 2020 Budget Act*, OFF. GOVERNOR GAVIN NEWSOM (June 29, 2020), <https://www.gov.ca.gov/2020/06/29/governor-newsom-signs-2020-budget-act> [<https://web.archive.org/web/20211106185120/https://www.gov.ca.gov/2020/06/29/governor-newsom-signs-2020-budget-act/>]. This and other material from this Article are based on Julie Gilgoff, *Pandemic-Related Vacant Property Initiatives*, 29(2) J. AFFORDABLE HOUS. & CMTY. DEV. L. 203 (2020).

7. The City of Newark, New Jersey used part of their COVID-19 stimulus package for a program called "Live Newark," which gives lower-income Newark residents a pathway to homeownership. Miles Howard, *Response to Pandemic Shows What's Possible in Housing*, SHELTERFORCE (May 20, 2020), <https://shelterforce.org/2020/05/20/response-to-pandemic-shows-whats-possible-in-housing> [<https://web.archive.org/web/20220106022329/https://shelterforce.org/2020/05/20/response-to-pandemic-shows-whats-possible-in-housing/>]; see also Press Release, *Mayor Baraka Commits \$1 Million To Covid-19 Relief Program For Homeowners And First-Time Buyers*, INSIDER NJ (April 1, 2020,

12:26 PM), <https://www.insidernj.com/press-release/mayor-baraka-commits-1-million-covid-19-relief-program-homeowners-first-time-buyers/> [<https://web.archive.org/web/20220106022433/https://www.insidernj.com/press-release/mayor-baraka-commits-1-million-covid-19-relief-program-homeowners-first-time-buyers/>].

8. State governments are taking an inventory of the vacant properties in their possession and devising methods to repurpose them for housing for the homeless. On January 15, 2020, California Governor Gavin Newsom signed Executive Order N-06-19, which offered 286 state-owned properties to local governments to use for "innovative and cost-effective housing developments" towards homelessness solutions. The land identified for the project includes vacant lots, fairgrounds, armories, and other state buildings, which can be developed into affordable housing. See Press Release, *On the Heels of State of the State, Governor Newsom Highlights State-Owned Properties Available for Emergency Homeless Housing, Calls on Cities and Counties to Partner with the State*, OFF. GOVERNOR

majority of housing-related government assistance during the pandemic went and continues to go towards rent forgiveness, but some local and state governments have begun to use federal COVID funds towards longer-term housing solutions.

Although issues of rent relief dominate the headlines regarding COVID-related housing instability, this Article focuses on policies and practices that redistribute property away from surplus property owners and transfer to tenants, Community Land Trusts,<sup>9</sup> or other nonprofit, public entities, to preserve as affordable housing, in perpetuity.

Part II of this Article explores redistributive policies that have been passed and are being further considered in various jurisdictions to prevent corporate real estate investment firms from acquiring distressed properties in the post-pandemic economic climate. Many small landlords can no

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GAVIN NEWSOM (Feb. 21, 2020), <https://www.gov.ca.gov/2020/02/21/on-the-heels-of-state-of-the-state-governor-newsom-highlights-state-owned-properties-available-for-emergency-homeless-housing-calls-on-cities-and-counties-to-partner-with-the-state> [<https://web.archive.org/web/20211106185222/https://www.gov.ca.gov/2020/02/21/on-the-heels-of-state-of-the-state-governor-newsom-highlights-state-owned-properties-available-for-emergency-homeless-housing-calls-on-cities-and-counties-to-partner-with-the-state/>]. The governor called on local leaders to review sites available in their regions and invited officials to work with the state to develop housing and shelter proposals that help move the homeless off the streets. The state is offering local governments \$1 leases on state-owned property and \$650 million in State Emergency Homeless Aid to be used to build out sites. As of November 2021, there were a total of eleven active projects under the Executive Order. Exec. Order No. N-06-19 Affordable Housing Development (Cal. 2019). Housing created under this order is not exclusively for the homeless—it includes rentals for households earning from 30% to 80% of area median income. This state-sponsored redistribution of vacant properties for affordable housing parallels Title V of the McKinney-Vento Homeless Assistance Act, the federal program that conveys unused federal properties to eligible homeless service providers without cost. The federal Act identifies properties that are no longer utilized to deed or lease them for the purpose of providing housing or services to the homeless. See THIS LAND IS YOUR LAND: HOW SURPLUS FEDERAL PROPERTY CAN PREVENT AND END HOMELESSNESS, NAT'L L. CTR. ON HOMELESSNESS & POVERTY 4 (2013).

9. A Community Land Trust (“CLT”) is typically a nonprofit organization that acquires land in a specific geographic area and retains ownership of the land while leasing to low-income residents through long-term ground leases. The leaseholders may own their homes or other improvements on the land, but they do not own the land underneath, nor do they decide the selling price due to resale restrictions. Thus, there exists a bifurcation of the traditional property rights of a homeowner. See Rosalind Greenstein & Yesim Sungu-Eryilmaz, *Community Land Trusts: A Solution for Permanently Affordable Housing*, LAND LINES 8 (Jan. 2007), [https://www.lincolnst.edu/sites/default/files/pubfiles/1187\\_Community%20Land%20Trusts%20A%20Solution%20for%20Permanently%20Affordable%20Housing%20LL%20Article%20January%202007.pdf](https://www.lincolnst.edu/sites/default/files/pubfiles/1187_Community%20Land%20Trusts%20A%20Solution%20for%20Permanently%20Affordable%20Housing%20LL%20Article%20January%202007.pdf) [[https://web.archive.org/web/20211106185358/https://www.lincolnst.edu/sites/default/files/pubfiles/1187\\_Community%20Land%20Trusts%20A%20Solution%20for%20Permanently%20Affordable%20Housing%20LL%20Article%20January%202007.pdf](https://web.archive.org/web/20211106185358/https://www.lincolnst.edu/sites/default/files/pubfiles/1187_Community%20Land%20Trusts%20A%20Solution%20for%20Permanently%20Affordable%20Housing%20LL%20Article%20January%202007.pdf)].

longer keep up with their tax and mortgage payments, let alone make necessary repairs to keep their properties up to code. Vulnerable property owners may be looking to offload their properties and sell to the highest bidder, thus removing additional affordable housing stock at a time when it is needed most.

Many of the policies discussed in this Article aim to redistribute properties that are purposely kept vacant by property owners. Part III will discuss the social ills stemming from abandoned, vacant properties, followed by a discussion of deterrent policies, such as vacant property taxes. This Part discusses the potential for housing the homeless in current available vacant housing stock without significant rehabilitation of those properties.

Part IV will further contextualize these proposals and policies within the unique economic and social circumstances that we find ourselves in as our country emerges from the pandemic. This Part will examine the government's attempts to preserve and create non-congregate housing to contain the spread of the virus, and will also explore how other social movements that coincided with the pandemic—namely the Black Lives Matter movement and Defund the Police campaigns—influence fights for affordable housing.

Part V provides historical context for redistributive policies since our country's founding—those that encouraged the usurpation of land away from Native Americans and promoted Westward expansion. After discussing these early efforts to redistribute land to parties who “put the land to the most productive use,” this Part will analyze the long-standing property law of Adverse Possession, and justifications for its reform. This Article posits that courts should consider the unique circumstances of each party—the surplus property holder and the adverse possessor—favoring a disposition of property to those in need. Courts should further consider the sweat equity that has been invested by the adverse possessor in the property as conferring a property right. Without these reforms, the Adverse Possession doctrine will continue to be inaccessible and obsolete.

Part VI delves into the history of urban squatters, highlighting victories of past campaigns which garnered the support of local governments to culminate in the squatters' acquisition of land. This section then transitions to discuss modern parallels of squatter movements from the early twenty-first century to today, as another “extralegal model” of land redistribution.

Part VII analyzes property theories that justify redistributive policies and practices. In the absence of adequate policies that create enough affordable housing for those in need, this section argues that self-help measures should be increasingly tolerated.

Part VIII addresses popular criticism of redistributive policies and practices before reaching the conclusion that land reform promoting redistribution is what will most efficiently address Americans' housing needs as the U.S. emerges from the COVID–19 pandemic.

## II. POST-COVID STATE AND LOCAL POLICIES TO PRESERVE AFFORDABLE HOUSING AND PROMOTE REDISTRIBUTION

As our country emerges from the pandemic, many landlords of affordable rentals are behind on their mortgage and tax payments due to pandemic-related financial hardship.<sup>10</sup> There is a backlog of repairs in these units that small landlords simply cannot afford to make.<sup>11</sup> As a result, many property owners will consider selling their property to the highest bidder to turn a profit, thus removing the property from existing affordable housing stock, and forcing an even greater percentage of the population onto the street. The policies discussed in this section would interrupt that trend to preserve distressed properties as affordable and redistribute them to those in need.

### *A. Tenant Opportunity to Purchase Act (TOPA)*

The Tenant Opportunity to Purchase Act (TOPA) is one such policy that gives tenants the right of first purchase and/or the right of first refusal when a multi-family unit is put up for sale. TOPA was first enacted in Washington, D.C.<sup>12</sup> in 1980, and is currently being proposed in cities such

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10. Nearly 10 million Americans are behind on their rent payments, according to the U.S. Census Bureau. See Chris Arnold, *Landlords Struggling to Stay Afloat See Lifeline in COVID–19 Relief for Renters*, NPR (Mar. 17, 2021, 5:00 AM), <https://www.npr.org/2021/03/17/977441157/landlords-struggling-to-stay-afloat-see-lifeline-in-covid-19-relief-for-renters> [<https://web.archive.org/web/20211106185753/https://www.npr.org/2021/03/17/977441157/landlords-struggling-to-stay-afloat-see-lifeline-in-covid-19-relief-for-renters>].

11. *Id.*

12. D.C. CODE § 42-3404 (1980).

as Berkeley<sup>13</sup> and Oakland, California,<sup>14</sup> Somerville, Massachusetts,<sup>15</sup> as well as state-wide in California,<sup>16</sup> Massachusetts,<sup>17</sup> and New York.<sup>18</sup> What each of these TOPA bills share in common is the requirement that landlords give notice to tenants and then allow a specified amount of time for tenants to express interest, make an offer, and secure funding, with the option to assign their right to a third party housing developer before the property is put up for private sale.<sup>19</sup> In some proposals, tenants will also have the opportunity to match the highest bid before the property is sold to private developers. In most jurisdictions, when tenants or a third-party housing developer purchase a property through TOPA, the property will be maintained as affordable in perpetuity.

There is staunch opposition against TOPA bills nation-wide, including in the East Bay of California, where a group of property owners and other residents banded together to form the group “STOP TOPA” (Taking Our Property Away).<sup>20</sup> The group claims that the bill would disempower property owners from determining the selling price and parties to whom they wish to sell, thus constituting a constitutional taking, and an infringement on their property rights.

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13. *Berkeley City Council Land Use, Housing, & Economic Development Committee Regular Meeting*, CITY OF BERKELEY (Mar. 5, 2020), <https://www.cityofberkeley.info/uploadedFiles/Clerk/2020-03-05%20Agenda%20Packet%20-%20Land%20Use.pdf> [<https://web.archive.org/web/20211106185830/https://www.cityofberkeley.info/uploadedFiles/Clerk/2020-03-05%20Agenda%20Packet%20-%20Land%20Use.pdf>].

14. *TOPA: Moms 4 Housing Tenant Opportunity to Purchase Act*, PROTECT OAKLAND RENTERS, <https://www.protectoaklandrenters.org/what-is-topa.html> [<https://web.archive.org/web/20211106185958/https://www.protectoaklandrenters.org/what-is-topa.html>] (last visited Jan. 6, 2022).

15. An Act to Preserve Affordable Housing Through a Local Option Tenant’s Right to Purchase, H.R. 3017, 2017 Leg., 190th Sess. (Mass. 2017).

16. AB-1703 Residential Real Property: Sale of Rental Properties: Right of First Offer, CAL. LEGIS. INFO. (July 14, 2020), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB1703](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1703) [[https://web.archive.org/web/20220106153707if\\_/https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB1703](https://web.archive.org/web/20220106153707if_/https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1703)].

17. An Act to Guarantee a Tenant’s First Right of Refusal, S. 786, Leg. 2019, 191st Sess. (Mass. 2019); An Act to Guarantee a Tenant’s First Right of Refusal, S. 890, Leg. 2021, 192d Sess. (Mass. 2021).

18. An Act to Amend the Real Property Actions and Proceedings Law, in Relation to Establishing the Tenant Opportunity to Purchase Act, S. 3157, Assemb. 2021, 2021–2022 Sess. (N.Y. 2021).

19. Julie Gilgoff, *Giving Tenants the First Opportunity to Purchase Their Homes*, SHELTERFORCE (July 24, 2020), <https://shelterforce.org/2020/07/24/giving-tenants-the-first-opportunity-to-purchase-their-homes/> [<https://web.archive.org/web/20211123084528/https://shelterforce.org/2020/07/24/giving-tenants-the-first-opportunity-to-purchase-their-homes/>].

20. STOP TOPA, <https://www.stoptopa.org/> [<https://web.archive.org/web/20220106155348/https://www.stoptopa.org/>] (last visited Jan. 6, 2022).



*B. Community Opportunity to Purchase Act (COPA)*

A related bill, the Community Opportunity to Purchase Act (COPA), has been passed in San Francisco, California,<sup>21</sup> and is now being proposed elsewhere, including Oakland, California,<sup>22</sup> and New York City.<sup>23</sup> San Francisco's COPA bill gives qualified nonprofit organizations and community groups the right of first purchase,<sup>24</sup> and/or the right of first refusal, to acquire certain properties offered for sale, including buildings with three or more units or vacant land that could be developed into three or more residential units.<sup>25</sup>

When the Oakland COPA bill was first drafted, it proposed another triggering event, besides sale of the property, which was when a property was kept vacant for more than ninety days without a justifiable reason,<sup>26</sup>

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21. *Community Opportunity to Purchase Act (COPA)*, CITY & CNTY. OF S.F. <https://sfmohcd.org/community-opportunity-purchase-act-copa> [<https://web.archive.org/web/20211115150246/https://sfmohcd.org/community-opportunity-purchase-act-copa>] (last visited Jan. 6, 2022).

22. The City of Oakland proposes a Community Opportunity to Purchase Act that allows affordable housing developers a right of first offer and first purchase once certain properties are put up for sale. Sam Lew, *Moms 4 Housing Bill Expanded*, 48HILLS (Feb. 13, 2020), <https://48hills.org/2020/02/moms-4-housing-bill-expanded/> [<https://web.archive.org/web/20220106155737/https://48hills.org/2020/02/moms-4-housing-bill-expanded/>]. The bill, authored by Councilmember Nikki Fortunato Bas, is inspired by a group of moms who were homeless and began to occupy a property that was intentionally being kept vacant by its owner. The COPA bill was supposed to be heard in the Community and Economic Development Committee Meeting of Oakland City Council March 24, 2020, but its introduction was temporarily postponed by the COVID pandemic. Telephone Interview with Leslie Gordon, Program Manager of Equitable Development, Urb. Habitat (June 4, 2020). Now the Oakland TOPA and COPA bill will be combined into one policy to be considered at a future legislative session.

23. *Giving Qualified Entities a First Opportunity to Purchase and An Opportunity to Submit an Offer to Purchase Certain Residential Buildings When Offered for Sale*, N.Y. City Council, (June 18, 2020), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4573837&GUID=0603C069-82DE-4977-904B-A07F3F468D90&Options=ID%7CText%7C&Search=rivera> [<https://web.archive.org/web/20220106201438/https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4573837&GUID=0603C069-82DE-4977-904B-A07F3F468D90&Options=ID%7CText%7C&Search=rivera>].

24. COPA bills can be distinguished from TOPA bills in that the latter policy gives tenants the first right of purchase, with the option to assign that right to a third party, whereas COPA bills give qualified nonprofits and other affordable housing developers the first right of purchase directly.

25. CITY & CNTY. OF S.F., *supra* note 21.

26. Telephone Interview with Leslie Gordon, Program Manager of Equitable Development, Urban Habitat (June 4, 2020). The original draft of Oakland's COPA bill was inspired by the Moms 4 Housing group, who occupied a property in their West Oakland neighborhood that had been sitting vacant for over ninety dates. *See* Part VI.A for more details.

signaling that it may be considered a “surplus” property. What the COPA policy was trying to prevent was surplus property holders intentionally keeping property vacant because the property owner did not need that income or wanted the property value to appreciate before entering into a rental agreement or sale.<sup>27</sup> Although this provision of Oakland’s COPA bill was struck, its inclusion in the preliminary proposal sheds light on growing support that owners should lose property rights if they fail to maintain occupancy in their housing units.

*C. S. 1079*

Lastly, California recently passed S. 1079, which gives tenants, Community Land Trusts, and other nonprofit housing developers<sup>28</sup> a right of first refusal—an opportunity to match (in the case of tenants) or exceed by just \$1 (in the case of CLTs and other nonprofit housing developers) the winning bid in a foreclosure auction—thereby reclaiming distressed properties from the hands of private investors. In early 2021, there were already approximately 6,000 homes in some stage of foreclosure in the

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27. See generally Alanna Schubach, *Why Do Some NYC Landlords Leave Apartments Empty?*, BRICK UNDERGROUND (Aug. 30, 2017, 11:39 AM), <https://www.brickunderground.com/rent/why-landlords-leave-apartments-empty> [<https://web.archive.org/web/20220106202535/https://www.brickunderground.com/rent/why-landlords-leave-apartments-empty>]. It has been a widespread practice for owners of multiple properties to keep their properties vacant until the property appreciates more because there are not sufficient disincentives to sit on the property. It is difficult for some to fathom that, in such developed and densely populated cities like New York City or Oakland, CA, so many properties would be left vacant for months or years at a time. In many instances, the vacancies are intentional, reflecting a choice by real estate firms or private landlords that it is more profitable to hold onto the properties as investments, rather than rent or sell them. Owners wait until the property value goes up, the neighborhood is further gentrified, and the owners can get a higher sale price or rental rate. It is specifically the practice of large corporate real estate firms purchasing, intentionally keeping property vacant until it becomes profitable enough to “flip it,” as well as government or quasi-government organizations intentionally keeping property vacant, that is the subject of this Article. In these instances, the land is treated as a means for profit, far removed from an immediate shelter purpose. *Id.*; see also Tracy Hadden Loh & Michael Rodriguez, *Why is That House or Storefront Vacant?*, GREATER GREATER WASH. (Aug. 27, 2018), <https://ggwash.org/view/68318/why-is-that-house-or-storefront-vacant> [<https://web.archive.org/web/20211106191524/https://ggwash.org/view/68318/why-is-that-house-or-storefront-vacant>].

28. Resident Property: Foreclosure, S. 1079, Leg. 2020, 2019–2020 Sess. (Cal. 2020). See Section 7 of S. 1079 for a definition of who is an “eligible bidder.”

state of California—this was with residential eviction moratoria in place, which delayed the foreclosure process for additional homeowners.<sup>29</sup>

S. 1079 aims to prevent another foreclosure crisis in California by prohibiting foreclosed properties from being sold to real estate corporations in bulk.<sup>30</sup> Instead, each foreclosed property must be auctioned individually, and tenants of properties with one to four units, as well as CLTs and other eligible bidders,<sup>31</sup> are given the right of first refusal to meet or exceed the winning bid at auction within forty-five days. If an eligible bidder is able to produce these funds, the auctioneer must sell to the eligible bidder rather than the investor. This law went into effect in 2021 and will sunset in five years (2026). It can be seen as part of an effort to redistribute properties away from large corporate landowners in the aftermath of the pandemic.<sup>32</sup>

Community Land Trusts are ideal candidates to serve as stewards of vacant and distressed properties put up for sale by landlords who cannot afford their upkeep, and properties foreclosed due to an owner's inability to afford mortgage payments.<sup>33</sup> Community Land Trusts would need adequate funding, however, to purchase distressed properties at a scale that would make a difference in the housing crisis.

The California Community Land Trust Network (CACLT Network) therefore put forth a proposal to fund S. 1079, called the Foreclosure Intervention Housing Preservation Program (FIHPP),

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29. *Support SB 1079*, CAL. CMTY. LAND TR. NETWORK, <https://www.cacltnetwork.org/support-sb-1079/> [<https://web.archive.org/web/20211106191643/https://www.cacltnetwork.org/support-sb-1079/>] (last visited Jan. 6, 2022).

30. Press Release, *Governor Signs SB 1079, Homes for Homeowners, Not Corporations*, CAL. STATE SENATE (Sept. 28, 2020), <https://sd09.senate.ca.gov/news/20200928-governor-signs-sb-1079-homes-homeowners-not-corporations> [<https://web.archive.org/web/20211106191811/https://sd09.senate.ca.gov/news/20200928-governor-signs-sb-1079-homes-homeowners-not-corporations>].

31. Eligible bidders given right of first refusal include an eligible tenant buyer, a nonprofit based in California whose primary activity is the development and preservation of affordable rental housing, and many other categories. *See Resident Property: Foreclosure*, S. 1079, ch. 202, Leg. 2020, 2019–2020 Sess. (Cal. 2020).

32. This bill was approved by Governor Newsom on September 28, 2020, and filed with Secretary of State on that same day. S. 1079 went into effect January 1, 2021. *Ild.*

33. The cost-effectiveness of permanently affordable housing models such as Community Land Trusts is evident by comparing the number of years of affordable housing a CLT provides with each dollar of the public subsidy spent. The initial investment in affordable housing is recycled by the resale restrictions contained in the lease. As land is permanently removed from the speculative market, the terms of affordability are locked into perpetuity, ensuring permanently affordable housing for those who need it most for generations to come. KELLY WEISS, CITY OF AUSTIN, *THE COMMUNITY LAND TRUST REPORT: CREATING PERMANENT AFFORDABLE HOMEOWNERSHIP OPPORTUNITIES IN AUSTIN, TEXAS* 10 (2005).

which was ratified by Governor Newsom on July 19, 2021.<sup>34</sup> AB 140,<sup>35</sup> which implements the housing items of the 2021 California budget and creates FIHPP, provides \$500 million in loans and grants to nonprofits purchasing and rehabilitating buildings at foreclosure auction, in the foreclosure process, or at risk of foreclosure.<sup>36</sup> According to Leo Goldberg, Co-Director of the CACLT Network, “FIHPP is an unprecedented investment in long-term housing affordability that will help reverse the cycle of speculative investment and displacement that is playing out across the state, particularly in low-income communities of color.”<sup>37</sup>

Since the passage of S. 1079 in January 2021, there have already been efforts by property owners to skirt around the law’s mandates, passing out waivers at public auctions that would exempt owners from auctioning to eligible bidders if the buyer planned to use the property for their primary residence for twelve months following the auction.<sup>38</sup> In one instance, when a bidder admitted that he did not qualify for this exemption, the auctioneer told them to “just sign the waiver anyway.”<sup>39</sup>

Some foreclosures are also being initiated without alerting tenants about their rights. Jocelyn Foreman, an employee of Berkeley’s Public Schools, was renting a house which foreclosed on March 4, 2021 and was sold at a trustee sale.<sup>40</sup> Ms. Foreman was not alerted of her right to make a bid on the house where she was living as was required by S. 1079. Housing activists intervened and initiated a fundraising campaign for Jocelyn to purchase her home so that she might be able to stay.<sup>41</sup> The prevailing bid of \$600,000.00 was placed by the large real estate

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34. *Foreclosure Intervention Housing Preservation Program (FIHPP) Fact Sheet*, CAL. COMTY. LAND TR. NETWORK, <https://www.cacltnetwork.org/fihpp/> [<https://web.archive.org/web/20220106210728/https://www.cacltnetwork.org/fihpp/>] (last visited Jan. 6, 2022).

35. Assemb. B. No. 140, ch. 111, Leg. 2021, 2020–2021 Sess. (Cal. 2021).

36. CAL. COMTY. LAND TR. NETWORK, *supra* note 34.

37. E-mail from Leo Goldberg, Co-Director of the California Community Land Trust Network (Aug. 21, 2021) (on file with author).

38. E-mail from Amy Hines-Shaikh, Consultant with California Community Land Trust Network (Mar. 26, 2021) (on file with author).

39. S. 1079 working group meeting notes (Mar. 2, 2021) (on file with author).

40. E-mail newsletter from Sustainable Economies Law Center (Mar. 24, 2021) (on file with author).

41. *Planting Seeds with Jocelyn Foreman*, TOGETHER RISING, <https://app.mobilecause.com/vf/TRGive/ErinRhoades> [<https://web.archive.org/web/20211106192025/https://app.mobilecause.com/vf/TRGive/ErinRhoades>] (last visited Jan. 6, 2021).

investment firm, Wedgewood,<sup>42</sup> and Ms. Foreman had forty-five days to produce funds to match Wedgewood's bid and regain possession of her home, according to the provisions of S. 1079.

Luckily, Ms. Foreman was able to partner with The Community Land Trust, Northern California Land Trust (NCLT), which purchased the property, then offered Ms. Foreman an occupancy agreement with an option to purchase.<sup>43</sup> Under this arrangement, Ms. Foreman will eventually secure a traditional mortgage to buy the home, but the trust will maintain ownership of the land to preserve as permanently affordable.<sup>44</sup> Because of the fundraising that Jocelyn and supporters did,<sup>45</sup> the National Housing Trust (NHT),<sup>46</sup> which has the capacity to make up the difference between what a tenant can reasonably afford and what the unit could rent for at local market prices, loaned the remaining amount to match Wedgewood's bid.<sup>47</sup> According to Sarah Scruggs, Co-director of Policy at NCLT, NHT does not ordinarily move that quickly, but made an exception since "they believed in this process and wanted to make the first [S. 1079] purchase happen."<sup>48</sup>

TOPA, COPA, and S. 1079 are all policies that seek to redistribute properties to Community Land Trusts and other housing nonprofits, who would then lease the property as affordable housing to those who earn substantially less than the area median income. These policies are essential as the U.S. emerges from the COVID-19 pandemic to keep essential shelter away from private speculators, preserving homes as permanently affordable.

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42. Erin Baldassari & Molly Solomon, *Grandma Challenges Real Estate Giant in Early Test of New California Law*, KQED (Apr. 6, 2021), <https://www.kqed.org/news/11868037/grandma-challenges-real-estate-giant-in-early-test-of-new-california-law> [<https://web.archive.org/web/20220106211930/https://www.kqed.org/news/11868037/grandma-challenges-real-estate-giant-in-early-test-of-new-california-law>].

43. E-mail from Sarah Scruggs, Stewardship & education coordinator/Co-director of policy, Northern California Land Trust (Aug. 20, 2021) (on file with author).

44. Baldassari & Solomon, *supra* note 42.

45. *Planting Seeds with Jocelyn Foreman*, GIVE LIVELY, <https://secure.givelively.org/donate/berkeley-public-schools-fund/planting-seeds-with-jocelyn-foreman> [<https://web.archive.org/save/https://secure.givelively.org/donate/berkeley-public-schools-fund/planting-seeds-with-jocelyn-foreman>] (last visited Jan. 6, 2022).

46. *What is Preservation?*, NAT'L HOUS. TR., <https://www.nationalhousingtrust.org/what-preservation> [<https://web.archive.org/web/20211106192818/https://www.nationalhousingtrust.org/what-preservation>] (last visited Jan. 6, 2022).

47. E-mail from Sarah Scruggs, Stewardship & Education Coordinator/Co-director of Policy, Northern California Land Trust (Aug. 20, 2021) (on file with author).

48. *Id.*

## III. EFFORTS TO DETER VACANCIES

It is in society's interest to deter property owners from keeping their properties vacant in the midst of a housing crisis. Vacant properties typically cost municipalities millions of dollars in lost tax revenue in any given year.<sup>49</sup> Besides potential lost revenue from property taxes, vacancies negatively impact the value of surrounding homes, decreasing their values.<sup>50</sup> This loss in home value has had an even more dramatic effect on minority and first-time homebuyers.<sup>51</sup> Studies have shown that it is vacancy, not poverty, that appears to have the biggest impact on crime statistics.<sup>52</sup>

There is an assumption that vacant properties would cost too much to rehabilitate to make the units up to code and are therefore not worth the investment. It is true that some vacancies are in need of repair, and an even smaller subset are considered blighted.<sup>53</sup> But other vacancies are suitable for occupancy without any rehabilitation. The District of Columbia is a case in point. According to a report by the District of Columbia's Office of the Chief Financial Officer,<sup>54</sup> as of November 15, 2019, there were 9,826 vacant properties in the District.<sup>55</sup> Out of those vacancies, 4,026 were luxury Class A apartments, 2,700 were Class B, and 3,100 were Class C. Class A accounted for 91.8% of new housing on the market between 2018 and 2019, a 96.5% increase in occupied units, and 83.6% of units under construction.<sup>56</sup> Therefore, Luxury Class A apartments were being

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49. According to the Federal Reserve Bank of Boston, Massachusetts, it has lost approximately \$4.1 million in tax revenues over a two-year period because of vacant foreclosed homes. Valerie Schneider, *Property Rebels: Reclaiming Abandoned, Bank-Owned Homes for Community Uses*, 65 AM. U. L. REV. 399, 407–08 (2015).

50. One study, using data from Columbus, Ohio, concluded that each vacant home within 250 feet of a given property decreases that property's value by 3.5%. *Id.* at 407 (citing Lindsey Beckett, Note, *The Right to Rent Post-Foreclosure: A Legislative Proposal to Address Widespread Vacancies in the Ongoing Foreclosure Crisis*, 51 HARV. J. ON LEGIS. 171, 171 (2014)).

51. *Id.* at 408 (citing CTR. FOR RESP. LENDING, 2013 UPDATE: THE SPILLOVER EFFECTS OF FORECLOSURES 1 (2013)) ("Minority neighborhoods have lost or will lose \$1.1 trillion in home equity as a result of spillover from homes that have started the foreclosure process . . .").

52. *Id.* at 406 (citing JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 9 (2013)).

53. See generally Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 395 (2000).

54. See GOV'T OF THE D.C., DISTRICT OF COLUMBIA ECONOMIC AND REVENUE TRENDS: DECEMBER 2019 (2019).

55. *Id.*

56. *Id.*

constructed so rapidly that it produced an excess supply, unaffordable to renters, and sitting vacant.

Many of the luxury apartments in D.C. have received public subsidies in their construction phase, including tax abatements, steeply discounted public land, and publicly-funded loans. According to the D.C. Auditor, some of these projects are out of compliance with subsidy requirements, including repayment of District loans within the promised timeframe, or adhering to the terms of a Community Benefits Agreement.<sup>57</sup>

These D.C. housing statistics point to the viability of housing the homeless in vacant units without significant rehabilitation. Drafters of a plan called “Vacant to Virus-Reduction” (V2VR)<sup>58</sup> propose to repurpose vacant units to house the homeless. The plan would entail the District taking an inventory of vacant housing stock, inspecting units with out-of-date inspections to create a database of available units, matching people experiencing homelessness with a unit according to their needs, and assisting in the moving process.<sup>59</sup> Low-income individuals who would live in these vacant properties would pay a maximum 30% of their income on rent directly to the landlord.

Similarly, Barcelona, Spain has enacted a policy that promotes redistribution, triggered when private property owners keep their properties vacant in the midst of the pandemic-related housing crisis. In July 2020, the Housing Department in Barcelona wrote to fourteen companies that owned 194 empty apartments around Barcelona, warning that if they did not find tenants to occupy the units by the end of the summer, the City could take possession and rent the units out as public housing for lower-income tenants.<sup>60</sup> If the real estate firms did not comply,

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57. See, e.g., OFF. OF THE D.C. AUDITOR, STRONGER MANAGEMENT OF THE HOUSING PRODUCTION TRUST FUND COULD BUILD MORE AFFORDABLE HOUSING (2018). OFF. OF THE D.C. AUDITOR, AUDIT OF THE AFFORDABLE HOUSING MANDATES FOR DEVELOPMENT PROJECTS FORMERLY MANAGED BY THE DISSOLVED NATIONAL CAPITAL REVITALIZATION CORPORATION AND ANACOSTIA WATERFRONT CORPORATION (2013).

58. The title “Vacant to Virus-Reduction” is a play on D.C. Mayor Bowser’s “Vacant to Vibrant DC” program, since according to V2VR drafters, the mayor has not fulfilled her promise to transform vacant properties “into vibrant and productive solutions.” *Vacant to Vibrant DC*, DC.GOV, <https://dhcd.dc.gov/page/vacant-vibrant-dc> [https://web.archive.org/web/20211106193420/https://dhcd.dc.gov/page/vacant%20-vibrant-dc] (last visited Jan. 6, 2020).

59. Telephone interview with Caitlin Cocilova, Steering Committee member of the D.C. Grassroots Planning Coalition (July 23, 2020).

60. Feargus O’Sullivan, *Barcelona’s Latest Affordable Housing Tool: Seize Empty Apartments*, BLOOMBERG (July 16, 2020, 12:48 PM), <https://www.bloomberg.com/news/articles/2020-07-16/to-fill-vacant-units-barcelona-seizes-apartments> [https://web.archive.org/

Barcelona could require the landlord to sell the vacant property to the City at 50% of market rate in order to preserve the property as affordable.<sup>61</sup>

#### A. Vacant Property Taxes

A common penalty for keeping property vacant is paying a vacant property tax. One vacant property tax was implemented by the City of Vancouver, imposing a tax of 1% of the taxable assessed value on owners of residential units who do not use their homes as a principal residence, or rent it out, for at least six months of that year.<sup>62</sup> There are a number of exceptions for landlords, including if the home is undergoing major renovations or if the owner or family member is under medical care.<sup>63</sup>

Oakland, California charges owners of vacant properties annually between \$3,000 and \$6,000, depending on whether the property is residential, undeveloped, and a list of other criteria.<sup>64</sup> Washington, D.C.'s Vacant Property Tax determines whether properties are vacant or blighted

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org/web/20220110035707/https://www.bloomberg.com/tosv2.html?vid=&uuid=61007ee1-71c9-11ec-9ae7-474a50565165&url=L25ld3MvYXJ0aWNsZXNvMjAyMC0wNy0xNi90by1maWxsLXZhY2FudC11bml0cy1iYXJjZWxvbmEtc2VpemVzLWFwYXJ0bWVudHM=]. Measures were passed in 2016 that legalize municipalities in the region of Catalonia in northeast Spain to take control of rental properties that have been sitting vacant, without tenants, for more than two years. Ajuntament de Barcelona, *Expropriation and Social Use of Empty Bank-Owned Flats to Resume*, Info Barcelona (Nov. 4, 2018, 6:11 PM) [https://www.barcelona.cat/infobarcelona/en/tema/housing/expropriation-and-social-use-of-empty-bank-owned-flats-to-resume\\_640261.html](https://www.barcelona.cat/infobarcelona/en/tema/housing/expropriation-and-social-use-of-empty-bank-owned-flats-to-resume_640261.html) [https://web.archive.org/web/20220107022119/https://www.barcelona.cat/infobarcelona/en/tema/housing/expropriation-and-social-use-of-empty-bank-owned-flats-to-resume\_640261.html]. The city can then rent them as affordable housing for a period of four to ten years before returning the property to its original owner. But now, since passing a new law in December of 2019, owners of vacant properties are at risk of losing those properties permanently. *Decreto Ley 17/2019, de 23 de diciembre, de medidas urgentes para mejorar el acceso a la vivienda [Decree Law 17/2019, of December 23, on Urgent Measures to Improve Access to Housing]*, NOTICIAS JURIDICAS [JUD. NEWS], [http://noticias.juridicas.com/base\\_datos/CCAA/656733-dl-17-2019-de-23-dic-ca-cataluna-medidas-urgentes-para-mejorar-el-acceso.html](http://noticias.juridicas.com/base_datos/CCAA/656733-dl-17-2019-de-23-dic-ca-cataluna-medidas-urgentes-para-mejorar-el-acceso.html) [https://web.archive.org/web/20211106193719/https://noticias.juridicas.com/base\_datos/CCAA/656733-dl-17-2019-de-23-dic-ca-cataluna-medidas-urgentes-para-mejorar-el-acceso.html] (last visited Jan. 6, 2022).

61. *Id.*

62. CITY OF VANCOUVER, FAQ'S ABOUT THE EMPTY HOMES TAX AND REAL ESTATE (2018).

63. *Empty Homes Tax*, CITY OF VANCOUVER, <https://vancouver.ca/home-property-development/empty-homes-tax.aspx> [https://web.archive.org/web/20220107024332/https://vancouver.ca/home-property-development/empty-homes-tax.aspx] (last visited Jan. 6, 2022).

64. *Vacant Property Tax (VPT)*, CITY OF OAKLAND, <https://www.oaklandca.gov/topics/vacantpropertytax> [https://web.archive.org/web/20211106193946/https://www.oaklandca.gov/topics/vacantpropertytax] (last visited Jan. 6, 2022).



and taxes the properties accordingly: vacant property at \$5.00 per \$100 of assessed value and blighted property at \$10.00 per \$100 of assessed value.<sup>65</sup>

New York State Assembly Member Linda Rosenthal introduced N.Y. Assembly Bill 9966<sup>66</sup>, which would fine landlords with residential units that remain vacant for at least three months and reserve those funds for a program that provides housing vouchers for the homeless. The fine would apply only to affordable, rent-regulated units that are kept vacant, with the rationale that if a landlord withholds these essential affordable units, they must otherwise make contributions to housing those in need.

The first step in any punitive measure or policy penalizing vacant property holders is to identify or count the vacant properties within a jurisdiction. “Housing Not Warehousing” bills were passed in New York City, which required the City to register vacant buildings and lots under its jurisdiction and then analyze data to estimate how many could be used for affordable housing.<sup>67</sup> The bills were considered an essential step in repurposing these vacant properties and putting them back to public use.

### *B. The Vacant Property in the United States Could House All the Homeless*

According to the U.S. Census Bureau’s 2018 American Community Survey, more than seventeen million vacant housing units exist nationwide.<sup>68</sup> Even excluding the vacancies that are available for rent (but not yet occupied), up for sale, or being kept for occasional or seasonal use,

65. *OTR Vacant Real Property*, DC.GOV., <https://otr.cfo.dc.gov/node/388912> [<https://web.archive.org/web/20220107024820/https://otr.cfo.dc.gov/node/388912>] (last visited Jan. 6, 2022).

66. Assemb. B. No. 9966, Assemb. 2020, 2019–2020 Sess. (N.Y. 2020).

67. *A Victory Ten Years in the Making: We Passed the Housing Not Warehousing Act!*, PICTURE THE HOMELESS, (Dec. 21, 2017), <https://www.picturethehomeless.org/victory-ten-years-making-passed-housing-not-warehousing-act> [<https://web.archive.org/web/20211106194122/https://www.picturethehomeless.org/victory-ten-years-making-passed-housing-not-warehousing-act/>].

68. *Compare American Community Survey: Occupancy Status*, U.S. CENSUS BUREAU (2018), <https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Detailed%20Tables&t=Vacancy&table=B25002&tid=ACSDT1Y2018.B25002&lastDisplayedRow=2&vintage=2018> [[https://web.archive.org/web/20210522052148/https://data.census.gov/akam/11/pixel\\_6c19a8a2](https://web.archive.org/web/20210522052148/https://data.census.gov/akam/11/pixel_6c19a8a2)], with *Vacant Zombie Property Rate in U.S. Holds Steady Amid Foreclosure Moratorium*, ATOM DATA SOLS. (May 28, 2020), <https://www.atomdata.com/news/market-trends/q2-2020-vacancy-zombie-foreclosure-report> [<https://web.archive.org/web/20211106194240/https://www.atomdata.com/news/market-trends%20/q2-2020-vacancy-zombie-foreclosure-report/>] (second quarter survey of vacant properties revealing 1.5% vacancies among non-rental homes).

there are still over 6.1 million residential units unoccupied.<sup>69</sup> Meanwhile, the number of homeless individuals counted in the United States is less than a million.<sup>70</sup> Many housing advocates believe that if property owners were severely penalized for intentionally keeping their properties vacant, they would lower rents, make repairs quicker, and succumb to pressure to put their properties to public use to avoid these penalties.

#### IV. THE PANDEMIC HAS NOT CREATED THE HOUSING CRISIS, BUT HAS MAGNIFIED HOUSING INSTABILITY

After the COVID outbreak in 2020, more than 25% of American adults had trouble paying their bills,<sup>71</sup> and many fell behind on rent payments.<sup>72</sup> According to the household pulse survey, more than one in six unemployed tenants have fallen behind in rent payments, and 45% of all renters think they will be evicted from their homes in the coming months.<sup>73</sup> Median rent has more than doubled over the past two decades, significantly outpacing renters' incomes.<sup>74</sup> Many renters did not have savings to fall back on when faced with unexpected, pandemic-related financial hardship, and if not for moratoria, they would be on the street.

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69. U.S. CENSUS BUREAU, *supra* note 68.

70. According to the U.S. Department of Housing and Urban Development, there were 567,715 homeless people counted on a single night in America, although homeless advocates argue that number is a gross underestimate. Press Release, *HUD Releases 2019 Annual Homeless Assessment Report*, U.S. DEP'T HOUS. AND URB. DEV. (JAN. 7, 2020), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_20\\_003](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_003) [[https://web.archive.org/web/20211106194401/https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_20\\_003](https://web.archive.org/web/20211106194401/https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_003)]; see also *How Many Americans are Homeless? No One Knows*, N.Y. TIMES (Jan 28, 2021), <https://www.nytimes.com/2021/01/28/opinion/homeless-america-data.html> [<https://web.archive.org/web/20220107145918/https://www.nytimes.com/2021/01/28/opinion/homeless-america-data.html>].

71. 25% of U.S. adults say they or someone in their household was laid off or lost their job because of the coronavirus outbreak. Kim Parker et al., *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> [<https://web.archive.org/web/20211106194613/https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>]. The statistic of who had trouble paying bills increased exponentially for Blacks (43%) and Latinos (37%). *Id.*

72. The above Pew research study says that 16% of all American adults have had trouble paying rent during the pandemic. *Id.*

73. Matthew Desmond, *The Tenants Who Evicted Their Landlord*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2020/10/13/magazine/rental-housing-crisis-minneapolis.html> [<https://web.archive.org/web/20211106194648/https://www.nytimes.com/2020/10/13/magazine/rental-housing-crisis-minneapolis.html>].

74. *Id.*

The CARES Act implemented a federal moratorium on evictions,<sup>75</sup> with some funds available for rent relief. However, the Act expired in July of 2020, and was replaced by the CDC moratorium, during which rent continued to accumulate, without an answer as to how it will be repaid when the moratorium is lifted. The CDC Director indicated that there would not be any further extensions to the nation-wide residential eviction moratorium “absent an unexpected change in the trajectory of the pandemic.”<sup>76</sup> The Delta variant and accompanying rise in COVID-19 cases led the CDC to extend a narrower version of the moratorium until October 3, 2021 in the regions of the U.S. that still have a “substantial” or “high” rate of COVID.<sup>77</sup> Although rent freezes and extensions of moratoria have helped many tenants stay in their homes, evictions are looming on the horizon for those unable to pay back rent, and landlords have already begun to sidestep moratoria or carry out evictions due to loopholes in existing eviction protections.<sup>78</sup>

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75. The Federal CARES Act eviction moratorium was in effect from March 27, 2020 to July 24, 2020. It was supplemented by state or city-wide moratoria, some of which offered greater protections to tenants. See *COVID-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/> [<https://web.archive.org/web/20220107154810/https://evictionlab.org/covid-policy-scorecard/>] (last visited Jan. 6, 2022) (providing a rating system of each state’s eviction moratorium). When the Federal CARES Act expired over the summer of 2020, the Centers for Disease Control and Prevention (CDC) issued a new federal eviction moratorium which went into effect on September 4, 2020, and was extended until March 31, 2021. See MAGGIE MCCARTY & LIBBY PERL, CONG. RSCH. SERV., IN11516, FEDERAL EVICTION MORATORIUMS RESPONSE TO THE COVID-19 PANDEMIC (2021).

76. *Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 3, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf> [<https://web.archive.org/web/20211106194813/https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf>]. The latest version of the CDC moratorium expired on October 3, 2021.

77. *Id.* See Also *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021) for a discussion of whether the CDC exceeded its statutory authority by extending the most recent version of its federal moratorium through the Public Health Service Act.

78. Matthew Goldstein, *Landlords Jump the Gun as Eviction Moratorium Wanes*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/07/23/business/evictions-moratorium-cares-act.html> [<https://web.archive.org/web/20211106194845/https://www.nytimes.com/2020/07/23/business/evictions-moratorium-cares-act.html>]; Jacob Passy, *Big Landlords Have Started More Than 40,000 Evictions Despite the CDC Moratorium*, MKT. WATCH (Feb. 12, 2021, 9:39 AM), <https://www.marketwatch.com/story/corporate-landlords-have-started-more-than-40-000-evictions-during-the-cdc-moratorium-but-some-say-theyre-trying-to-help-tenants-11613067572> [<https://web.archive.org/web/>

Within this context, there have been national cries to cancel rent unpaid during the months of the pandemic<sup>79</sup> and also to re-envision what the housing system post-pandemic could look like. A popular sentiment is that there is no going back to normal after the COVID–19 pandemic. “Normal was the problem in the first place. . . . There is a different power relationship that we’re asking of society right now.”<sup>80</sup>

The new focus of property law must be to move away from what eviction expert Matthew Desmond calls the “extractive model,”<sup>81</sup> which takes away people’s wages and forces them to live paycheck to paycheck. Our country must foster the acquisition and development of permanent housing for low-income individuals that removes land from the speculative market. Property law theory justifies the redistribution of property if, as in our current system, property is concentrated in the hands of the few, with the majority excluded from an opportunity to own property or enjoy housing stability themselves.<sup>82</sup>

#### *A. The Intersection of Racism and the Policing of Homeless People*

COVID–19 has magnified disparities of race, class, access to justice, and housing.<sup>83</sup> The timing of the COVID–19 pandemic coincided with The Black Lives Matter Movement, which brought global attention to police brutality, the lack of police training, and overuse of brutal violence by law enforcement against people of color. The movement that shed light on violence against black and brown Americans was accompanied by cries to

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20211106194936/https://www.marketwatch.com/story/corporate-landlords-have-started-more-than-40-000-evictions-during-the-cdc-moratorium-but-some-say-theyre-trying-to-help-tenants-11613067572].

79. In May 2020, tenant groups around the Country coordinated a rent strike in which tens of thousands of renters in New York City and Los Angeles withheld their rent, after which organizers thought to implement the rent strike on a much larger scale. Desmond, *supra* note 73.

80. *Id.* (quoting Davin Cárdenas, field organizer of the Right to the City Alliance, a national organization focused on tenant rights).

81. *Id.*

82. According to Joseph Singer, when ownership is not widespread or a system supports unequal distribution, redistribution is required to allow real ownership opportunities for the majority. Widespread distribution of property ownership must be the primary goal of our property system. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 144 (2000).

83. For a more in-depth discussion on this topic, see Olga Tomasello, *Feerick Center’s Social Justice Speaker Series Spotlights Pandemic Housing Injustices*, FORDHAM L. NEWS (Mar. 16, 2021), <https://news.law.fordham.edu/blog/2021/03/16/feerick-centers-social-justice-speaker-series-spotlights-pandemic-housing-injustices/> [<https://web.archive.org/web/20211106195407/https://news.law.fordham.edu/blog/2021/03/16/feerick-centers-social-justice-speaker-series-spotlights-pandemic-housing-injustices/>].

defund the police and redirect those funds towards necessary social services that help rehabilitate rather than penalize symptoms of poverty.<sup>84</sup>

Statistics have surfaced recording the high proportion of non-emergency 911 calls, including those which involve homeless individuals.<sup>85</sup> Policy makers and advocates have entertained a new system where non-emergency calls may be redirected to a social service agency that can meet the needs of the homeless with less punitive measures.<sup>86</sup> Some jurisdictions report that 80% of calls to the police concern the homeless.<sup>87</sup> About 40% of the City of Berkeley, California's 911 calls involve an unhoused resident or someone experiencing a mental health crisis, according to Berkeley's Mayor, Jesse Arreguin.<sup>88</sup> The Berkeley City Council therefore cut \$9.25 million from its police budget and voted to redirect those funds to a new Specialized Care Unit that would deploy crisis workers, rather than police officers, to noncriminal calls.<sup>89</sup>

Various cities are considering redirecting non-emergency calls relating to the homeless to other social service organizations where a social worker, for example, may approach the problem different from law enforcement. Austin, Texas has already cut its police department budget

84. WE ARE CURB, <https://www.curbprisonspending.org/> [<https://web.archive.org/web/20220107180739/https://curbprisonspending.org/>] (last visited Jan. 6, 2022).

85. Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend their Time?* N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [<https://web.archive.org/web/20211106195453/https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html>]; see also Carl Smith, *Does Every Emergency Call Require Police Response?*, GOVERNING (Jul. 14, 2020), <https://www.governing.com/next/does-every-emergency-call-require-police-response.html> [<https://web.archive.org/web/20211106195615/https://www.governing.com/next/does-every-emergency-call-require-police-response.html>].

86. Philip V. McHarris & Thenjiwe McHarris, *No More Money for the Police*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html?referringSource=articleShare> [<https://web.archive.org/web/20220107181752/https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html?referringSource=articleShare>].

87. See INT'L CITY/CNTY. MGMT. ASS'N, POLICE DEPARTMENT OPERATIONS ANALYSIS/PARKS AND RECREATION DEPARTMENT PARK RANGER DIVISION REVIEW: SANTA CRUZ, CALIFORNIA, CITY OF SANTA CRUZ (n.d.).

88. Jesse Arreguin, *Berkeley Mayor: What "Defund the Police" Means for My City*, S.F. CHRON. (July 14, 2020), <https://www.sfchronicle.com/opinion/openforum/article/Berkeley-mayor-What-defund-the-police-15403555.php> [<http://web.archive.org/web/20211108161536/https://www.sfchronicle.com/opinion/openforum/article/Berkeley-mayor-What-defund-the-police-15403555.php>].

89. Jon Kawamoto, *Berkeley City Council Defunds Police Department to the Tune of \$9.2 Million*, MERCURY NEWS (July 2, 2020, 12:23 PM), <https://www.mercurynews.com/2020/07/02/berkeley-city-council-approves-budget-with-9-2-million-in-police-cuts/> [<https://web.archive.org/web/20220107183118/https://www.mercurynews.com/2020/07/02/berkeley-city-council-approves-budget-with-9-2-million-in-police-cuts/>].

by \$150 million<sup>90</sup> and plans to reallocate funds to areas like food access, alternative forms of public safety, and community support.<sup>91</sup> Many believe that instead of punishing and policing people for not having homes, funding should be used to create homes and rehabilitate individuals.

*B. Public Space as Sites for Homeless Encampments: Redistributing Access to the Commons*

Policies that criminalize homelessness, including ordinances that authorize evictions of homeless encampments and arrests of people for sleeping and lying down in public, have also been the subject of public debate.<sup>92</sup> The Centers for Disease Control and Prevention issued guidance in March 2020 that advised localities not to clear homeless encampments without providing alternative non-congregate housing to people to prevent further spread of COVID-19.<sup>93</sup> Although some jurisdictions are still enforcing ordinances instructing the police to evict the homeless in tent encampments,<sup>94</sup> other jurisdictions are decreasing police aggression

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90. Meena Venkataramanan, *Austin City Council Cuts Police Department Budget By One-Third, Mainly Through Reorganizing Some Duties Out From Law Enforcement Oversight*, TEX. TRIB. (Aug. 13, 2020, 6:00PM), <https://www.texastribune.org/2020/08/13/austin-city-council-cut-police-budget-defund/> [http://web.archive.org/web/20211108161958/https://www.texastribune.org/2020/08/13/austin-city-council-cut-police-budget-defund/].

91. *Id.*

92. Samantha Batko et al., *Alternatives to Arrests and Policy Responses to Homelessness*, URB. INST. (Oct. 2020), <https://www.urban.org/sites/default/files/publication/103158/alternatives-to-arrests-and-police-responses-to-homelessness.pdf> [http://web.archive.org/web/20211108162048/https://www.urban.org/sites/default/files/publication/103158/alternatives-to-arrests-and-police-responses-to-homelessness.pdf].

93. The CDC suggests that tent encampments should be allowed to stay in the absence of alternate social-distanced shelter options, and, instead of disbanding them, a city should encourage those staying in encampments to set up their tents with at least twelve feet by twelve feet of space per individual, helping to decompress the encampment by linking those at higher risk for severe illness to individual rooms, and working together with community coalition members to improve sanitation in encampments. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 5.

94. Jacob Pierce, *Santa Cruz Retreats from Homeless Sweep as Protestors Push Back*, GOOD TIMES (Dec. 28, 2020), <https://goodtimes.sc/santa-cruz-news/santa-cruz-homeless-sweep-protesters/> [http://web.archive.org/web/20211108162317/https://goodtimes.sc/santa-cruz-news/santa-cruz-homeless-sweep-protesters/]. In Santa Cruz, California, for example, City Manager Martin Bernal attempted to sweep hundreds of houseless individuals from San Lorenzo Park during the cold and rainy winter, despite there being no alternative shelter available, the City being in COVID lockdown, and the ICUs being full. A coalition of activists known as “Stop the Sweeps” eventually blocked the City from completing their camp sweep due to a temporary restraining order. *Id.* When the council was back in session, city staff drafted an ordinance to enhance their ability to conduct sweeps again. SANTA CRUZ, CAL., ORDINANCE NO. 2021-03 (2021).

towards these communities,<sup>95</sup> upholding the standards of the Supreme Court case *Martin v. Boise*, that the state may not criminalize conduct that is an unavoidable consequence of being homeless in the absence of adequate alternatives.<sup>96</sup>

COVID-19 has exposed “not in my backyard” (NIMBY) opposition to encampments of the homeless in public places and magnified the need for the government to take an unequivocal role in preserving access of those without homes to public places to live and sleep, in the absence of adequate alternatives. In upholding the right of the homeless to sleep in public spaces, rather than preserve parks solely for the recreation of those privileged to live in adequate shelter, the government would be redistributing rights of the commons to those who need it most.

The following section asserts that the COVID era would not be the first time in American history that the U.S. government took a stance in promoting redistribution of access to land to those who need it most, and that the COVID era is ripe for this type of radical property reform.

#### V. EARLY EXAMPLES OF PROPERTY REFORM: THE TRANSFORMATION OF THE SQUATTER INTO THE WESTERN PIONEER

The 2020s would not be the first time in American history that popular movements have succeeded in transforming widely-accepted property configurations leading to property redistribution by the government.

From the 18th to 19th century, the government encouraged the development of “wilderness lands,” especially with the goal of westward expansion.<sup>97</sup> The judicial and legislative branches both shared a prejudice against undeveloped lands, condoning land grabs against Native

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95. While struggling to meet the need for non-congregate housing, many cities have decided to allow homeless tent encampments to remain in public places that would have normally been cleared. The Minneapolis Park Board, for example, has voted to allow the homeless to sleep in city parks. This ruling is consistent with the CDC’s statement that if individual housing options are not available, people living unsheltered or in tent encampments should be allowed to remain where they are. Minneapolis Parks Commissioner Chris Meyer has gone on the record as saying, “I am unwilling to evict somebody unless I can tell them where they should go.” Matt Sepic, *Divided Minneapolis Park Board Supports Encampment at Powderhorn Park*, MPRNEWS (June 19, 2020, 10:46 AM), <https://www.mprnews.org/story/2020/06/19/divided-minneapolis-park-board-supports-encampment-at-powderhorn-park> [http://web.archive.org/web/20211108162434/https://www.mprnews.org/story/2020/06/19%20/divided-minneapolis-park-board-supports-encampment-at-powderhorn-park].

96. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh’g*, 920 F.3d 584 (9th Cir. 2019).

97. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 538–89 (1996).

American tribes,<sup>98</sup> and expressly holding that the “Central government’s” ownership held sway over Native American title. These practices could be attributed to racist and ethnocentric ideology, as well as the notion that Native Americans had not put the land to “productive use.”<sup>99</sup> This practice continued as the government became motivated to encourage the development of vacant, uninhabited land in the Western United States, through “Westward Expansion.”

Days after the Louisiana Purchase in 1803, the U.S. government began to auction land west of the Mississippi River to “speculators,” many of whom would never live on the property. The sales provided valuable funds to the government, and the government in turn did not protest practices of absentee landholding. It was a common practice for squatters to occupy the vacant land in the owners’ absence, working the land, and hoping they would eventually gain title. Public support mounted to recognize a right of “preemption,” which would entitle squatters on public land to purchase the land they improved at low, fixed prices, or at a minimum to obtain the value of their improvements.<sup>100</sup>

Despite the military attempting to evict the occupiers, squatters persisted in trespassing on and improving the land.<sup>101</sup> Squatters began to organize themselves into “settlers’ associations,” attending auctions to intimidate speculators from bidding on squatter-occupied land.<sup>102</sup>

Some local governments supported the squatter movements, and although they could not directly counter the federal policy of selling public lands to absentee speculators, they could support squatters by adapting local laws that made it easier for squatters to dispossess private absentee owners.<sup>103</sup>

For example, local governments raised taxes on land to make it expensive for absentee landlords to hold land idle while they waited for land values to increase,<sup>104</sup> thus paralleling modern “vacant property taxes.” When President Van Buren assumed the presidency, he took a public stance that “selling [public] lands for the greatest possible sum of money, without regard to higher considerations,” was not the proper goal of federal land policy.<sup>105</sup>

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98. See *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

99. See Sprankling, *supra* note 97, at 569.

100. Eduardo Moises Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1107 (2007).

101. *Id.* at 1108.

102. *Id.*

103. *Id.* at 1110.

104. *Id.*

105. *Id.* at 1113.



In 1841, the federal government abandoned its longstanding position that squatting on public lands was illegal, and Congress enacted the first preemption statute for surveyed federal lands.<sup>106</sup> The 1862 Homestead Act provided the free acquisition of federal land by those who met a five-year residency and improvement requirement.

The revision of policy to redistribute land away from speculators to those who live on and care for the land was as relevant in the 19th century, as it is today. The American property system has valued putting land to “productive use” and has encouraged the upkeep of property in the face of negligent oversight since its founding. The government today must expand laws it created to favor squatters over speculators who do not adequately monitor their property.

*A. Modern Parallel: Adverse Possession and Exceptions in Criminal Trespass Statutes Can Legitimize Squatters’ Occupation of Vacant Property*

Adverse Possession is a long-standing property law in all fifty states, plus the District of Columbia, that has the potential to redistribute land away from negligent property holders to those in need. The doctrine has six components that the adverse possessor must satisfy for a successful claim: (1) actual possession [that is] (2) open and notorious, (3) hostile (without permission), (4) exclusive, (5) continuous, and (6) for the required statutory period.<sup>107</sup> Under the common law, the adverse possessor had to be in possession for twenty years, though many jurisdictions have reduced that requirement. While the statutory requirements for the time in possession varies by jurisdiction from two years to twenty years, adverse possession doctrine is otherwise relatively uniform as a “well[-]entrenched” tenet of property law.<sup>108</sup>

Adverse possession forces landowners to maintain and monitor their land, discouraging them from “sleeping” on their rights for an indefinite period.<sup>109</sup> Rather than letting land lay unused, adverse possession encourages owners to actively use and monitor their land to eject any trespassers before the statutory requirement elapses. Traditional utilitarianism property theories justify adverse possession<sup>110</sup> in that the lawbreaker-occupier is placing a higher value on the property than the true

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106. *Id.*

107. Davis, *supra* note 4, at 83–84 (citing JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 168, 177 (9th ed. 2008)).

108. *Id.*

109. Brian Gardiner, *Squatters’ Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT’L & COMP. L. REV. 119, 122 (1997).

110. Davis, *supra* note 4, at 85.

owner, utilizing the property for dwelling purposes. The lawbreaker-occupier who has nothing (or very little) would not be able to offer as much money through market transactions to demonstrate the value they place on the land, but their higher estimation may be demonstrated by the time and effort they spend to improve the land and occupy it, in contrast with the absentee landowners.<sup>111</sup>

Peñalver and Katyal assert that in keeping with social justice property theory,<sup>112</sup> “it is not wrong to appropriate someone else’s surplus property in order to provide for one’s own need when viable legal alternatives are not available.”<sup>113</sup> “The intentional adverse possessor, or squatter, has typically been someone without much property but with a great deal of time and a willingness to invest. . . in improving the unoccupied property of another.”<sup>114</sup>

States like Arizona have lowered the statutory period required to gain adverse possession to as low as two years to make the requirements more attainable.<sup>115</sup> Some statutory variations look at whether a squatter has beautified the property, or improved the land, thus adding to the argument that sweat equity or stewardship should confer a property right.<sup>116</sup> In addition, many have advocated for the courts to look at the unique characteristics of each party, to balance principles of fairness, in order to determine who deserves to win title to the property.<sup>117</sup>

The United States’ property system has emulated that of the United Kingdom’s in several key ways, including in the implementation of adverse possession law. Now that the U.K. Adverse Possession law was modified by The Land Registration Act of 2002 (LRA 2002),<sup>118</sup> the U.S. should likewise modify their adverse possession law to include other criteria. LRA 2002 outlines that an adverse possessor might be granted the property she is occupying through consideration of “some other reason” besides the six traditional elements listed above, opening the possibility for considerations of fairness.<sup>119</sup> Social justice theorists have argued for the modification of the American Adverse Possession doctrine to include

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111. Peñalver & Katyal, *supra* note 100, at 1145.

112. Social justice property theory draws upon human rights and redistributive justice principles, focusing on more egalitarian property systems. Davis, *supra* note 4, at 74.

113. Peñalver & Katyal, *supra* note 100, at 1170.

114. *Id.*

115. The statutory period is two years in Arizona. ARIZ. REV. STAT. ANN. § 12-522 (2021); *see also* Cherek, *supra* note 3, at 297.

116. Some jurisdictions still require that the claimant cultivate or improve the land. Cherek, *supra* note 3, at 288.

117. Davis, *supra* note 4, at 98.

118. Land Registration Act 2002, c. 9, § 97, sch. 6, para. 5(2)–(4) (U.K.).

119. Davis, *supra* note 4, at 97.

considerations about the necessity of the adverse possessor<sup>120</sup> and whether the property is “surplus.”<sup>121</sup> A property owner should be more susceptible to lose title, should their property be considered surplus.

This Article argues that now, more than ever, in light of the COVID–19 pandemic, should the U.S. modify its adverse possession statutes to include consideration of the unique circumstances of each party and give courts discretion to relax the statutory requirements to award property to an adverse possessor in need. As analyzed below, recent COVID-related policy has explicitly defined what it means to be a surplus property owner and how to define a tenant in need. These definitions, which prioritize immediate need of shelter for essential purposes, should be incorporated into policy on an ongoing basis, even when the SARS-CoV-2 virus is contained.

### *B. Definitions of “Large Landlords”*

“Large landlords,” or owners of multiple properties, have been explicitly defined by state-sponsored rent relief programs. New Jersey’s Small Landlord Rent Relief Program, for example, prioritized small landlords who were dependent on their rental income as a means of subsistence to receive government rent-reimbursement funds ahead of large real estate investment firms.<sup>122</sup> New Jersey’s pandemic relief program for small landlords reserved relief for landlords who owned no more than ten rental units.<sup>123</sup> Thus, there was a government-sponsored acknowledgement that large investment firms who own multiple, large properties could afford to lose rental income more than landlords dependent on income derived from their properties.

Housing rights organizers’ movement to cancel rent during the pandemic aims to carve out a fund for independent landlords who do not benefit from tax breaks and subsidies made available to large firms,<sup>124</sup> exemplifying another identifier of a property owner who uses their property as a means of subsistence, versus large real estate investment

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120. *Id.* at 99.

121. Peñalver & Katyal, *supra* note 100, at 1170.

122. *Small Landlord Emergency Grant Program*, N. J. HOUS. & MORTG. FIN. AGENCY, <https://www.nj.gov/dca/hmfa/rentals/sleg/> [<https://web.archive.org/web/20210115201636/https://www.nj.gov/dca/hmfa/rentals/sleg/>] (last visited Jan. 7, 2022).

123. *Id.*

124. Amanda Holpuch, *Biggest Thing to Happen to Renters Since WWII: Why This US Eviction Expert is Optimistic*, GUARDIAN (Oct. 29, 2020, 6:30 AM), <https://www.theguardian.com/us-news/2020/oct/29/matthew-desmond-us-evictions-interview> [<http://web.archive.org/web/20211108162640/https://www.theguardian.com/us-news/2020/oct/29/matthew-desmond-us-evictions-interview>] (interviewing Michael Desmond).

firms who use their property to increase wealth, disconnected from its essential shelter purpose.

As the purpose of adverse possession statutes is to prevent the owner from neglecting their vacant property,<sup>125</sup> property theorists point to the modern day ease of monitoring property as a justification for the harsh penalty when owners fail to detect intruders within the statutory period.<sup>126</sup> When an occupier enters the surplus vacant property of a large landowner who is failing to adequately monitor their property, owners should rightly be at risk of losing it to those who need a home for shelter purposes.

The evaluation of who would win title to property in an adverse possession suit would be case-specific and would require a court to conduct fact-finding as to whether the occupier of the property is truly in need and whether the property in question was actually a surplus property.

### *C. Definitions of An Occupier in Need*

The definition of an occupant in danger of homelessness, and therefore in need of shelter, has likewise been explicitly defined during the pandemic. According to the hardship declaration included in the CDC moratorium,<sup>127</sup> in order to qualify for eviction protection, tenants who would otherwise become at risk of homelessness if evicted, needed to fill out a hardship declaration attesting to these facts, and then would be protected.<sup>128</sup> In this document, tenants needed to attest that they were unable to pay full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, or lay-offs, and that if evicted, they would likely become homeless, need to move into a homeless shelter, or need to move into a new residence shared

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125. Cherek, *supra* note 3, at 282 (citing to Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2434–55 (2001)).

126. As Peñalver & Katyal recognize, the technology of property monitoring has improved, and with it, the ease that property owners can monitor their properties. Peñalver & Katyal, *supra* note 100, at 1171.

127. *Declaration Under Penalty of Perjury For The Centers For Disease Control And Prevention's Temporary Halt In Evictions To Prevent Further Spread Of Covid-19*, CDC.GOV, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf> [<http://web.archive.org/web/20211108162807/https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>] (last visited Jan. 7, 2022).

128. To be protected from eviction, tenants must provide a written declaration to their landlord attesting that they have sought government rental assistance, will earn no more than \$99,000 in annual income (or \$198,000 if filing a joint tax return), cannot pay their full rent due to loss of income, work hours or extraordinary medical expenses, have used best efforts to make timely partial payments, and would become homeless if evicted. *Id.*

by other people who live in close quarters because they have no other available housing options.<sup>129</sup>

This Article argues that even when the concern of the spread of SARS-CoV-2 has subsided, adequate, non-congregate shelter should still be a right for all. The right should be upheld in adverse possession cases for those at risk of homelessness due to low earnings and lack of a safety net. Relaxing the requirements of adverse possession in the face of considerations of fairness and the unique circumstances of the parties, determining if the adverse possessor is in need, and if the property in question is “surplus” to the owner, are essential reforms in the post-pandemic housing climate.

*D. Beautifying Property as a Form of Sweat Equity Should Confer a Property Right*

To prevail on an adverse possession claim in the seventeenth- and eighteenth-century American courts, the adverse possessor was required to demonstrate that she engaged in activities such as residing on the land, cultivating or farming the land, fencing or enclosing the land, or making improvements to the land.<sup>130</sup>

Investment of time to improve the property should likewise be considered today in determining if an occupier or squatter is given title to a property. According to Lisa Alexander, stewardship, the act of caring for and improving upon a property, even if it does not belong to the occupant, should confer a property right.<sup>131</sup> Once someone puts significant sweat equity, or time and effort to improve the home, this action should confer the legal right to stay. Sweat equity, or beautifying a property through time invested, should today be considered by a court when deciding whether to relax the statutory requirements of adverse possession and grant title to the adverse possessor.

There are historical examples of housing organizations, including the Chicago Anti-Eviction Campaign (CAEC), training occupiers to improve the home where they were squatting, and devising a “‘good neighbor contract’—a non-binding but formal agreement with neighbors to be an asset, not a liability, to the neighborhood.”<sup>132</sup> According to Alexander’s studies, because CAEC’s actions often helped rather than harmed the

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129. *Id.*

130. Cherek, *supra* note 3, at 281.

131. *See generally*, Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245 (2015).

132. *Id.* at 271–72.

neighborhood, local police were reluctant to evict the occupiers, even though they are technically illegal trespassers.<sup>133</sup>

This paper argues that if trespassers have spent enough time and energy to beautify the property, this should be taken into account when the court decides whether to grant the property to adverse possessors, and further, that even if they are not successful in their claims, under no circumstances should they be prosecuted for criminal trespass. Laws protecting squatters who beautify property from criminal prosecution already exist in the state of Illinois, with an exception to the state's criminal trespass statute.

The Illinois trespass statute provides an exception to prosecution for criminal and civil trespass for a person who "beautifies" unoccupied and abandoned residential and industrial properties.<sup>134</sup> The statute defines "unoccupied and abandoned residential and industrial property" as any real estate: (1) in which the taxes have not been paid for a period of at least two years; and (2) which has been left unoccupied and abandoned for a period of at least one year. "Beautifies" means to landscape, clean up litter, to repair dilapidated conditions, or to board up windows and doors.<sup>135</sup> This exception in the Illinois statute provides protection from criminal prosecution or civil action for money damages for a squatter living unauthorized in the owner's property if they are considered to have beautified the property.

It is a widespread tenet in our country's criminal law system that some crimes deserve higher punishment than others and that intent should play into satisfying the elements of a crime. Those who nonviolently break property laws are less morally culpable than other types of lawbreakers.<sup>136</sup> Here, trespassers who are trying to avoid harm to themselves and their families by finding a place to live should be punished less severely than other law breakers, especially if their intent to beautify and care for the property is manifest. Although it is within the property owner's right to exclude, law enforcement must not over-deter squatters from occupying property out of necessity. Investment of time and resources to beautify the land exhibits care towards another's property in the face of the owner's negligence, and the trespasser's presence must not be criminalized.

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133. *Id.*; Ben Austen, *The Death and Life of Chicago*, N.Y. TIMES (May 29, 2013), <http://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html> [<https://web.archive.org/web/20220107223712/https://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html>].

134. See 720 ILL. COMP. STAT. ANN. 5/21-3 (2012).

135. *Id.*

136. Peñalver & Katyal, *supra* note 100, at 1144.

VI. PAST VICTORIES OF URBAN SQUATTERS PROVIDE EXAMPLES OF  
HOW LOCAL GOVERNMENTS CAN TACITLY SUPPORT OCCUPIERS

There is a long history of unauthorized squatters gaining permanent control of property through their refusal to leave, after living there and making improvements on the land.<sup>137</sup> In instances when government and law enforcement passively tolerates their presence instead of evicting them, these actions can be interpreted as recognition of squatters' rights to usurp property out of necessity.

The victories of New York City squatters are paramount. The 1960s and 1970s saw disinvestment in residential buildings by landlords disinclined to maintain their properties.<sup>138</sup> Tax arrears accrued and eventually led to tax foreclosures that brought properties under City ownership.<sup>139</sup>

When the City government gained possession of tax delinquent properties, a common practice was to return them to the private sector by auctioning them to the highest bidder,<sup>140</sup> with the goal of fostering private development and increasing the urban tax base.<sup>141</sup> Unfortunately, the highest bidder was oftentimes a speculator who allowed the property to fall back into tax arrears.<sup>142</sup>

Many landlords determined that their real estate was not a profitable investment and abandoned their buildings.<sup>143</sup> A number of these properties were destroyed or badly damaged as a result of arson.<sup>144</sup> The continued presence of large amounts of vacant, sound housing attracted squatters who took possession of buildings and fixed them up.<sup>145</sup> When their actions attracted media attention, other inspired tenant groups followed their example, occupying abandoned buildings around the City.<sup>146</sup> Squatters

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137. Gardiner, *supra* note 109, at 141.

138. Andrea McArdle, *(Re)integrating Community Space: The Legal and Social Meanings of Reclaiming Abandoned Space in New York's Lower East Side*, 2 SAVANNAH L. REV. 247, 250–51 (2015).

139. *Id.* at 251

140. Peñalver & Katyal, *supra* note 100, at 1123, 1144.

141. *Id.*

142. *Id.*

143. McArdle, *supra* note 138, at 251.

144. *Id.*

145. RONALD LAWSON, THE TENANT MOVEMENT IN NEW YORK CITY, 1904–1984, CH. 5 (1986).

146. *Id.*

were more difficult to remove than expected, requiring force, generating disturbing media images<sup>147</sup> and public support for them to stay.<sup>148</sup>

Absentee ownership caused neighborhood problems like increased crime rates and property value depreciation. Activists pressured government to convert those properties into affordable housing. In the late 1970s and early 1980s, several groups, including the Association of Community Organizations for Reform Now (ACORN), initiated squatting campaigns.<sup>149</sup> ACORN carefully selected squatters who could not afford to pay for adequate housing, warning them that their actions were illegal, and that there was no guarantee they would be able to stay in the homes in which they squatted.<sup>150</sup>

Squatters obtained signatures from 75% of the neighbors surrounding the abandoned property to demonstrate community support for their occupation.<sup>151</sup> On the day the squatting was to begin, ACORN always alerted the media and held a rally, which often featured local ministers and elected public officials, thus generating additional community support for squatting efforts.<sup>152</sup>

In 1973, the New York City Urban Homesteading Assistance Board (UHAB) was established to work with people who wanted to take over vacant, abandoned housing, turn the housing into habitable homes, and become owners.<sup>153</sup> In spite of the City's government-sanctioned organization to help tenants rehab buildings, tenants who did not go through these legal means were forcefully evicted by politicians, including former New York City Mayor Rudolph Giuliani, who spent millions attempting to oust squatters in gentrifying neighborhoods.<sup>154</sup> Still, the squatters persisted.

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147. See, e.g., Shawn G. Kennedy, *Riot Police Remove 31 Squatters from Two East Village Buildings*, N.Y. TIMES (May 31, 1995), <https://www.nytimes.com/1995/05/31/nyregion/riot-police-remove-31-squatters-from-two-east-village-buildings.html> [<http://web.archive.org/web/20211108163454/https://www.nytimes.com/1995/05/31/nyregion/riot-police-remove-31-squatters-from-two-east-village-buildings.html>].

148. Lawson, *supra* note 145.

149. Peñalver & Katyal, *supra* note 100, at 1123, 1125.

150. *Id.*

151. *Id.*

152. *Id.* at 1125–26.

153. *Self-Help Housing: The Story of the Urban Homesteading Assistance Board*, URB. OMNIBUS (Dec. 19, 2012), <https://urbanomnibus.net/2012/12/self-help-housing-the-story-of-the-urban-homesteading-assistance-board/> [<http://web.archive.org/web/20211108163607/https://urbanomnibus.net/2012/12/self-help-housing-the-story-of-the-urban-homesteading-assistance-board/>].

154. *The Squatters of East 13<sup>th</sup> Street*, CREATING DIGITAL HIST. (Dec. 17, 2020, 5:05 AM), <http://creatingdigitalhistory.wikidot.com/13th-street> [<https://web.archive.org/web/20220108161450/http://creatingdigitalhistory.wikidot.com/13th-street>].



In 2002, the Bloomberg administration struck a deal with residents to sell a number of the contested buildings for \$1 each to UHAB, who helped make repairs to meet building codes, and then sold the units back to residents as limited equity co-ops.<sup>155</sup> Although these select squatters eventually enjoyed victory, it was only after decades of persistence.

Squatting campaigns from the 1970s illustrate how public support for squatters strengthened their case to stay on the property and eventually win title, a model which has been replicated as today's housing crisis worsens.

*A. Modern Parallel: Local Support for Recent Squatter Movement Gives Rise to Transfer of Title*

“Moms 4 Housing” was a group of homeless mothers who occupied a vacant home in West Oakland, California, and eventually gained the right to stay. West Oakland has gone through rapid gentrification in recent years, resulting in the widespread displacement of communities of color.<sup>156</sup>

The property that the group of moms reclaimed had been foreclosed and auctioned the year before and purchased for \$500,000 by Wedgewood, Inc., a massive real estate company.<sup>157</sup> The property had sat vacant in the moms' neighborhood for months, while there were no housing options for them to live with their children.

According to Bay Area media outlets, “real estate speculators like Wedgewood act as a ‘displacement machine,’ exacerbating the city’s vacancies and jacking up prices.”<sup>158</sup> Wedgewood is “one of Oakland’s most prolific house flippers,” the San Francisco Chronicle reported.<sup>159</sup> The company buys houses, evicts tenants, and then eventually remodels them. The company does not need the income from each of their properties since

155. McArdle, *supra* note 138, at 261.

156. Sarah Holder & Brentin Mock, *A Group of Mothers, a Vacant Home, and a Win for Fair Housing*, BLOOMBERG (Jan. 28, 2020, 9:54 AM), <https://www.bloomberg.com/news/articles/2020-01-28/the-oakland-moms-who-launched-a-housing-movement> [https://web.archive.org/web/20220110035211/https://www.bloomberg.com/tosv2.html?vid=&uid=b0762ab6-71c8-11ec-b268-525347537467&url=L25ld3MvYXJ0aWNsZXNvMjAyMC0wMS0yOC90aGUtb2FrYGFuZC1tb21zLXdoby1sYXVvY2hlZC1hLWhvdXNpbmctbW92ZW1lbnQ=].

157. *Id.*

158. *Id.*

159. Matthias Gafni & J.K. Dineen, *Moms 4 Housing Eviction: Just How Many Flips, Vacant Homes Are There in Bay Area?*, S.F. CHRON. (Jan. 19, 2020, 4:57 PM), <https://www.sfchronicle.com/bayarea/article/Moms-4-Housing-eviction-Just-how-many-flips-14986950.php> [http://web.archive.org/web/20211108163724/https://www.sfchronicle.com/bayarea/article/Moms-4-Housing-eviction-Just-how-many-flips-14986950.php].

it owns so many. Although these practices are not illegal, the City of Oakland intervened to regulate absentee speculators' practices.

The practice of private speculators purchasing distressed properties and intentionally keeping them vacant was especially troubling in the face of the ongoing homeless crisis in Oakland. There are more vacant housing units than homeless people in the City of Oakland,<sup>160</sup> yet the number of people living on the street continues to soar. The number of homeless residents grew by 47% from 2017 to 2019, according to the City's biennial point-in-time count.<sup>161</sup>

In the meantime, public outcry against the real estate investment company's practices, and the widespread sympathy for the homeless mothers, resulted in the company agreeing to sell the property to the Oakland Community Land Trust, which will ensure affordable housing for the moms and generations beyond. Wedgewood also entered into a nonbinding understanding with the City of Oakland that they intend to negotiate with the City when they try to put a property up for sale and give the right of first purchase to community land trusts or other affordable housing developers, even in the absence of a legislative mandate.<sup>162</sup>

If the Oakland Community Opportunity to Purchase Act (COPA) passes, real estate firms like Wedgewood will have no choice but to give CLTs the right of first purchase when they put their properties up for sale. This Article argues that giving CLTs the right of first purchase, and/or the right of first refusal, must be the norm, concretized by policies like COPA or statewide bills like S. 1079. In the meantime, informal pressure by cities should support transferring title from absent property owners to squatters or community groups that preserve housing as permanently affordable.

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160. There were more vacant housing units than homeless people in the City of Oakland in 2019, according to the latest U.S. Census data: 5,898 vacant homes in Oakland, as compared to 4,071 homeless people. Jon Kawamoto, *Oakland Council President Wants City to Buy Properties at Auctions for Affordable Housing*, MERCURY NEWS (Jan. 16, 2020, 12:41 PM), <https://www.mercurynews.com/2020/01/16/oakland-official-calls-for-city-to-buy-county-properties-for-affordable-housing> [<http://web.archive.org/web/20211108163917/https://www.mercurynews.com/2020/01/16/oakland-official-calls-for-city-to-buy-county-properties-for-affordable-housing/>].

161. Sarah Ravani, *Oakland Homelessness Surges 47%—Per-Capita Number Now Higher Than SF and Berkeley*, S.F. CHRON. (July 22, 2019 9:36 PM), <https://www.sfchronicle.com/bayarea/article/Oakland-homelessness-surges-47-per-capita-14115123.php> [<http://web.archive.org/web/20211108164102/https://www.sfchronicle.com/bayarea/article/Oakland-homelessness-surges-47-per-capita-14115123.php>].

162. Kawamoto, *supra* note 160. Wedgewood's pledge seems to be more aspirational than enforceable. Wedgewood was the same real estate company who bought Ms. Jocelyn Foreman's property without giving her notice, in violation of S. 1079.

*B. Occupations of Foreclosed Homes*

Lisa Owens of City Life/Vida Urbana has said that “When COVID–19 hit the United States, the country was already reeling from a severe housing crisis.”<sup>163</sup> The foreclosure crisis of the late 2000s displaced millions of families, renters included. In California, an estimated 38% of all foreclosures in 2010 were rental properties. Rents continued to rise after 2010, pushed upward in part by foreclosed homeowners-turned-tenants entering the market.<sup>164</sup>

After the 2008 crisis, thousands of foreclosed properties sat vacant for years, giving rise to a host of social ills.<sup>165</sup> Former occupants of foreclosed properties, and others experiencing homelessness or living in substandard homes, saw the opportunity to occupy foreclosed properties for whatever amount of time was feasible.<sup>166</sup>

Support for these efforts grew through the “Occupy Our Homes” movement, which helped to place homeless individuals and families in bank-owned foreclosed homes.<sup>167</sup> In December of 2011, Occupy Our Homes protesters in over two dozen cities in the U.S. occupied foreclosed and real estate-owned homes, interrupted auctions of bank-owned homes, and blocked evictions of owners and tenants from foreclosed homes.<sup>168</sup>

Occupy Our Homes activists have voiced their disgust with bank-owned foreclosed properties sitting vacant when they could be used to house the homeless.<sup>169</sup> One Occupy Our Homes website declares “[n]ot only do we have thousands of people without homes, we have thousands of homes without people. Boarded-up houses are sitting empty—increasing crime, lowering the value of other homes in the neighborhood, erasing the wealth that lifts families into the middle class.”<sup>170</sup>

Each Occupy Our Homes group, nation-wide, employs different tactics tailored to the local nuances in which they operate, but share a similar goal: to reclaim vacant, bank-owned properties by moving homeless individuals and families into homes that banks have failed to maintain.<sup>171</sup> With the help of community groups, the occupiers work to

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163. Desmond, *supra* note 73, at 39.

164. *Id.*

165. Schneider, *supra* note 49, at 406.

166. Cherek, *supra* note 3.

167. Schneider, *supra* note 49, at 403.

168. Alexander, *supra* note 131, at 268.

169. Schneider, *supra* note 49, at 409–10.

170. *Id.* at 410.

171. *Id.* at 411.

improve the property by gardening, installing new fixtures, and making repairs.<sup>172</sup>

Occupy Homes Minnesota has reclaimed at least seven homes and has successfully engaged in foreclosure defense.<sup>173</sup> Local Minnesota police have developed a policy that allows occupiers to remain in an occupied home indefinitely unless the owner undertakes a citizen's arrest.<sup>174</sup> This sort of informal tolerance of occupants by refusing to execute eviction orders reinforces the consequences of negligent property owners keeping their properties vacant.

*C. Modern Parallel: COVID-era Occupations See New Victories*

Around the time that Philadelphia issued its “stay-at-home order” for the coronavirus in late March, about forty homeless people moved into ten vacant homes owned by the Philadelphia Housing Authority (PHA).<sup>175</sup> The PHA has been publicly criticized for keeping its buildings vacant and then selling to the highest bidder.<sup>176</sup> Now, the homeless people who moved in are making necessary repairs such as painting, putting down carpets, installing appliances, and exterminating rodents. These residents believe that they should have the right to stay.

Occupy PHA, the Workers Revolutionary Collective, and the Black and Brown Workers Cooperative are among the organizations that support the homeless residents' right to stay, and are making a larger demand that

172. *Id.*

173. Alexander, *supra* note 131, at 272.

174. *Id.* at 272.

175. Emma Ockerman, *Homeless People Are Moving into Vacant Homes in Philly and Fixing Them Up*, VICE NEWS (July 10 2020, 3:48 PM), [https://www.vice.com/en\\_us/article/e/935dy5/homeless-people-are-moving-into-vacant-homes-in-philly-and-fixing-them-up](https://www.vice.com/en_us/article/e/935dy5/homeless-people-are-moving-into-vacant-homes-in-philly-and-fixing-them-up) [[https://web.archive.org/web/20220108223639/https://www.vice.com/en\\_us/article/e/935dy5/homeless-people-are-moving-into-vacant-homes-in-philly-and-fixing-them-up](https://web.archive.org/web/20220108223639/https://www.vice.com/en_us/article/e/935dy5/homeless-people-are-moving-into-vacant-homes-in-philly-and-fixing-them-up)]. Although the PHA is a public agency, it is independent of the City's government. It receives federal funding as a nonprofit, quasi-public corporation, chartered to provide safe, sanitary, decent housing for families of low income. *Philadelphia Housing Authority*, CITY OF PHILA.: DEPT. OF RECORDS (Nov. 8, 2000), <https://www.phila.gov/phils/Docs/Inventor/graphics/agencies/A152.htm> [<http://web.archive.org/web/20211108164302/https://www.phila.gov/phils/Docs/Inventor/graphics/agencies/A152.htm>].

176. Philadelphia Councilmember Jamie Gauthier said she was concerned that PHA's plan to sell the Westpark Apartments in her district did not include any requirements for affordable housing. Michael D'Onofrio, *Councilwoman Questions Planned Sale of 2 Public Housing Towers in West Philadelphia*, PHILA. TRIB. (Feb. 6, 2020), [https://www.phillytrib.com/news/local\\_news/councilwoman-questions-planned-sale-of-2-public-housing-towers-in-west-philadelphia/article\\_1f870609-96f0-5dfa-b0ba-af6c64cac382.html](https://www.phillytrib.com/news/local_news/councilwoman-questions-planned-sale-of-2-public-housing-towers-in-west-philadelphia/article_1f870609-96f0-5dfa-b0ba-af6c64cac382.html) [[http://web.archive.org/web/20211108164333/https://www.phillytrib.com/news/local\\_news/councilwoman-questions-planned-sale-of-2-public-housing-towers-in-west-philadelphia/article\\_1f870609-96f0-5dfa-b0ba-af6c64cac382.html](http://web.archive.org/web/20211108164333/https://www.phillytrib.com/news/local_news/councilwoman-questions-planned-sale-of-2-public-housing-towers-in-west-philadelphia/article_1f870609-96f0-5dfa-b0ba-af6c64cac382.html)].

the PHA and other development agencies transfer ownership of vacant properties into a Community Land Trust, where the homes would be preserved for permanent low-income housing.<sup>177</sup> One of the residents occupying a PHA home said that she is immunodeficient and that living between her car and a hotel room for months during the global pandemic was terrifying. The vacant home gave her a place to quarantine when there were no other options.<sup>178</sup> The coalition of radical organizations, who call themselves Philadelphia Housing Action, won a landmark victory in October 2020, gaining ownership of fifty-nine vacant PHA buildings, that will be used to house the homeless.

Another COVID-era occupation movement had success, when in March 2020, a collective of activists in Los Angeles began to occupy a dozen homes which were supposed to be torn down as part of a proposed freeway extension, but were sitting vacant. In the end, the “reclaimers” were able to stay in more than twenty of the houses through their persistence and advocacy work.<sup>179</sup> One of the activists who was part of the group “Reclaiming Our Homes” told a reporter, “[t]he LA mayor put a shelter-in-place order, but how am I supposed to wash my hands without a house?”<sup>180</sup> The Los Angeles activists demanded that California put its vacant properties to use as shelter for the homeless.<sup>181</sup> “Reclaiming Our Homes” began planning their takeover of the homes before the pandemic, inspired by the Moms 4 Housing group in Oakland.

Even if city officials do not initially recognize occupiers’ right to stay, organized acts to obtain adequate shelter after the lifting of eviction moratoria will likely become commonplace. In the absence of adequate housing for the homeless, it may be in a jurisdiction’s best interest to allow illegal occupiers to stay in properties that are abandoned or sitting vacant if there are no viable alternatives. This Article argues that in the absence of policy that redistributes property from the hands of large, surplus property owners to those in need of housing, there should be a greater tolerance of self-help measures.

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177. Ockerman, *supra* note 175.

178. *Id.*

179. Rick Paulas, *Homeless People Are Taking Over Vacant Homes to Escape the Coronavirus*, VICE NEWS (June 19, 2020, 8:47 AM), [https://www.vice.com/en\\_us/article/3azkay/homeless-people-are-taking-over-vacant-homes-to-escape-the-coronavirus](https://www.vice.com/en_us/article/3azkay/homeless-people-are-taking-over-vacant-homes-to-escape-the-coronavirus) [[https://web.archive.org/web/20220108224406/https://www.vice.com/en\\_us/article/3azkay/homeless-people-are-taking-over-vacant-homes-to-escape-the-coronavirus](https://web.archive.org/web/20220108224406/https://www.vice.com/en_us/article/3azkay/homeless-people-are-taking-over-vacant-homes-to-escape-the-coronavirus)]. *See also* Sylvie Douglis, *Empty Houses, Reclaimed*, NPR (Mar 1, 2021, 5:01 PM), <https://www.npr.org/transcripts/971873769> [<https://web.archive.org/web/20210419171510/https://www.npr.org/transcripts/971873769>].

180. *Id.*

181. *Id.*

VII. UTILITARIAN AND SOCIAL JUSTICE PROPERTY THEORIES JUSTIFY  
REDISTRIBUTIVE POLICIES AND STRATEGIES

Various property theorists justify policies that redirect properties away from surplus property holders and into the hands of those in need of housing, or organizations who pledge to preserve the property as affordable for those who need it most. Joseph Singer states that “no person can have a justified expectation of keeping surplus property while others are systematically excluded from a property system.”<sup>182</sup> Widespread distribution is a primary goal of many property theories and achieving that goal will require redistribution. When ownership is not widespread, or a system supports unequal distribution, redistribution is required to realize the goal of providing real ownership opportunities.<sup>183</sup> Utilitarian property theories hold that society will reap the benefits when parties in need make productive use of the land that is not as valuable to the property owner.<sup>184</sup>

Stated differently, “ownership cannot mean what it is often thought to mean: that one has a right to act without regard for others’ interests, needs, and expectations.”<sup>185</sup> Ownership is not absolute, and comes with a variety of obligations as well as rights.<sup>186</sup> If property owners fail to adequately monitor, maintain, and put their property to use, they may run the risk of losing their property because of onerous penalties, laws that could trigger a forced transfer, or because illegal occupiers could claim it. To assert that a fee simple holder has absolute ownership would permit the continuation of an unequal system that excludes the majority from participating in our property system and allows land to be used in an unproductive way.

*A. Self-Help Measures Should Be Justified in the Absence of Sufficient  
Redistributive Policies to Promote the “Evolution of Property Law”*

This Article argues that until redistributive policies are passed widely to create an adequate supply of affordable housing through preservation and redistribution, there should be an increased tolerance of self-help measures when those in need of housing occupy vacant properties.

As Lisa T. Alexander writes in her law review article, “Occupying the Constitutional Right to Housing”:

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182. Davis, *supra* note 4, at 94 (citing SINGER, *supra* note 82 at 137–38).

183. Davis, *supra* note 4, at 80.

184. Cherek, *supra* note 3, at 282.

185. Davis, *supra* note 4, at 96 (citing SINGER, *supra* note 82, at 210).

186. *Id.* (citing SINGER, *supra* note 82, at 16).

[W]hen protestors . . . resort to self-help strategies such as squatting in absentee-owned housing and creating new housing structures through sweat-equity, they are forcing local police, banks, neighbors, and other local decision-makers, outside of their associational community, to both recognize and choose between their vision of housing rights and the official legal version. When local decision-makers [allow] these occupiers . . . to temporarily remain in place, they are provisionally acquiescing in the protestors' conceptions of legal meaning and rights. To the extent that these movements obtain long-term warrants or permanent possession of even a few homes that they do not own or rent, they are challenging local property entitlements and manifesting a right to housing at the local level . . . .<sup>187</sup>

In Eduardo Peñalver and Sonia Katyal's seminal work, "Property Outlaws," they argue that those who intentionally occupy a vacant apartment and beautify it, taking better care of the property than the owner, are not just to be tolerated, but in certain circumstances lauded as advancing the goals of our property system. "[P]roperty outlaws have played an important role in the evolution and transfer of property entitlements," they write. "[I]f property is to perform this function, the law should be careful not to overdeter nonviolent refusals to abide by existing property arrangements."<sup>188</sup>

This Article posits, as social justice property theorists have in the past, that intentional trespassers or squatters are justified in taking another party's "surplus" property and redistributing it to themselves, assuming they are in need and have no viable legal alternative.<sup>189</sup> Self-help practices will likely increase if the government fails to intervene to pass policies that preserve and create affordable housing. As theorists have posited, "a comprehensive system of government-sponsored redistribution and social insurance is an obvious substitute for . . . self-help redistribution . . . and would generate far fewer spillover effects."<sup>190</sup>

Property theorist Jeremy Waldron has stated, "nobody should be permitted ever to use force to prevent another man from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them."<sup>191</sup> Redistribution must occur to avoid this situation.

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187. Alexander, *supra* note 131, at 266–67.

188. Peñalver & Katyal, *supra* note 100, at 1095.

189. *Id.* at 1170.

190. Cherek, *supra* note 3, at 307 (citing Peñalver & Katyal, *supra* note 100, at 1179).

191. Davis, *supra* note 4, at 94 (citing JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 240–41 (1993)).

Although the use of force and other punitive measures to remove squatters off vacant properties are still commonplace, there is greater awareness that the problem of homelessness is not a matter to be criminalized during, and in the years following, the COVID-19 public health crisis. As our country emerges from the pandemic and homelessness rates soar, self-help measures should be tolerated in the absence of adequate policy that preserves and redistributes affordable housing to meet the need of non-congregate housing.

As Professor Mark Edwards and other legal scholars have argued, property law, perhaps even more than other areas of law, must evolve quickly to adjust to changing socially constructed concepts of what “property” is, and what rights should accompany ownership.<sup>192</sup> Now, as our country emerges from the COVID-19 pandemic, is the time to demand radical property reform.

#### VIII. ARGUMENTS AGAINST REDISTRIBUTIVE POLICIES AND PRACTICES

Opponents of the policies and practices discussed in this Article will point to the problematic nature of self-help measures in promoting lawlessness and a property system plagued by fear. If occupation and squatter movements are tolerated, the practice will become more widespread in what could result in a lawless system, they would argue.<sup>193</sup> Even forced state-condoned transfers like eminent domain, or a court-award of title to an adverse possessor, would be less preferable than voluntary transfers, i.e., selling land to whoever offers the highest bid.

In answer to those objections, adverse possession is a well-established doctrine in U.S. property law because it is against societal interests to allow property to sit underutilized. Further, forced transfers under the powers of eminent domain are constitutional because there are public uses of land deemed to be more important than individual property rights, as long as just compensation is offered.

Many of the policies discussed in this Article, such as TOPA, COPA and S. 1079 are only triggered when a voluntary transfer is initiated by the owner—putting a property up for sale. The government would only be regulating who gets the right of first purchase or refusal. Although

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192. Schneider, *supra* note 49, at 415–16.

193. See Peñalver & Katyal, *supra* note 100, at 1123, 1150 (applying the “Broken Windows” theory to property outlaws).



opponents assert that these policies constitute a regulatory taking, they are justified by sufficient governmental interest.<sup>194</sup>

There are a number of objections specifically to squatting: that it violates principles of fairness in that the owner who paid just compensation is losing what they rightfully bought or acquired; and that squatters gain shelter for themselves while others remain on waiting lists for public housing. But property rights are not static. The purpose of any property system is to provide adequate and secure housing for the majority. Market forces have driven rental and home sale prices to unaffordable rates for most Americans. Especially in the aftermath of the pandemic, when many lost their means of subsistence due to circumstances beyond their control, property reform must now correct the widespread housing insecurity that is plaguing our country.

#### IX. CONCLUSION

There are many pragmatic reasons for preferring legislative solutions to property maldistribution as compared to self-help measures. But redistributive policies will only be effective if adequate funding is made available to preserve the existing stock of affordable housing and remove additional land from the speculative market.

Peñalver and Katyal discuss in their work, *Property Outlaws*, the question of objective distributive justice: “she took what she badly *needed* from the superabundance of another in such a way that her actions avoided an even greater evil.”<sup>195</sup> Although self-help practices technically violate property laws in depriving the owner of her right to exclude<sup>196</sup> and to convey the property to whomever she wishes, property rights also come with obligations, and are not absolute. Squatting should be tolerated, especially if criteria such as beautification and possession for a decreased statutory period are met, which should legitimize the possessor’s right to stay. As Peñalver and Katyal discuss, even with a robust system of private property in our country, property rights must shift over time in response to the unique circumstances of society and needs of the people. Property theorists recognize the threat to the stability of the overall property system that an unregulated right to appropriate the property of others may present.

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194. See *Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* 68 Cal. Rptr. 2d 532 (1997), for a discussion of what constitutes a legitimate governmental interest, and therefore justifies a government-mandated right of first refusal.

195. Peñalver & Katyal, *supra* note 100, at 1154.

196. *Id.* at 1098 (discussing the right to exclude playing a crucial role in safeguarding individual liberty).

However, they also recognize the inherent instability of inequitable property distribution.<sup>197</sup>

While there is no disputing the value of stability in property entitlements, both for the individual and for society as a whole, the survival of this system depends on its ability to respond dynamically. Now, in the aftermath of the COVID-19 pandemic, when Americans have faced financial hardship due to an unprecedented global pandemic, our society must reconsider a profit-motivated property system that allows the wealthy to amass more property than they could adequately monitor while a growing population is evicted to the streets.

While housing advocates work to protect renters and homeowners from pandemic-related housing instability, our country must look to create long-term housing solutions for an expanding homeless population. The pandemic has magnified on the need for massive property reform to avoid an even greater housing crisis. The policies discussed in this paper that redistribute properties to those in need and preserve existing affordable housing must be immediately pursued.

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197. Davis, *supra* note 4, at 97.