

# PROPERTY REBELS: RECLAIMING ABANDONED, BANK-OWNED HOMES FOR COMMUNITY USES

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*In urban cores, abandoned, bank-owned, foreclosed homes attract crime, drain value from neighboring properties, and deplete the resources of municipalities, creating economic black holes in communities. Groups of activists affiliated with the Occupy Our Homes movement have been working to undo the harm caused by these abandoned homes by placing otherwise homeless individuals in neglected bank-owned properties.*

*This Article argues that modifications to existing property law norms such as adverse possession can provide a legal framework through which abandoned homes might be put to community use, not necessarily to end homelessness—which has roots, causes, and consequences beyond the scope of this Article—but instead to combat the harms blocks of abandoned, bank-owned homes cause communities and to re-engineer the relationships between banks and the communities in which such banks own property.*

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#### INTRODUCTION

*Property is intended to serve life, and no matter how much we surround it with rights and respect, it has no personal being. It is part of the earth man walks on; it is not man.*<sup>1</sup>

In 2014, approximately 30,000 men, women, and children lived on the streets and in the shelters of Baltimore, Maryland.<sup>2</sup> Approximately 139,000 homeless people lived in Chicago, Illinois between 2013 and 2014,<sup>3</sup> and approximately 16,000 homeless people lived in Detroit, Michigan in 2014.<sup>4</sup> In each of these cities, and in

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1. MARTIN LUTHER KING, JR., *THE TRUMPET OF CONSCIENCE* 58 (Beacon Press 2011) (1968). Between November and December of 1967, Dr. Martin Luther King, Jr. delivered five lectures for the Canadian Broadcasting Corporation's Massey Lecture Series. Thereafter, transcripts of his lectures were released as a book, *Conscience for Change*. After King's assassination in 1968, that book was republished under a new title, *The Trumpet of Conscience*.

2. Alana Semuels, *Could Baltimore's 16,000 Vacant Houses Shelter the City's Homeless?*, ATLANTIC (Oct. 20, 2014), <http://www.theatlantic.com/business/archive/2014/10/can-homeless-people-move-into-baltimores-abandoned-houses/381647> (noting that on an average night in Baltimore, there are 3000 homeless people); see also HOMELESS SERVS. PROGRAM, CITY OF BALT. MAYOR'S OFFICE OF HUMAN SERVS., 2013 HOMELESS POINT IN TIME COUNT REPORT 10, 17 (2013), <http://humanservices.baltimorecity.gov/portals/humanservices/downloads/2013%20City%20of%20Baltimore%20Homeless%20Point%20In%20Time%20Count%20Report.pdf> (finding 2638 people in Baltimore were homeless on a single night in January 2013).

3. *FAQ/Studies*, CHI. COAL. FOR THE HOMELESS, <http://www.chicagohomeless.org/faq-studies> (last visited Dec. 1, 2015).

4. HOMELESS ACTION NETWORK OF DETROIT, 2014 STATE OF HOMELESSNESS ANNUAL REPORT FOR THE DETROIT CONTINUUM OF CARE 3 (2014),

many other cities across the United States,<sup>5</sup> there are more abandoned, bank-owned homes than there are homeless people on any given night.<sup>6</sup> At least theoretically, in many cities, every homeless individual could be sheltered in a bank-owned, foreclosed home.<sup>7</sup> In the years since the 2008 financial crisis, however, tens of thousands of these properties have remained vacant in urban areas,<sup>8</sup> attracting crime,<sup>9</sup> degrading property values,<sup>10</sup> and creating economic black

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[http://static1.squarespace.com/static/5344557fe4b0323896c3c519/t/5564954de4b0e65363edc950/1432655181336/FINAL+FINAL+2014\\_HAND+ANNUAL+REPORT\\_SPREAD.pdf](http://static1.squarespace.com/static/5344557fe4b0323896c3c519/t/5564954de4b0e65363edc950/1432655181336/FINAL+FINAL+2014_HAND+ANNUAL+REPORT_SPREAD.pdf).

5. *Compare, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-34, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 18–19 (2011) [hereinafter VACANT PROPERTIES] (reporting between 9000 and 10,000 abandoned buildings in Indianapolis, Indiana, and 7000 in Cleveland, Ohio), *with* IND. UNIV. PUB. POLICY INST., 2014 HUD POINT-IN-TIME COUNT: HOMELESSNESS IN INDIANAPOLIS I (2014), [http://www.chipindy.org/wp-content/uploads/2013/07/HomelessCount\\_2014\\_Final.pdf](http://www.chipindy.org/wp-content/uploads/2013/07/HomelessCount_2014_Final.pdf) (finding about 2000 homeless individuals on a given night in Indianapolis), *and* COAL. ON HOMELESSNESS AND HOUS. IN OHIO, 2013 OHIO HOMELESSNESS REPORT: ABRIDGED I (2013) (finding about 12,000 homeless individuals on a given night in Cleveland).

6. In Baltimore, there are almost 13,000 more abandoned homes than homeless people on a given night. *Compare* VACANT PROPERTIES, *supra* note 5, at 18 (reporting 16,000 abandoned homes in Baltimore), *with* HOMELESS SERVS. PROGRAM, *supra* note 2, at 17 (counting approximately 2700 homeless people in Baltimore on a given night in 2013). Similarly, Chicago has almost 12,000 more abandoned homes than homeless people on a given night. *Compare* VACANT PROPERTIES, *supra* note 5, at 18 (reporting 18,000 abandoned homes in Chicago), *with* *The Facts Behind the Faces*, CHICAGO COAL. FOR THE HOMELESS, [http://www.issueab.org/click/kc\\_download1/facts\\_behind\\_the\\_faces\\_a\\_fact\\_sheet\\_from\\_the\\_chicago\\_coalition\\_for\\_the\\_homeless\\_2015\\_the/chicagohomeless?\\_ga=1.177335661.912419522.1439472278](http://www.issueab.org/click/kc_download1/facts_behind_the_faces_a_fact_sheet_from_the_chicago_coalition_for_the_homeless_2015_the/chicagohomeless?_ga=1.177335661.912419522.1439472278) (last visited Dec. 1, 2015) (finding 6294 people were homeless on a given night in Chicago in 2014). Finally, there is also a staggering difference in Detroit, with almost 14,000 more abandoned homes than there are homeless people in a night. *Compare* VACANT PROPERTIES, *supra* note 5, at 19 (reporting 30,000 abandoned homes in Detroit as of 2009), *with* HOMELESS ACTION NETWORK OF DETROIT, *supra* note 4, at 3 (approximating 16,000 homeless people on an average night in Detroit in 2014).

7. Bank-owned, foreclosed homes are known as Real Estate Owned (“REO”) properties in the finance and housing industries. The terms “bank-owned” and “REO” will be used interchangeably in this Article.

8. See Stephen M. Dane et al., *Discriminatory Maintenance of REO Properties as a Violation of the Federal Fair Housing Act*, 17 CUNY L. REV. 383, 383–84 (2014) (referencing a “glut” of REO properties); see also Ben Austen, *The Death and Life of Chicago*, N.Y. TIMES MAG. (May 29, 2013), [http://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html?\\_r=0](http://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html?_r=0) (adding that in Chicago, 62,000 properties were vacant at the end of 2012 and two-thirds were concentrated in minority neighborhoods in the South and West sides of the city).

9. See WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 6 (2005), [http://www.995hope.net/content/pdf/Apgar\\_Duda\\_Study\\_Short\\_Version.pdf](http://www.995hope.net/content/pdf/Apgar_Duda_Study_Short_Version.pdf) (reporting that police officers have found that

holes in communities.<sup>11</sup> Notwithstanding growing homeless populations, many cities have begun to order the demolition of these abandoned homes.<sup>12</sup> In some places, the public costs associated with abandoned homes are so high that it is often cheaper to destroy them than to determine how the spaces might be better used.<sup>13</sup>

This Article asks whether modifications to existing property law norms such as adverse possession<sup>14</sup> can provide a legal framework through which abandoned homes might be put to community use, not necessarily to end homelessness—which has roots, causes, and consequences beyond the scope of this Article—but instead to combat the harms blocks upon blocks of abandoned, bank-owned homes cause communities and to re-engineer the relationships between banks and the communities in which such banks have property interests.

One coalition of community activists has attempted, without an articulated legal narrative for its actions, to do just that. This

vacant foreclosed homes draw “gang activity, drug dealing, prostitution, arson, rape, and murder”); *see also* Austen, *supra* note 8 (stating that materials in foreclosed houses, such as copper, were stolen for their monetary value).

10. *See* JOSIAH MADAR ET AL., N.Y.U. FURMAN CTR. FOR REAL EST. AND URB. POL’Y, TRANSFORMING FORECLOSED PROPERTIES INTO COMMUNITY ASSETS 5 (2008), [http://furmancenter.org/files/FurmanCenterWhitePaper\\_TransformingForeclosedPropertiesIntoCommunityAssets.pdf](http://furmancenter.org/files/FurmanCenterWhitePaper_TransformingForeclosedPropertiesIntoCommunityAssets.pdf) (explaining that properties left vacant as a result of foreclosure increase supply in the local housing market, make the area less desirable to homebuyers, and reduce the value of other properties).

11. *See* APGAR & DUDA, *supra* note 9, at 7 (noting that vacant foreclosed properties reduce local tax revenue and therefore diminish the resources of local governments); Dane et al., *supra* note 8, at 384 (explaining that because of REOs, local governments spend millions of dollars to “address code violations, perform maintenance [to] mitigat[e] dangerous or blighted conditions, demolish unsafe structures, and identify and contact those responsible for [the] vacant properties”); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1848–49 (2013) (stating that the low property values and increased crime caused by these vacant houses increase the economic burden on already-suffering local governments, and, in addition, contribute to a growing homeless population).

12. Brady Dennis, *Banks Turn to Demolition of Foreclosed Properties to Ease Housing-Market Pressures*, WASH. POST (Oct. 12, 2011), [http://www.washingtonpost.com/business/economy/banks-turn-to-demolition-of-foreclosed-properties-to-ease-housing-market-pressures/2011/10/06/gIQAWigIgL\\_story.html](http://www.washingtonpost.com/business/economy/banks-turn-to-demolition-of-foreclosed-properties-to-ease-housing-market-pressures/2011/10/06/gIQAWigIgL_story.html).

13. David Kane, Note, *Restoration Remedies for Remaining Residents*, 61 UCLA L. REV. 812, 828 (2014); *see* Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property After the Foreclosure Crisis*, 73 MD. L. REV. 523, 569 (2014) (stating that abandoned and dilapidated foreclosed properties have driven Baltimore City’s costs up as much as \$34,199 per property); *see also* Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUS. L. REV. 1385, 1388 (2015) (noting that demolishing one abandoned building costs around \$9000).

14. *See infra* note 122 (describing the elements of adverse possession).

loosely knit group of activists, the “Occupy Our Homes”<sup>15</sup> movement, works to place homeless individuals and families in bank-owned houses, shifting, in small and large ways, the relationship between banks and low-income communities.<sup>16</sup>

This seemingly radical act—taking over private property for community or individual use—is neither unheard of nor particularly radical in the context of property law norms.<sup>17</sup> Property law is one of the few areas of law in which law-breakers may ultimately be brought back within the fold of the law-abiding community, simply due to the passage of time. In the context of adverse possession, for example, those deemed illegal trespassers eventually may be rewarded with title to the property without ever having to pay the original owner.<sup>18</sup> There are few other areas of law that provide such a direct route for advocacy and change via law-breaking.<sup>19</sup>

The actions of Occupy Our Homes activists provide a lens through which we might seek to reorganize the bundle of ownership rights<sup>20</sup> foreclosing banks claim when those banks fail to maintain and market properties in urban cores. The Occupy Our Homes activists force us to

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15. See *Background*, OCCUPY OUR HOMES, <http://occupyourhomes.org/about> (last visited Dec. 1, 2015) (listing other activist groups in the movement, including Take Back the Land, Neighborhoods Organizing for Change, Housing is a Human Right, and Right to the City); see also Austen, *supra* note 8 (noting that Occupy Our Homes is affiliated with the Anti-Eviction Campaign, a group with similar goals).

16. See *Background*, *supra* note 15.

17. Some scholars are critical of the lack of radical thinking in the realm of progressive property scholarship. See, e.g., Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 109 (2013) (positing that property scholars should realize the importance of race and poverty in property law so that proposals to help those who do not own property are workable rather than utopian and so that helping these marginalized groups, “what should be the progressive vision of property law,” is not undermined).

18. See *infra* note 122 (describing the elements of adverse possession).

19. For instance, it is unlikely that breaking a criminal law norm over time would result in a person ultimately being rewarded for such behavior.

20. See *infra* Part III (referring to the prevalent paradigm within property law that groups of ownership rights are sometimes referred to as a “bundle of sticks”). Some scholars criticize the “bundle of sticks” metaphor. See, e.g., John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 1 (1986) (noting that the contents of the “bundle of sticks” changes as our individual rights and responsibilities evolve over time); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 714 (1996) (arguing that the term “bundle of rights” is an empty phrase that evokes an image but does not describe a clear thesis or set of ideas). Despite this criticism, in discussing the redistributive goals of the Occupy Our Homes activists, the “bundle of sticks” metaphor is a useful tool, as it demonstrates the multifaceted concept of “property” and the notion that “ownership” is not an all-or-nothing concept.

consider whether—when banks fail to properly maintain and market abandoned, foreclosed homes—some of the rights that banks possess should be passed to community groups (perhaps in the form of community land trusts) through a somewhat relaxed version of adverse possession.

Since the 2008 economic crisis, there has been a robust debate among scholars regarding how property law norms might shift to address the depletion of property values, the increase in crime, and the host of other ills that have flowed from the glut of bank-owned, foreclosed homes in urban cores.<sup>21</sup> Some scholars, such as Professor Brown Richardson of Tulane University, have advocated for relaxing the standards of adverse possession to address the abandoned homes crisis.<sup>22</sup> For the most part, these scholars have advocated for allowing individual adverse possessors to acquire title to abandoned properties.<sup>23</sup> This Article argues that, where communities are harmed by abandoned, bank-owned homes and community groups such as the Occupy Our Homes group described herein organize a response, the adverse possession doctrine should be relaxed as other scholars have suggested, but the beneficiaries of such a relaxation of standards should be community groups, not just individual adverse possessors.

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21. See, e.g., Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL'Y & THE LAW 271, 273 (2012) (detailing the increase in claims on vacant property via adverse possession due in part to the 2008 financial crisis); Gregg H. Mosson, *Robosigning Foreclosures: How It Violates Law, Must Be Stopped, and Why Mortgage Law Reform Is Needed to Ensure the Certainty and Values of Real Property*, 40 W. ST. U. L. REV. 31, 66 (2012) (stating that housing policy should change to address new concerns such as decreased homeownership as a result of more stringent credit standards); Richardson, *supra* note 13, at 1385–86 (proposing that the “actual possession” requirement for adverse possession be replaced with a “notice of intent to possess” requirement, thereby allowing private parties to acquire ownership of abandoned properties more efficiently while also protecting true owners).

22. See *id.*; see also Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1040–41 (2006) (contending that adverse possession “should be redesigned and narrowed to effect shifts of land to higher-valuing users only when two conditions are met to a high degree of probability: (1) the difference between the parties’ valuations of the land is very large; and (2) a market transaction is not available” (footnote omitted)). Fennell seeks to include a documented knowledge requirement to the doctrine of adverse possession that facilitates consensual deal making between parties instead of penalizing such efforts. *Id.* at 1043.

23. See Richardson, *supra* note 13, at 1385–86; see also Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1145–46 (2007) (reasoning that the extremely high value an adverse possessor places on the property in the form of long-term use, improvements, and risks of sanctions, compared to the “lackadaisical response” of the true owner, weighs in favor of involuntary transfers of property).

Part I of this Article outlines the problem, describing the effects bank-owned, abandoned properties have on urban neighborhoods. Part II examines the Occupy Our Homes movement's attempts to move "sticks" from the bundle of banks' ownership rights back into the community and provides a brief history of similar movements. Part III considers the supple nature of property law—its responsiveness to shifting social norms and its capacity to redefine the rights that come with ownership. This Part posits that property law, unlike many other areas of law, is particularly ripe for law-changing through the type of law-breaking activities employed by Occupy Our Homes activists. Building on the work of other scholars and using the Occupy Our Homes activists' work as a model, Part V puts forth a proposal that calls for the relaxation of certain requirements of the adverse possession doctrine and, upon the satisfaction of those requirements, the transfer of ownership rights from badly behaving banks to community groups or community land trusts.

#### I. BANKS ARE BAD NEIGHBORS: THE PROBLEM OF EMPTY HOUSES

In cities such as Baltimore and Detroit, some neighborhoods are filled with blocks upon blocks of abandoned, foreclosed homes.<sup>24</sup> Nationwide, the U.S. Government Accountability Office reported that vacant residential units, not including those used seasonally or by migrant workers, increased from seven million in 2000 to ten million in 2010.<sup>25</sup> More recent estimates put the number of vacant properties at approximately fourteen million, or over ten percent of the total number of housing units in the country.<sup>26</sup> States with high rates of

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24. See Joel Kurth & Christine MacDonald, *Volume of Abandoned Homes 'Absolutely Terrifying'*, DETROIT NEWS (July 8, 2015), <http://www.detroitnews.com/story/news/special-reports/2015/05/14/detroit-abandoned-homes-volume-terrifying/27237787> (noting that over one third of homes in Detroit have been foreclosed in the last ten years due to mortgage defaults or unpaid taxes, and most have never been reoccupied); Terrence McCoy, *Baltimore Has More Than 16,000 Vacant Houses. Why Can't the Homeless Move In?*, WASH. POST (May 12, 2015), [http://www.washingtonpost.com/local/baltimore-has-more-than-16000-vacant-houses-why-cant-the-homeless-move-in/2015/05/12/3fd6b068-f7ed-11e4-9030-b4732caefe81\\_story.html](http://www.washingtonpost.com/local/baltimore-has-more-than-16000-vacant-houses-why-cant-the-homeless-move-in/2015/05/12/3fd6b068-f7ed-11e4-9030-b4732caefe81_story.html) (explaining that in Baltimore, vacant housing is "as stitched into the city's social fabric as the Baltimore Ravens").

25. VACANT PROPERTIES, *supra* note 5, at 12 (citing statistics that exclude vacant units used seasonally or by migrant workers); see also Richardson, *supra* note 13, at 1387 (stating that the *total* number of vacant properties increased by 4.5 million between 2000 and 2010).

26. 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) (citing Octavio Nuiry, *America's 14.2 Million Vacant Homes: A National Crisis*, REALTYTRAC (May 14, 2013), <http://www.realtytrac.com/content/news-and->

foreclosure, such as Nevada, Arizona, Florida, and Georgia, saw vacancies increase by more than eighty-five percent between 2000 and 2010.<sup>27</sup> In 2012, a record-breaking 7.4 million vacant homes, primarily located in the Southern and Western United States, were not marketed for sale or rent.<sup>28</sup> Not surprisingly, the current inventory of vacant properties is a direct result of the 2008 foreclosure crisis.<sup>29</sup> While federal and local policy initiatives as well as private lawsuits have worked to slow the tide of foreclosures, there are currently few policy initiatives aimed at confronting the problems that flow from the existing stock of vacant, bank-owned properties.<sup>30</sup>

Before the 2008 crisis, many urban areas suffered from the ills correlated with poverty. Studies have shown that it is *vacancy*, not *poverty*, that appears to have the biggest impact on crime statistics.<sup>31</sup> A study in Pittsburgh demonstrated that while foreclosures alone have little effect on crime, violent crime significantly increases in the immediate surrounding area of vacant properties.<sup>32</sup> A Philadelphia study, controlling for demographic and socioeconomic factors, found

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opinion/americas-142-million-vacant-homes-a-national-crisis-7723). The most recent U.S. Census Bureau data show that the current number is 12.8 million for all year-round vacancies. See Press Release, U.S. Dep't of Commerce, Residential Vacancies and Homeownership in the Second Quarter 2015 4 (July 28, 2015), <http://www.census.gov/housing/hvs/files/qtr215/currenthvspress.pdf>.

27. Keith Fudge et al., *Vacant and Abandoned Properties: Turning Liabilities Into Assets*, EVIDENCE MATTERS (U.S. Dep't of Hous. & Urb. Dev.), Winter 2014, at 4, [http://www.huduser.org/portal/periodicals/em/EM\\_Newsletter\\_winter\\_2014.pdf](http://www.huduser.org/portal/periodicals/em/EM_Newsletter_winter_2014.pdf); see also VACANT PROPERTIES, *supra* note 5, at 12 (finding that the number of non-seasonal vacancies increased in Nevada by 126%, in Arizona by 92%, and in Florida by 90%).

28. Fudge et al., *supra* note 27, at 4 (citing JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., *THE STATE OF THE NATION'S HOUSING* 2013, at 9 (2013)).

29. See *id.* at 3–4 (noting that the foreclosure crisis, as well as long-term urban decline, depopulation, and disinvestment, has led to the current over-stock of vacant homes in urban centers).

30. See *id.* at 13 (arguing that “[m]ore research will be needed to empower policymakers” to make decisions about what to do with vacant and abandoned properties).

31. See *id.* at 4–5; see also James J. Kelly, Jr., *A Continuum In Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 112–14 (2013) (“If a rundown vacant building signals neighborhood decline, a boarded-up property blares that message out through a megaphone.”).

32. Fudge et al., *supra* note 27, at 5, 14 (citing Lin Cui & Randall Walsh, *Foreclosure, Vacancy and Crime*, 87 J. URB. ECON. 72 (2015)) (finding that, within 250 feet of a foreclosed property, the violate crime rate was nineteen percent higher than the area between 250 and 353 feet from the property); see also Hye-Sung Han, *The Impact of Abandoned Properties on Nearby Property Values*, 24 HOUSING POL'Y DEBATE 311, 315–16 (2014) (citing a study from Austin, Texas, that found eighty-three percent of unsecured abandoned homes were being used for illegal activities).



that vacancy was the strongest predictor of violent assaults.<sup>33</sup> In addition to violent crimes, communities with significant numbers of vacant homes are more likely to struggle with frequent arson and a host of other negative consequences.<sup>34</sup>

Increased crime is not the only negative effect of vacant homes; abandoned homes also result in striking economic costs to municipalities and individual homeowners. Local governments often bear the cost of maintaining vacant and abandoned properties, even when banks own those properties. For example, Philadelphia has spent over twenty million dollars every year maintaining approximately 40,000 vacant properties.<sup>35</sup> Another study in Baltimore found that each vacant property in the city individually increases the city's police and fire expenditures by \$1472 every year.<sup>36</sup>

In addition to the costs of maintaining vacant properties, the decrease in values associated with vacant, foreclosed properties costs municipalities millions of dollars in lost tax revenue.<sup>37</sup> According to

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33. Fudge et al., *supra* note 27, at 5 (citing Charles C. Branas, David Rubin & Wensheng Guo, *Vacant Properties and Violence in Neighborhoods*, ISRN PUB. HEALTH 5 (2012), <http://dx.doi.org/10.5402/2012/246142>); see Press Release, Nat'l Fair Housing Alliance, Bank of America Charged with Creating Unhealthy Housing Through Widespread Practice of Housing Discrimination (Nov. 14, 2013), <http://www.nationalfairhousing.org/Portals/33/bofanr131114.pdf> (indicating that community safety is threatened when uninhabited homes lack secure locks); see also Fudge et al., *supra* note 27, at 5 (stating that “[v]acant and abandoned properties are widely considered to attract crime because of the ‘broken windows theory’—that one sign of abandonment or disorder (a broken window) will encourage further disorder”).

34. See Fudge et al., *supra* note 27, at 5 (stating that arson crimes are closely associated with vacant properties); see also Kelly, *supra* note 31, at 114 (noting that the safety risks and environmental hazards that stem from abandoned buildings are so great as to cause reduction in the resale value of nearby houses, and, relatedly, owners of property adjacent to vacant houses often struggle to get casualty and liability insurance).

35. Fudge et al., *supra* note 27, at 5 (citing ECONSULT CORP. ET AL., *VACANT LAND MANAGEMENT IN PHILADELPHIA: THE COSTS OF THE CURRENT SYSTEM AND THE BENEFITS OF REFORM 9* (2010)) (indicating that although the city only owns 10,000 of the vacant properties, the city incurs the upkeep costs for all vacant properties).

36. *Id.* at 7 (citing Bob Winthrop & Rebecca Herr, *Determining the CO\$T of Vacancies in Baltimore*, 25 GOV'T FIN. REV. 38, 39 (2009)); see also Dane et al., *supra* note 8, at 384 (noting that local governments spend millions of dollars managing code violations, tearing down unsafe structures, and trying to track down those responsible for the properties).

37. Declining property values, of course, also affect banks' bottom lines. Properties are often worth more at the time of foreclosure than they are worth months or years later because the fact that the home was abandoned drives down values in the entire community. See Super, *supra* note 11, at 1854 (contending that foreclosure “epitomizes waste” because consequences of lenders taking possession of a defaulting mortgagor's home include substantial reduction of the value of the property and those around it).

the Federal Reserve Bank of Boston, Massachusetts has lost approximately \$4.1 million in tax revenues over a two-year period because of vacant foreclosed homes.<sup>38</sup>

Of course, on top of affecting municipalities' bottom lines, vacancies negatively impact the value of surrounding homes, decreasing home values by hundreds of millions of dollars.<sup>39</sup> 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%.<sup>40</sup> Moving outward again, each vacant property within the next 250 feet is associated with an additional decrease in value of approximately one percent.<sup>41</sup> This loss in home value has had an even more dramatic effect on minority and first-time homebuyers.<sup>42</sup>

Abandoned properties do not just drive crime up and property values down; there are also many psychosocial effects of foreclosures both on those who are displaced by foreclosures and on those who remain in communities. Children living in communities with high incidences of foreclosures and abandoned homes, for example, may experience the same types of learning disruptions that plague those who have been displaced by foreclosure; even those who have remained in place during the foreclosure crisis suffer when classmates move or when schools are shut down due to low enrollment.<sup>43</sup> Further, the mere presence of abandoned homes in a community affects the aspirations and attitudes of those living in proximity to neighborhoods of vacant properties.<sup>44</sup>

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38. Beckett, *supra* note 26, at 181.

39. See Beckett, *supra* note 26, at 178.

40. *Id.* at 179 (citing BRIAN A. MIKELBANK, SPATIAL ANALYSIS OF THE IMPACT OF VACANT, ABANDONED AND FORECLOSED PROPERTIES 15 (2008), <https://www.clevelandfed.org/en/newsroom-and-events/publications/special-reports/sr-200811-spatial-analysis-of-impact-of-vacant-abandoned-foreclosed-properties.aspx>).

41. *Id.*

42. See CTR. FOR RESPONSIBLE LENDING, 2013 UPDATE: THE SPILLOVER EFFECTS OF FORECLOSURES 1 (2013), <http://www.responsiblelending.org/mortgage-lending/research-analysis/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf> ("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 . . ."); CTR. FOR RESPONSIBLE LENDING, NEW DATA SHOWS IMPORTANT MARKET SEGMENTS REMAIN LOCKED-OUT OF CONVENTIONAL MORTGAGES IN SLOWLY RECOVERING HOUSING MARKET (Sept. 30, 2014), <http://www.responsiblelending.org/media-center/press-releases/archives/New-Data-Shows-Important-Market-Segments-Remain-Locked-out-of-Conventional-Mortgages-in-Slowly-Recovering-Housing-Market.html>.

43. Kane, *supra* note 13, at 824 (citing VICKI BEEN ET AL., FURMAN CTR. FOR REAL ESTATE & URB. POL'Y, N.Y.U. SCHOOL OF LAW, KIDS AND FORECLOSURES: NEW YORK CITY 4-5 (2010)).

44. See *id.* at 825 ("[I]ncreased crime and concentrated foreclosures limit the willingness of customers to shop at neighborhood establishments, which further

In some neighborhoods in Detroit, banks own eighty percent of foreclosed homes, meaning that almost every resident lives within a few blocks from a bank-owned, abandoned house.<sup>45</sup> When the housing market is booming, the prospect of a profitable sale incentivizes banks to maintain or improve their properties. During the recent housing crisis, however, the financial incentive to maintain and market homes disappeared, and many lenders settled on the least expensive plan for maintaining their properties—neglect.<sup>46</sup>

Abandoned homes fill neighborhoods with smashed windows; odors of rotting food; “chest-high” weeds; exposed wiring; and “infestations of rats, snakes, ants, bees, and termites.”<sup>47</sup> Determined to minimize the scourge of vacant properties and motivated by the plight of the homeless, the Occupy Our Homes movement was born.

## II. THE OCCUPY OUR HOMES MOVEMENT PUTS THE BUNDLE OF STICKS IN THE RIGHT HANDS

### A. *The Occupy Our Homes Movement*

Responding to both the increase in unoccupied homes and the growing homeless populations in urban centers, Occupy Our Homes groups seek to place homeless individuals in bank-owned, foreclosed properties or to keep the foreclosed-upon owners in place. To Occupy Our Homes activists, it is an unacceptable fact that on any given night for each person sleeping on the street in cities like Detroit, Baltimore, and Chicago there is a bank-owned, foreclosed home sitting vacant in a neighborhood.<sup>48</sup> One Occupy Our Homes

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depresses both the job market and the general neighborhood economy.”).

45. *Detroit Real Estate Trends & Market Info*, REALTYTRAC (Sept. 2015), <http://www.realtytrac.com/statsandtrends/foreclosuretrends/mi/wayne-county/detroit>.

46. See Kane, *supra* note 13, at 815–16 (footnotes omitted). “How an owner assesses the value of its REO property and its predictions about how quickly a local residential real estate market will improve will determine when and at what price it is willing to sell. If an REO owner is unwilling to sell a property at the current market price with the expectation that it will be able to command a higher price at some point in the future, the property may remain vacant for an extended period, increasing the chance that its foreclosure will negatively impact surrounding properties.” Madar et al., *supra* note 10, at 6.

47. Dane et al., *supra* note 8, at 384 (footnotes omitted).

48. See HOMELESS SERVS. PROGRAM, *supra* note 2, at 17 (reporting that 2638 people are homeless on any given night in Baltimore, Maryland); HOMELESS ACTION NETWORK OF DETROIT, *supra* note 4, at 3 (calculating that roughly 16,000 people are homeless on any given night in Detroit, Michigan); *The Facts Behind the Faces*, *supra* note 6, at 3 (finding that during January 2014, 6294 people were homeless on any given night in Chicago, Illinois).

website declares “Not 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>49</sup>

The Occupy Our Homes movement is responsive to the fact that banks are notoriously bad homeowners and neighbors, particularly when they own homes in minority or poor neighborhoods.<sup>50</sup> Banks tend

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49. See *Background*, OCCUPYOURHOMES.ORG, <http://occupyourhomes.org/about/> (last visited Dec. 1, 2015). Local Occupy Our Homes movements seem to have similar visions. The Minneapolis Occupy Our Homes group, for example, posted the following vision statement on its website:

Born of the Occupy Wall Street movement, we believe the people who live and work in our communities should democratically control their land and housing, not the big banks who gambled with our homes and crashed the economy. . . . We work to defend our neighbors from foreclosure and homelessness by halting evictions through public pressure and mass mobilization, while developing leadership and building consciousness among all members of the community. We seek to unite homeowners, tenants, and people experiencing homelessness to fight for safe and equitable housing as a human right through policy and system change.

*About Us*, OCCUPYHOMESMN.ORG, <http://www.occupyhomesmn.org/background>.

50. There have been a number of lawsuits in recent years alleging that banks' failure to maintain and market foreclosed homes in minority neighborhoods while employing more active maintenance and marketing tactics in predominantly white neighborhoods violates the Fair Housing Act. The National Fair Housing Alliance and five of its member organizations, for example, have filed a federal housing discrimination complaint against Bank of America, alleging that the bank maintains and markets foreclosed homes in predominantly white neighborhoods in a much better manner than it does in predominantly African-American and Latino neighborhoods. The complaint addresses Bank of America's practices in Baltimore, Maryland and Toledo, Ohio, among other cities. See Press Release, Nat'l Fair Housing Alliance, *supra* note 33; see also Fifth Amended Fair Housing Complaint at 2 n.2, Nat'l Fair Hous. All. v. Bank of Am. Corp., File No. 04-13-0016-8, Inquiry No. 349540 (HUD Sept. 3, 2014), [http://www.nationalfairhousing.org/Portals/33/2014-09-30\\_Fifth\\_amended\\_complaint-Bank\\_of\\_America.PDF](http://www.nationalfairhousing.org/Portals/33/2014-09-30_Fifth_amended_complaint-Bank_of_America.PDF) (adding four new cities to the original complaint: Cleveland, Ohio; Kansas City, Kansas; New Orleans, Louisiana; and Vallejo, California); see also Second Amended Complaint for Declaratory and Injunctive Relief and Damages at 1, Mayor of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (D. Md. 2010) (No. 1:08-cv-00062-JFM), 2010 WL 1459070 (alleging that Wells Fargo engaged in discriminatory lending practices, which resulted in foreclosures in, and therefore injuries to, minority neighborhoods and borrowers). Alleged externalities related to bank-owned, foreclosures include “[a] significant decline in the value of nearby homes, resulting in a decrease in property tax revenue; . . . [a]n increase in the number of abandoned and vacant homes; . . . [a]n increase in criminal and gang activity as abandoned and vacant homes become centers for squatting, drug use, drug distribution, prostitution, and other unlawful activities; . . . [i]ncreased expenditures for police and fire

to let homes in the areas most affected by the foreclosure crisis fall into disrepair, where they become havens for trash, rodents and drug dealers, destroying the property values of surrounding homes and contributing to the social maladies that already plague poorer neighborhoods.<sup>51</sup>

Each Occupy Our Homes group employs slightly different tactics, tailored to the particular environments in which they operate. However, each group appears to have a similar goal: when banks fail to maintain or market abandoned homes, the Occupy Our Homes activists hope to pry some of the “sticks” from banks’ bundle of ownership rights and place those “sticks” into the hands of the community members they serve.<sup>52</sup>

In some cities, Occupy Our Homes activists focus on “reclaiming” vacant, bank-owned properties by moving homeless individuals and families into homes that banks have let fall into disrepair.<sup>53</sup> With the help of community groups, the “occupiers” work to improve the property by maintaining gardens, installing new fixtures, and making repairs.<sup>54</sup> In some instances, the families pay “rent” to the community groups for use of the home and in others, the “occupiers” offer to pay

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protection; . . . [i]ncreased expenditures to secure abandoned and vacant homes; . . . [a]dditional expenditures to acquire and rehabilitate vacant properties; and . . . [a]dditional expenditures for administrative, legal, and social services.” *Mayor of Balt.*, 677 F. Supp. 2d at 849. See generally NAT’L FAIR HOUSING ALL., ZIP CODE INEQUALITY: DISCRIMINATION BY BANKS IN THE MAINTENANCE OF HOMES IN NEIGHBORHOODS OF COLOR (2014), [http://www.mvfairhousing.com/pdfs/2014-08-27\\_NFHA\\_REO\\_report.PDF](http://www.mvfairhousing.com/pdfs/2014-08-27_NFHA_REO_report.PDF).

51. See Fifth Amended Fair Housing Complaint, File No. 04-13-0016-8, at 4–5. See generally NAT’L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES (2009), <http://www.smartgrowthamerica.org/documents/true-costs.pdf> (analyzing ills—be it crime, infestation, aesthetics, or deterioration of property value—brought on by foreclosure).

52. *Occupy Homes: New Coalition Links Homeowners, Activists in Direct Action to Halt Foreclosures*, DEMOCRACYNOW! (Nov. 11, 2011), [http://www.democracynow.org/2011/11/11/occupy\\_homes\\_new\\_coalition\\_links\\_homeowners](http://www.democracynow.org/2011/11/11/occupy_homes_new_coalition_links_homeowners) (describing the movement’s “one-two punch” of occupying homes owned by banks and rescuing vacant homes to create greater access to housing).

53. Press Release, Occupy Wall Street, Occupy Our Homes: The 99% Stands Up To Big Banks to Keep Families in Their Homes (Dec. 6, 2011), <http://www.commondreams.org/newswire/2011/12/06/occupy-our-homes-99-stands-big-banks-keep-families-their-homes>; see also Austen, *supra* note 8 (describing the Anti-Eviction Campaign, which aims to “take over” vacant properties).

54. See Austen, *supra* note 8 (explaining that the Anti-Eviction campaign works to restore vacant properties in order to provide houses for the homeless); *D6 Day of Action Live Updates*, OCCUPYOURHOMES.ORG (Dec. 6, 2012), <http://occupyourhomes.org/blog/2012/dec/6/d6-2012-updates> (documenting the first anniversary of the Occupy movement, when occupiers in Atlanta planted a garden in front of a house to commemorate moving a homeless family into a vacant, bank-owned home).

rent to the bank that owns the home.<sup>55</sup> Often, Occupy Our Homes activists work with members of the community to clean up properties and to select “tenants.”<sup>56</sup>

A 2013 New York Times article profiled one Chicago activist, Willie Fleming,<sup>57</sup> who went door-to-door in communities affected by foreclosures to discuss what he termed the “liberat[ion]” of foreclosed homes from banks.<sup>58</sup> Mr. Fleming walked the streets of neighborhoods with high concentrations of foreclosed homes, asking neighbors how they might react to a community group breaking into abandoned houses and making improvements so that homeless families and individuals could (illegally) occupy them.<sup>59</sup> Block by block, Mr. Fleming built support for the notion that, where banks fail to maintain homes, members of the surrounding communities should put the empty homes to better use.<sup>60</sup>

In other cities, the Occupy Our Homes movement focuses not on moving currently homeless individuals into empty properties, but on preventing the eviction of foreclosed-upon owners.<sup>61</sup> Through protests, sit-ins, and organized “occupations,” activists in these cities

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55. In lieu of eviction, occupiers are willing to pay market-rate rent, which is oftentimes more affordable than the monthly mortgage payment associated with the home. See *How “Occupy Our Homes” Can Win*, OCCUPYLV.ORG, <http://www.occupylv.org/blogs/how-occupy-our-homes-can-win>; Austen, *supra* note 8 (stating that at one point, the Chicago City Council was leaning towards approving an ordinance requiring banks to pay relocation fees to renters living in foreclosed properties, or allow them to pay rent until the sale of the building).

56. See Austen, *supra* note 8 (“In the past year . . . the Anti-Eviction Campaign freed up [twenty] abandoned properties, fixing up the buildings and moving ‘homeless people into the people-less homes.’”); see also Darryl Phillips, *Quality Squatters Wanted (or How to Occupy a House)*, OCCUPYLV.ORG (Dec. 28, 2011, 3:47 PM), <http://www.occupylv.org/blogs/quality-squatters-wanted-or-how-occupy-house> (“What is a quality squatter? ‘Squatter’ is easy, it’s anyone who moves in where he or she doesn’t belong. ‘Quality’ isn’t so easy, it involves ethical motives, understanding the risk/reward relationships, and willingness to put in the physical, mental, and spiritual effort necessary to make it work.”).

57. See Austen, *supra* note 8. Mr. Fleming goes by the name J.R., which, according to him, stands for “Just Righteousness.” *Id.*

58. *Id.*

59. *Id.*

60. *Id.* As noted *infra* note 101, when Mr. Fleming asked a couple whether they would support the takeover of empty houses in their neighborhood, the woman responded, “Hell, yeah” and her husband agreed saying, “That’s what we need, uh-huh, exactly.”

61. See *Occupy Homes: New Coalition Links Homeowners, Activist in Direct Action to Halt Foreclosures*, DEMOCRACY NOW! (Nov. 11, 2011), [http://www.democracynow.org/2011/11/11/occupy\\_homes\\_new\\_coalition\\_links\\_homeowners](http://www.democracynow.org/2011/11/11/occupy_homes_new_coalition_links_homeowners) (interviewing activists who have occupied homes to prevent the eviction of foreclosed-upon homeowners).

help foreclosed-upon owners remain in their homes.<sup>62</sup> Through their actions, the activists assert that creating swaths of neglected and unoccupied homes in urban environments should not be among the “bundle of rights” possessed by foreclosing banks.

*B. The Movements That Came Before*

The current Occupy Our Homes movement is not the first movement seeking to alleviate homelessness and call attention to vacant and neglected homes by “squatting” in those properties.<sup>63</sup> In the 1980s, for example, the Association of Community Organizations for Reform Now (“ACORN”), initiated a campaign to occupy city-owned vacant properties in Brooklyn, New York.<sup>64</sup> At that time, the New York economy was in decline, and the low and no-income population of New York City was rising rapidly.<sup>65</sup> Affordable housing was scarce, and banks regularly “redlined” poor and minority neighborhoods, which resulted in very little housing development in the neighborhoods that needed affordable options the most.<sup>66</sup>

ACORN’s original mode of protest did not involve occupying or squatting in homes;<sup>67</sup> the group first organized sit-ins outside of the mayor’s mansion and the Brooklyn Borough President’s office, demanding that the city’s resources be dedicated to affordable housing and that the city utilize the many vacant, City-owned properties as affordable housing development sites.<sup>68</sup>

The initial sit-ins and demonstrations outside of the Mayor’s mansion and the Brooklyn Borough President’s office had a limited impact: city officials made only tangential promises of pilot programs

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62. See OCCUPY OUR HOMES, <http://occupyourhomes.org> (last visited Dec. 1, 2015); see also *Bank Tenant Organizing Campaign*, SPRINGFIELD NO ONE LEAVES, <http://www.springfieldnooneleaves.org/snol-work/bank-tenant-organizing-campaign> (last visited Dec. 1, 2015) (claiming that residents subjected to foreclosure can stay in their homes while the organization supports them by forming blockades and vigils in front of the homes).

63. Though not addressed in detail in this Article, it should be noted that the Occupy Our Homes movement is not an entirely American phenomena. The South African courts, for example, recognized the rights of squatters. See *Modder East Squatters v. Modderklip Boerdery (Pty) Ltd.* 2004 All SA 169 (SCA) para. 2 (S. Afr.).

64. Eric Hirsch & Peter Wood, *Squatting in New York City: Justification and Strategy*, 16 N.Y.U. REV. L. & SOC. CHANGE 605, 606 (1987–88); see Fernanda Santos, *Effort Takes Shape to Support Families Facing Foreclosure*, N.Y. TIMES (Feb. 17, 2009), <http://www.nytimes.com/2009/02/18/nyregion/18foreclose.html>.

65. Hirsch & Wood, *supra* note 64, at 607.

66. *Id.* at 607–08.

67. See *id.* at 612.

68. *Id.*

related to affordability.<sup>69</sup> When little progress was made in the following months, ACORN recruited volunteers who were either homeless or had serious housing needs to help take possession of twenty-five vacant, city-owned buildings. The police quickly arrested eighteen squatters and obtained a temporary restraining order that subjected squatters to a \$5000 fine.<sup>70</sup> In a subsequent effort to undermine the squatting program, the City bulldozed a building that squatters had improved.<sup>71</sup>

The reaction to the City's harsh tactics was swift and overwhelmingly sympathetic to the "occupiers." The *New York Times* editorial board, for example, stated that the "occupiers" actions seemed "simple and sensible" in a piece titled "Give Squatters a Chance,"<sup>72</sup> and State Senator Thomas Bartosiewicz was arrested as he used a sledgehammer to help open a building for squatters.<sup>73</sup> Congressmen Ed Towns announced that he was willing to be arrested alongside ACORN members, and, before a case against ACORN squatters went to trial, Brooklyn District Attorney Elizabeth Holtzman decided not to pursue criminal charges.<sup>74</sup>

ACORN's efforts did not solve the housing crisis in New York, but it did shift the discourse about the distribution of property rights. Prior to ACORN's occupation, City officials suggested that the City's "bundle of rights" as property owners included the right to leave buildings empty or bulldoze them instead of prepare them for occupancy. City representatives seemed to say: *We're property owners, and, as owners, we have the right to leave properties empty if we so desire.*<sup>75</sup> After ACORN's occupation, the City was forced to concede that some of the "sticks in the ownership bundle" belonged to members of the community.<sup>76</sup> After the ACORN occupation, for example, the City

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69. *Id.* at 612.

70. *Id.* at 614.

71. *Id.*

72. *Id.* (citing *Give Squatters a Chance*, N.Y. TIMES (Aug. 11, 1985), <http://www.nytimes.com/1985/08/11/opinion/give-squatters-a-chance.html>). "The longer the city delays expanding [alternative programs], the more compelling becomes the squatters' case. Some squatting is inevitable in a housing market as tight as New York's. In most cases, squatters are interested only in temporary shelter." *Give Squatters a Chance*, N.Y. TIMES (Aug. 11, 1985), <http://www.nytimes.com/1985/08/11/opinion/give-squatters-a-chance.html>.

73. Hirsch & Wood, *supra* note 64, at 614.

74. *Id.*

75. See *supra* notes 64–74 and accompanying text (detailing the City's obstinate and domineering attitude toward property and squatters).

76. See Peñalver & Katyal, *supra* note 23, at 1127–28 ("Perhaps the greatest achievement of the urban squatting movements . . . was in the domain of public



agreed to assign the deeds to fifty-eight buildings containing 180 housing units to community groups, pledge nearly five million dollars to restore the buildings, and collaborate with the former squatters to create dozens of new housing units for low-income residents in New York.<sup>77</sup>

Other similar movements took place sporadically throughout the 1990s and 2000s. For example, after a homeless man froze to death in a cardboard box just 100 feet from the Cabrini Towers in Chicago (which had many vacant units), the National Union of the Homeless began an eight-city coordinated takeover of vacant government-owned apartments—a prototype for the Occupy Our Homes takeovers of bank-owned homes today.<sup>78</sup>

### III. PROPERTY LAW: A FERTILE GROUND FOR ACTIVISM

Given existing beliefs about the meaning of “ownership,” Occupy Our Homes’ actions may appear to be a radical deviation from existing legal norms.<sup>79</sup> However, property law is unique in that it leaves room for law-breakers to redefine the rights that accompany ownership.

#### A. *Changing Law Through Disobedience*

In a 2010 article, Professor Mark Edwards argued that property law offers a particularly fertile ground for spurring changes in the law via modifying existing social norms.<sup>80</sup> “What makes something ‘property’ is precisely that others routinely recognize and respect one’s claims . . . .”<sup>81</sup>

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opinion. As a method of protest, urban squatting was extremely photogenic. . . . Urban squatters[, moreover,] were . . . extremely effective at keeping the problem of low-income housing on the political agenda . . . .”)

77. Hirsch & Wood, *supra* note 64, at 614–15. ACORN activists also collaborated with the Consumer-Farmer Foundation and the Pratt Institute Center for Community and Environmental Development to create the Mutual Housing Association of New York (“MHANY”). City officials affirmatively remained distant from ACORN, possibly to ensure that it was never alleged that they endorsed the squatters’ actions. *Id.* at 614.

78. See Austen, *supra* note 8 (describing how Chicago’s housing crisis ignited a new form of activism).

79. Owners generally have the right to exclude all others from those properties. J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. LAW & POL’Y 39, 39–40 (2000).

80. Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457, 475–76 (2010) (explaining that the enforcement of property rights “provides fertile ground for the study of the gap between the legality and social acceptability of behavior”); see also Super, *supra* note 11, at 1775 (stating that property law “has adjusted to a long succession of social, economic, and political changes”).

81. See Edwards, *supra* note 80, at 475 (quoting Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 3).

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>82</sup>

The concept of “ownership” itself is an unclear one.<sup>83</sup> Most first year law students learn that ownership rights are not absolute and can instead be likened to a “bundle of sticks” in which certain rights might be divided among multiple parties.<sup>84</sup> A homeowner, for example, may have the right to sell her property, but that right is qualified; a potential buyer can prevent a sale that would violate an antidiscrimination statute, and a neighbor could prevent a sale that would violate a lawful covenant or deed restriction. Similarly, a homeowner may have the right to exclude others from the home, but again this right is not without limits. Firefighters, for example, may gain admittance over an owner’s objections if the property poses a threat to neighbors.<sup>85</sup> In sum, which “sticks” in the bundle of rights

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82. Rose, *supra* note 81, at 3 (explaining the difference between animal territoriality and a property regime where “others refrain from grabbing your things and running away with them”); *see also* Edwards, *supra* note 80, at 458 (concluding that “law functions as an anchor on behavior, providing stability but also space for deviance, which permits the evolution of property rights”); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014) (explaining that property law reflects our societal values and structures society through allocation of resources, administration of data, and the organization of competing interests and uses) (“Property is not only about the allocation of scarce resources, the management of complex information, or the coordination of land use among competing users; it is about our *way of life*. If this is true, then property law should reflect and shape our deepest values.”).

83. Michael Diamond, *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty*, 29 ST. LOUIS U. PUB. L. REV. 85, 86 (2009) (“The content of the term [‘property ownership’] depends on the culture in which it is employed and, within any particular culture, very often upon the period in which the concept is being discussed.”).

84. The “bundle of sticks” analogy has come under some attack in recent years. *See* Penner, *supra* note 20, at 714. That said, it remains a useful illustration of the ways in which property rights are distributed between competing parties.

85. For an example of the limits on property owners’ rights to exclude others from their property that is familiar to most law students, *see*, for example, *State v. Shack*, 277 A.2d 369 (N.J. 1971). In *Shack*, the Supreme Court of New Jersey held that the owner of a farm could not exclude health workers and legal services attorneys who sought to assist farm workers residing on the farm. *Id.* at 374–75. Similarly, property owners generally have a right to destroy their property if they so desire, but courts have limited that right when it interferes with a higher community purpose. *See, e.g.*, *Eyerman v. Mercantile Tr. Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975). In addition to the rights described above, property owners are also burdened by affirmative duties, such as the duty to pay taxes and, as is relevant to this Article, the duty to maintain property in a condition that does not unduly interfere with others’ property rights. *See generally* Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437 (2014).

belong to the owner of property and which ones belong to others—members of the community, municipal entities, or others—is not determined by reference to a rigid line; the division of property rights between owners and others is socially constructed and must be responsive to changing social norms.

In their 2007 article and 2010 book, Professors Eduardo Moisés Peñalver and Sonia K. Katyal argue that because the division of rights between parties is not determined in reference to a rigid rule, property law is not just particularly subject to change in general, but that it is particularly fertile ground for change-through-law-breaking.<sup>86</sup> Whereas law-breaking is unlikely to alter, for example, securities law or personal injury law, law-breaking in the area of property law is much more likely to result in a shift in a property law norm. According to Peñalver and Katyal, this happens for four reasons. First, property is critically important in people's day-to-day lives.<sup>87</sup> Second, property doctrines have a "particularly strong tendency toward inertia and ossification," which, in some cases, can only be disrupted by disobeying existing legal norms.<sup>88</sup> Third, society typically views violators of property law as less reproachable than other categories of criminal acts.<sup>89</sup> Finally,

because of property's blend of importance, stability, and violability, property law-breaking acquires a unique communicative power to reimagine our relationships with the material world and with each other[] and to provide an informal forum for the airing of conflicts over resources between owners and nonowners, which the law can eventually shift to accommodate.<sup>90</sup>

Peñalver and Katyal conclude that "[t]ime and again, groups of people have intentionally violated property laws, and in a number of important instances, property law has responded by shifting to accommodate their demands, bringing them back within the fold of the law-abiding community."<sup>91</sup> In the context of property law, more than in other areas of law, "where the legality and social acceptability

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86. See, e.g., Rosser, *supra* note 17, at 142 ("My point of departure from [Peñalver's and Katyal's] argument is that they do not consider more radical breaks from existing law and associated inequality in the distribution of property."). See generally Peñalver & Katyal, *supra* note 23. Some progressive property scholars argue that Peñalver and Katyal do not go far enough in advocating for radical departures from existing property norms.

87. See Peñalver & Katyal, *supra* note 23, at 1131.

88. *Id.*

89. *Id.*

90. *Id.*

91. See *id.* at 1099.

of behavior . . . diverge, it is ultimately the law, rather than the behavior, that changes.”<sup>92</sup> As one Occupy Our Homes activist put it, “We’re challenging amoral laws by breaking them.”<sup>93</sup>

### B. *Occupy Activists as Property Outlaws*

The Occupy Our Homes activists’ behavior—illegally occupying private property to house homeless families—is an attempt to create new legal norms through which some “sticks” in banks’ bundle of ownership rights could be transferred to homeless community members or community groups if the banks fail to properly maintain and market foreclosed homes or otherwise put empty homes to productive use.<sup>94</sup> The movement seeks to display the “concrete living out of an alternative legal conception”<sup>95</sup> that Peñalver and Katyal described;<sup>96</sup> that is, it seeks to create facts on the ground that demonstrate how a new legal norm, (i.e. the transfer of some ownership rights to homeless families or community groups) would work if an existing legal

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92. See Edwards, *supra* note 80, at 459. “Law,” according to Professor Edwards, “evolves to embody norms.” *Id.* at 468. Professor Edwards explains that there are “three models of decision making that may be applied to the decision whether to comply with a law or regulation: (1) cognitive, in which actors make decisions [reflexively]; (2) . . . rational choice, in which actors make decisions . . . based on . . . self-interest; and (3) normative, . . . in which actors make decisions based on ingrained beliefs about acceptability of behavior.” *Id.* at 464. The normative model is particularly important in the evolution of property rights, as the concept of “ownership” depends on normative values. Obviously, normative values are critical to other areas of law as well, ranging from criminal law to corporate law, but, normative values are particularly important to the very core of property law: the concept of ownership. *Id.* at 473–74; see also Peñalver & Katyal, *supra* note 23, at 1100 (noting that “there can be no doubt that, once a robust system of private property has been established, the precise content of that standard bundle of property rights shifts over time in response to varying pressures and incentives”).

93. See Austen, *supra* note 8.

94. Occupy Our Homes activists generally go to great lengths to ensure the social acceptance of their activities. In many cities, Occupy Our Homes activists seek community involvement and approval before placing “occupiers.” Occupy Our Home groups assist the occupiers in improving the vacant homes, which often greatly benefits surrounding property values. Additionally, the Occupy Our Homes movement often connects with media outlets to publicize their events and “occupations” in a way that is generally palatable to others (e.g., choosing working parents and other individuals who are likely to evoke sympathy as spokespeople). See generally Semuels, *supra* note 2 (discussing the potential creation of a Baltimore community land trust allowing for land to be bought and sold with a restricted resale value, making the houses more affordable, as the land is owned by the trust); see also Austen, *supra* note 8 (describing the Anti-Eviction campaign’s renovation of abandoned houses).

95. Peñalver & Katyal, *supra* note 23, at 1140.

96. See *id.*

norm, such as the placement of most of the “sticks” in the bundle of ownership rights in the hands of the record owner, were discarded.<sup>97</sup>

Seemingly aware that in violating existing legal norms new legal norms may be born, Occupy Our Homes activists have been careful in constructing and articulating those new norms. For example, while activists may advocate transferring some of the “sticks” in the bundle of ownership rights out of the hands of banks that have failed to properly maintain or market properties, the Occupy Our Homes movement does not appear to advocate placing all of those “sticks” directly in the hands of homeless individuals.<sup>98</sup>

Indeed, the Occupy Our Homes movement appears to serve the interests of those in the community surrounding bank-owned, abandoned homes as much as it does homeless individuals. For example, before placing individuals in an abandoned home, Occupy Our Homes activists generally consult with and build consensus among neighbors and other stakeholders in the community; because abandoned properties attract crime, neighbors often prefer to have a home occupied by someone approved by Occupy Our Homes activists rather than remain empty.<sup>99</sup> Additionally, after individuals are placed in abandoned houses, Occupy Our Homes activists often help those newly housed individuals maintain and improve the properties.<sup>100</sup> Occupy Our Homes activists also often serve as community

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97. The Occupy Our Homes activists are not the only ones to see adverse possession as a potential solution to the problem of abandoned homes. In 2013, members of the Pennsylvania legislature proposed legislation that would have modified the state’s adverse possession statute by shortening the required possessory period. See H.B. 1808, 2013–14 Gen. Assemb., Reg. Sess. (Pa. 2013). One of the stated purposes of the proposed bill was to help remedy the ills that flow from vacant properties. Richardson, *supra* note 13, at 1392 n.27. The Pennsylvania House passed the bill with a vote of 183 to 13, but the state’s Senate never took it up for discussion. *Id.* Further, other scholars have argued that the adverse possession doctrine should be modified in various ways to address the problems associated with abandoned properties. See, e.g., *id.* at 1385–86 (arguing that “actual possession” should not be required, but rather that “a notice of intent to possess should be sufficient”). The modifications to the adverse possession doctrine that other scholars have proposed, of course, would smooth the road for Occupy Our Homes activists. However, such proposals would ultimately place a property’s title in the hands of individual occupiers, which would not preserve affordability over time, as this Article suggests.

98. See Austen, *supra* note 8 (discussing the interests of both homeless individuals and of the surrounding community in filling unoccupied homes).

99. See *id.* (explaining that many community members support the Occupy movement’s actions).

100. See *id.* (telling the story of Martha Biggs, a squatter, who spent \$9000 fixing up the first floor of an abandoned home so she and her children could safely live there).

organizers, ensuring that neighbors are included in decisions regarding abandoned homes.<sup>101</sup>

The Occupy Our Homes movement leverages the fact that property rights are particularly responsive to emerging societal norms by chipping away at our conventional view of ownership under circumstances that garner much sympathy from the general public.<sup>102</sup> By moving homeless individuals and families into bank-owned, abandoned properties, the Occupy Our Homes movement calls into question the notion that the banks, as opposed to communities, are the rightful “owners” of such homes.<sup>103</sup> The image of homeless families, who are eager to put abandoned houses to good use, juxtaposed with the image of large banks that are failing to care for such homes, is powerful and persuasive. Such images may inspire the public to ask why some of the sticks in the banks’ bundle of rights should not be transferred to those who are eager to live in empty houses.<sup>104</sup>

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101. *Id.* (“The Anti-Eviction Campaign always canvassed a neighborhood before acting, . . . [J.R.] asked if [a couple of young parents] would support a takeover of either of the empty houses that sandwiched theirs or of any of the abandoned homes on their block. . . . ‘Hell, yeah,’ the woman said, without hesitation, from her lawn chair. ‘That’s what we need, uh-huh, exactly,’ the man added.”).

102. The Occupy Our Homes movement has been widely successful in garnering public support from neighbors surrounding “occupied” homes and from the general public. That said, there have been a number of news stories about squatters who have moved into homes that are individually owned (i.e., not owned by banks), and, in some cases, not vacant. Such actions are not condoned by the Occupy Our Homes movement and are not the subject of this Article. For a summary of some news stories regarding individuals who have “occupied” non-vacant or individually-owned homes, see Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. MASS. L. REV. 156, 159–61 (2014) and Peñalver & Katyal, *supra* note 23, at 1125 (noting that urban squatting movements, such as those that took place in New York in the 1980s (and those described in Part II.B of this Article) were motivated not just by a desire to obtain their own property, but also, in large part, by a “desire to express their opposition to [policies that fail] to provide adequate low-income housing in the cities”).

103. See Peñalver & Katyal, *supra* note 23, at 1180 (noting that the public seems to believe that criminal law should not punish actions the homeless take in order to stay alive, and that, under some circumstances, homeless individuals should be allowed to take the property of others); see also Rosser, *supra* note 17, at 116 (citing Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 768 (2009)) (explaining that other scholars have noted that property owners, including presumably banks, have obligations that run to the community).

104. Some members of Congress appear to endorse a redistribution of the “sticks” in the bundle. Reacting to the foreclosure crisis, Ohio Congresswoman Marcy Kaptur, said on the floor of the U.S. Congress: “So I say to the American people, you be squatters in your own homes. Don’t you leave.” See Amy Goodman, *Facing Foreclosure? Don’t Leave. Squat.*, ALTERNET (Feb. 5, 2009), [http://www.alternet.org/story/125533/facing\\_foreclosure\\_don%27t\\_leave.\\_squat](http://www.alternet.org/story/125533/facing_foreclosure_don%27t_leave._squat).

This type of intentional law-breaking-to-effect-law-change is the tool of those who cannot afford the cost of civil suits or “whose voice in the legislative process is too weak to attract the attention of lawmakers.”<sup>105</sup> Those involved in the Occupy Our Homes movement fall into this category; homeless individuals and Occupy Our Homes activists generally do not possess the political power necessary to affect the legislative process, so, like protesters before them, they seek change through non-violent law-breaking.

#### IV. A MOVEMENT IN NEED OF A NARRATIVE

##### A. *Occupy Wall Street’s Legal Narrative Does Not Fit*

Because it viewed itself primarily as a protest movement focused on influencing public opinion as opposed to altering specific legal concepts, the Occupy Wall Street movement (which is the ideological parent of the Occupy Our Homes movement) relied on legal narratives that were well-developed by past protest movements. For example, Occupy Wall Street activists relied on jurisprudence developed in part during the Civil Rights era that balanced protesters’ First Amendment rights with government entities’ rights to control, to some extent, the time, place, and manner of speech.<sup>106</sup>

Both in courts and to the press, members of the Occupy Wall Street movement asserted that, while encampments in public spaces may have violated health, safety, or trespass-related laws, the activists had a superseding First Amendment right to assemble and voice their opinions.<sup>107</sup> Even though few Occupy Wall Street protesters prevailed in their lawsuits, the fact that the protesters relied on an existing legal framework lent legitimacy to their actions.

Unlike its predecessor, Occupy Wall Street, the Occupy Our Homes movement is not primarily an “expressive” protest movement. It seeks not only to bring focus to a problem, but also to change specific legal norms. Accordingly, the Occupy Our Homes movement

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105. Peñalver & Katyal, *supra* note 23, at 1100.

106. See generally *Cox v. Louisiana*, 379 U.S. 536, 574 (1965) (holding that peaceful expression of opinion opposing the majority view are protected under the First Amendment); Claire Zillman, *Meet the Lawyers Keeping an Eye on Occupy Wall Street*, THE AMERICAN LAWYER, <http://www.americanlawyer.com/id=1202519324836/Meet-The-Lawyers-Keeping-an-Eye-on-Occupy-Wall-Street?slreturn=20150710154313> (last visited Dec. 1, 2015) (discussing that the mission of the National Lawyers Guild was to ensure the First Amendment rights of protestors on the streets).

107. *Cox*, 397 U.S. at 574; see also *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (holding that sleeping and camping in public areas is symbolic conduct protected by the First Amendment).

cannot rely solely on the legal frameworks and First Amendment principles upon which prior protest movements have depended.

By placing homeless individuals and families in abandoned, bank-owned, foreclosed homes, the Occupy Our Homes movement seeks not only to call attention to the plight of the homeless or the problems that flow from the foreclosure crisis; the movement also works to change existing legal norms. Banks, the Occupy Our Homes movement posits, should lose at least some of their ownership rights when (a) they fail to properly maintain and market abandoned homes and (b) community groups have stepped forward and offered to put the home to productive use. In this way, the Occupy Our Homes movement aims to alter the legal frameworks surrounding foreclosure and ownership through acquiring abandoned homes for community uses.

To be clear, the Occupy Our Homes movement is not a Marxist attack on property rights in general. The group does not seek to end the concept of privately-owned property entirely; rather, it strives to shift (even slightly) American notions of “ownership,” as the concept relates to bank-owned, abandoned properties.<sup>108</sup> Where banks fail to maintain properties and where members of a community seek to put an abandoned property to community use, the Occupy movement suggests that only some, but not all, of the banks’ property rights transfer to those who will most productively use the properties in question. Indeed, this solution considers both the future occupants’ and the banks’ best interest: it maintains, or in some cases increases, the value of the property, while providing a needy person or family with a home.<sup>109</sup>

Because it seeks not just to voice a dissenting opinion, but also to effectuate a fundamental change in property law, the Occupy Our Homes movement needs a clear legal narrative regarding why, how, and under what circumstances certain “sticks” should be removed from the banks’ bundle of rights, or to whom, exactly, the “sticks” should be transferred (i.e., directly to homeless individuals? To community groups who work with homeless individuals? To municipalities through a governmental taking?).

The questions are twofold. First, is it possible for the law to evolve to reflect the values of the Occupy Our Homes movement? Second, assuming it is *possible*, then what are the specific mechanisms that might be altered in order to establish a coherent legal narrative upon which the Occupy Our Homes movement might rely?

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108. See *Background*, OCCUPY OUR HOMES, <http://occupyourhomes.org/about> (last visited Dec. 1, 2015) (stating the mission of the Occupy Our Homes movement).

109. See Gupta, *supra* note 13, at 569; Super, *supra* note 11, at 1854.



*B. Existing Frameworks Offer Limited Tools*

When banks become owners of homes through the foreclosure process, they, like all property owners, must abide by local laws relating to the upkeep and maintenance of property, including housing codes and nuisance law.<sup>110</sup> Generally, however, banks have been slow to come into compliance with local housing codes and nuisance laws, even when under threat of litigation,<sup>111</sup> because only individual neighbors directly affected by nuisance properties—and in some cases municipalities—may sue to enforce the housing code and nuisance ordinances. Additionally, those who might be best equipped and most motivated, such as community activists, may lack standing to bring badly-behaving banks into court on a nuisance theory of liability.<sup>112</sup> Even when neighbors or municipalities do wish to sue, determining which lending entity owns a particular property can be cumbersome because of the ways in which mortgages were issued, repackaged, and sold in the years leading up to the foreclosure crisis.<sup>113</sup> Further, because bank-owned properties within even a small geographic area are likely to be managed by different

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110. See Kane, *supra* note 13, at 830 (“When banks obtain title to foreclosed properties, they become responsible for their upkeep.”); Rosser, *supra* note 17, at 158 (explaining that a “vast array of property doctrines,” including nuisance, “impose limitations on what owners can do with their land”).

111. See Dane et al., *supra* note 8, at 385 (“Major cities, including Los Angeles and Cincinnati, have sued big banks over blighted REO properties on a nuisance theory of liability.”).

112. See Kane, *supra* note 13, at 836.

113. See MADAR ET AL., *supra* note 10, at 6 (noting that “[a]s a result of securitization, most REO properties are owned not by banks, but by trusts operating for the benefit of the investors who hold the securities backed by the foreclosed mortgage”). Accordingly, identifying whom to sue in an action to enforce a housing code of a nuisance ordinance can be exceedingly cumbersome. See Super, *supra* note 11, at 1846 (“Mortgages have come to be treated as commodities, with the rights divided among various investors with different preferences. One entity may hold the rights to interest payments while another has a claim on principal repayments and still another, the late fees. Some arrangements even divide these interests further by year. With interests so fractured, gaining all parties’ consent to workouts is effectively impossible. Moreover, the compensation arrangements for mortgage servicing companies—the point people in any negotiation on foreclosure—produce strong disincentives to negotiate. Thus, the great mass of delinquent mortgages moves like so many lemmings past stopping points that could produce more value for all parties and into the abyss of pointless foreclosure.”); Austen, *supra* note 8 (“Thousands of other bad mortgages were bundled in private securitization trusts, frequently with the trusts technically owning the loans and the evicted homeowners owning the property.”).

services, coordinated efforts to enforce the housing code or nuisance ordinances are practically impossible.<sup>114</sup>

Because disparities in the way banks maintain their properties sometimes run on racial lines, the federal Fair Housing Act<sup>115</sup> may offer another avenue for holding banks responsible for maintaining properties. Two reports from the National Fair Housing Alliance show that “REO properties in White neighborhoods were more likely to have well-maintained lawns, secured entrances, and professional sales marketing,”<sup>116</sup> while “REO properties in African-American and Latino neighborhoods were more likely to have poorly maintained yards, unsecured entrances, look vacant or abandoned, and have poor curb appeal.”<sup>117</sup> The Fair Housing Act prohibits banks from treating properties in minority neighborhoods differently than majority-White neighborhoods because of the occupants’ race.<sup>118</sup> While there have been some successes in fair housing cases,<sup>119</sup> such

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114. See MADAR ET AL., *supra* note 10, at 7.

115. Fair Housing Act, 42 U.S.C. §§ 3601–31 (2012).

116. Dane et al., *supra* note 8, at 386 (quoting NAT’L FAIR HOUSING ALL., HERE COMES THE BANK, THERE GOES OUR NEIGHBORHOOD: HOW LENDERS DISCRIMINATE IN THE TREATMENT OF FORECLOSED HOMES 2 (2011), <http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=UF6xIHF35rI%3D&tabid=3917&mid=9405>).

117. *Id.*; see also Super, *supra* note 11, at 1786–87 (noting that “residents of high-poverty neighborhoods—who are disproportionately African American or Hispanic—lost much more of their wealth during the Great Recession than did those in communities with little poverty” (footnote omitted)).

118. 42 U.S.C. § 3603. The Fair Housing Act provides several causes of action the Occupy movement might use. First, banks’ neglect of REOs in minority neighborhoods affects that property and neighboring properties’ ability to be sold, which violates § 3604(a) and § 3605 of the Fair Housing Act. *Id.* §§ 3064(a), 3605 (prohibiting, respectively, refusal of sale, rental, negotiation for sale or rental, or denial of a dwelling because of “race, color, religion, sex, familial status, or national origin”; and, discrimination based on the same factors in the process of conducting, and in the terms or conditions of, real-estate transactions). Second, the discriminatory way in which banks maintain REO properties violates § 3604(b). *Id.* § 3604(b) (prohibiting discrimination in the terms, conditions, or privileges of the sale or in services provided as a part of the sale). Third, violating the Fair Housing Act’s general principles, the impact of neglected REO properties on surrounding properties perpetuates segregation. See generally Dane et al., *supra* note 8, at 390–96 (describing the discriminatory impacts of inadequate bank maintenance of vacant properties).

119. See, e.g., Third Amended Complaint for Declaratory and Injunctive Relief and Damages at para. 9, *Mayor of Balt. v. Wells Fargo Bank, N.A.*, No. 1:08-cv-00062:JFM (D. Md. Oct. 21, 2010), <http://www.clearinghouse.net/chDocs/public/FH-MD-0001-0001.pdf> (seeking damages that the City suffered because of vacant Wells Fargo properties that were disproportionately located in African-American neighborhoods and that caused housing code violations requiring Baltimore to devote substantial time and funds to “inspect, board, clean, condemn, pursue litigation regarding, and take other actions”); Luke Broadwater, *Wells Fargo Agrees to Pay \$175M Settlement in*

suits are only possible where litigants can show racial disparities in how banks treat their REO properties.<sup>120</sup> Additionally, the Occupy Our Homes activists do not seek to simply enforce existing laws regarding maintenance of properties; the activists seek something more profound—a reorganization of property rights so that when banks act in ways that are deleterious to communities, some of those rights are transferred out of the banks' hands.

## V. ADVERSE POSSESSION AND COMMUNITY LAND TRUSTS: A FRAMEWORK FOR ACTIVISTS

### A. *Adverse Possession: Property Rebels Rewarded*

Property law, unlike other areas of law, includes a somewhat bizarre quirk—the doctrine of adverse possession—through which those who are law-breakers may be brought back into the fold of law-abiders and, in fact, may be rewarded for their law-breaking behavior with title to property, without any (or with very minimal) financial cost.

The doctrine of adverse possession may be the underpinning of the adage that “possession is nine-tenths of the law.”<sup>121</sup> It provides that possession of property can “ripen” into title to or ownership of that property if the possession is continuous, open, actual, and hostile for the prescribed statutory period.<sup>122</sup> The doctrine's requirements

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*Pricing Discrimination Suit*, BALT. SUN (July 12, 2012), [http://articles.baltimoresun.com/2012-07-12/news/bs-md-ci-wells-fargo-20120712\\_1\\_mike-heid-wells-fargo-home-mortgage-subprime-mortgages](http://articles.baltimoresun.com/2012-07-12/news/bs-md-ci-wells-fargo-20120712_1_mike-heid-wells-fargo-home-mortgage-subprime-mortgages) (awarding \$125 million to loan borrowers in a fair-lending settlement with Wells Fargo).

120. Theoretically, if a bank neglected all of its properties equally, a Fair Housing claim would not be possible.

121. J. Maxwell Tucker, *Substantive Consolidation: The Cacophony Continues*, 18 AM. BANK. INST. L. REV. 89, 160 (2010).

122. The elements can be summarized as follows:

1. “Continuous,” meaning that the possessor occupies the property in an uninterrupted manner for the statutory period. The statutory period differs from state to state. Arizona, for example, has a two-year statutory period. ARIZ. REV. STAT. ANN. § 12-522 (2003). North Dakota, however, has a statutory period of ten years, N.D. CENT. CODE § 47-06-03 (2014), while Connecticut has a statutory period of fifteen years, CONN. GEN. STAT. § 52-575(a) (2013), and Pennsylvania has a statutory period of twenty-one years. 42 PA. CONS. STAT. § 5530 (2004).
2. “Open,” meaning that the possessor's occupation must be visible and cannot be covert. This is to give notice to the record owner and the chance to assert his ownership.
3. “Actual,” meaning that the possessor must make actual, physical entry on to the premises to begin the statutory period. The entry cannot be symbolic (e.g., a possessor cannot start the clock on the statutory period by sending a letter to

endeavor to balance the interests of the rightful owner (who is afforded significant time within which to assert his rights in the face of another's open occupation of his land), against those of the possessor (whose protracted period of uninterrupted use yields expectation and reliance interests),<sup>123</sup> and the community (which has an interest in the productive use of land).<sup>124</sup>

Though the policy rationales for adverse possession make sense—supporting reliance interests, encouraging productive use of land, and allowing for the clarification of title irregularities<sup>125</sup>—there is no doubt that the doctrine rewards law-breaking. An individual who is an illegal trespasser on the day before the statutory period ends is transformed into a legal owner the day after the statutory period ends.<sup>126</sup> An adverse possessor need not pay the record owner for his or her property; simply by virtue of satisfying the elements of the doctrine and filing an inexpensive quiet title claim,<sup>127</sup> a law-breaking trespasser may become a rightful owner.<sup>128</sup>

In the context of the foreclosure crisis, some scholars have argued that the adverse possession doctrine should be modified in various ways to address the problems associated with abandoned properties. Professor Sally Brown Richardson, for example, argues that “actual possession” of abandoned, bank-owned properties should not be required and that a notice of intent to possess should suffice.<sup>129</sup> Others have argued that the

the true owner expressing her intent to occupy by adverse possession).

4. “Hostile,” meaning that the possessor has not obtained the record owner’s permission to occupy the property. A renter, for example, cannot be an adverse possessor, because a renter has permission to occupy the premises.

See PAULA FRANZESE, *A SHORT & HAPPY GUIDE TO PROPERTY* 12–13 (2d ed. 2012); see also Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423–24 (2001).

123. See Stake, *supra* note 122, at 2423 (adding “exclusive” to the list of elements, meaning that the possessor must be the only one seeking to possess the property).

124. There are other policy rationales for adverse possession, such as clarification of title irregularities, which are not relevant to this Article’s discussion.

125. See Richardson, *supra* note 13, at 1403.

126. See Carol Nicole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 598 (2010) (“[I]f the squatter meets the elements of adverse possession for the statutory period, title may be transferred; a squatter is transformed into an owner.”).

127. *Id.* at 592.

128. See Cherek, *supra* note 21, at 277 (“[T]he result of [a] successful adverse possession is . . . uncompensated transfer of ownership from the original owner to the unlawful possessor.”). But see *id.* at 320–21 (arguing that states making reforms to their adverse possession statutes should consider requiring adverse possession claimants to pay the owner the acquired real property’s value and/or to reimburse the property’s original owner for expenses such as property taxes paid during the statutory period).

129. See Richardson, *supra* note 13, at 1392.

statutory period should be shortened, so that adverse possessors do not have to wait years before quieting title in their names.<sup>130</sup>

Of course, there are some downsides to rewarding property law-breakers. Incentivizing law-breaking could lead to the destabilization of property law norms that even community activists would like to keep in place.<sup>131</sup> For example, adherents to the “broken windows” theory of criminal behavior have hypothesized that law-breaking in one realm will quickly lead to law-breaking in other realms: if Occupiers break legal norms by illegally squatting in vacant houses, then others may feel empowered to break other legal norms, such as those prohibiting theft or violence.<sup>132</sup> The Occupy Our Homes activists seek to minimize crime and the negative impacts of abandoned homes in the neighborhoods they serve, and it would be a perverse result if their actions encouraged the types of law-breaking that the movement seeks to stymie.

That said, the doctrine of adverse possession provides a useful narrative for the Occupy Our Homes activists—it addresses their core mission, which is, in the case of abandoned, bank-owned homes, to use law-breaking to shift legal norms and remove some of the banks’ ownership rights from the banks’ bundle of sticks.

The question becomes, then, to whom should the banks’ rights be transferred? Many scholars seem to suggest (at least through their silence on the issue) that, upon the satisfaction of the relaxed requirements, title should transfer from banks to individual adverse possessors.<sup>133</sup> This Article posits that title should instead transfer to community groups, perhaps through the vehicle of a community land trust.

### B. *The Problems with Transferring to Individuals*

It might be tempting to think that simply allowing homeless individuals to take over vacant, bank-owned properties through a modified version of adverse possession (with a shorter statutory period or a weakened “actual possession” requirement, as Professor

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130. See *id.* at 1392, 1414 (citing Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 557 (2009); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 210 (2010); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 416 (2010)).

131. Edwards, *supra* note 80, at 474 (explaining the reliance on property norms to shape social relationships and define rights).

132. See Peñalver & Katyal, *supra* note 23, at 1150 (discussing the “broken windows” theory of criminal behavior and the potential for harmful feedback over time).

133. See sources cited *supra* note 23.

Richardson suggested)<sup>134</sup> would address both the problems of homelessness, crime, and property-devaluation that flow from leaving homes unoccupied; however, simply allowing individual squatters to gain title to homes through adverse possession is not a reasonable solution. It is attractive to be sure—it both punishes banks that fail to care for and market vacant properties while providing shelter to those who need it. That said, however, such a system does not address many of the root causes of homelessness, and it may over-incentivize squatting.<sup>135</sup> Additionally, it would fail to provide for sustained, affordable housing opportunities over time because once an individual gains title to a property via adverse possession, when he or she wishes to sell, such a sale will not be subject to any affordability restrictions.<sup>136</sup> Allowing the adverse possessor to simply sell the home to the highest bidder once he or she gains legal title to it defeats the movement’s purpose: providing housing for those who otherwise cannot afford it.

Perhaps most importantly, vesting title in individual occupiers does not guarantee that the long-term needs of the community are addressed. While Occupy Our Homes activists seem to do their best to assess and address community needs,<sup>137</sup> there is no real guarantee that Occupy Our Homes activists will respond to the desires and needs of members of the communities surrounding abandoned homes. Occupy Our Homes activists are not democratically elected, nor are they beholden to the community at large. Their primary goals include housing homeless individuals and wresting ownership rights from badly-behaving banks; long-term stewardship of community assets is not a mainstay of the activists’ vision.

### C. *The Community Land Trust Model*

Transferring some ownership rights directly to individuals in need presents a number of problems; transferring those “sticks” to a community group, such as a Community Land Trust responsible for the stewardship of those rights, however, would ensure that communities

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134. See Richardson, *supra* note 13, at 1392.

135. CITIZENS FOR ADEQUATE HOUSING, THE FACTS ON HOMELESSNESS AND HOUSING AFFORDABILITY (2015), <http://cahns.org/the-facts> (identifying four root causes of homelessness).

136. See Peñalver & Katyal, *supra* note 23, at 1167 (arguing that “[i]f legal reform is left to the individual actions of property outlaws, it is unlikely that the losses imposed on property owners will be fairly distributed”).

137. Occupy Our Homes activists often go door-to-door in neighborhoods to build support for their activities. See *supra* note 101.

harmed by banks' neglect of their foreclosed-upon properties would maximize the benefits of the Occupy Our Homes activists' activities.

Community Land Trusts are nonprofit organizations designed to ensure long-term housing affordability and community stewardship of land. Often, the boards of Community Land Trusts are democratically elected by residents of the surrounding neighborhoods and are responsive to that community.<sup>138</sup> Typically, Community Land Trusts acquire homes and then sever land ownership rights from home ownership rights.<sup>139</sup> Community Land Trusts then sell the homes, with affordability restrictions, to low or moderate-income individuals while maintaining ownership of the underlying property.<sup>140</sup>

Homeowners in Community Land Trust homes benefit from many of the traditional positive aspects of homeownership: opportunities to borrow against equity, ability to devise property in a will, and pride in ownership.<sup>141</sup> Upon resale, homeowners may reap some of the rewards of an uptick in the real estate market, but affordability restrictions require that the home be passed to another low or moderate-income individual.<sup>142</sup> At the same time, by separating the ownership of the land from ownership of the homes upon the land, Community Land Trusts are able to ensure that properties continue to benefit the surrounding communities over time.<sup>143</sup>

There is a history of activists pushing for ownership of abandoned homes to be transferred not to individuals, but instead to community groups. As discussed in Part II, one of the first Occupy Our Homes-type movements, which took place in Brooklyn in the 1980s,<sup>144</sup> eventually transitioned from a traditional protest movement to one that worked with the city to transfer some of the city's ownership rights to community organizations.<sup>145</sup> To ensure that rehabilitated

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138. See Stephen R. Miller, *Community Land Trusts: Why Now Is the Time to Integrate This Housing Activists' Tool into Local Government Affordable Housing Policies*, 23 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 349, 365 (2015); see also Deliah D. Lawrence, *Can Communities Effectively Fight Displacement Caused by Gentrification?*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 357, 369 (2002); Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 112 (2011).

139. See sources cited *supra* note 138.

140. See sources cited *supra* note 138. Typically, Community Land Trusts enter into long-term ground leases with homeowners, which lay out the obligations of the parties with respect to the land on which the home is situated. *Id.*

141. See sources cited *supra* note 138.

142. See sources cited *supra* note 138.

143. See sources cited *supra* note 138.

144. See *supra* Part II.B (describing the Brooklyn movement).

145. Note that the vacant homes were owned by the city, not the bank, in this example.

units remained in the low-income housing stock for the foreseeable future, the city transferred ownership of the properties to MHANY, the community organization that facilitated negotiations between “occupiers” and the City.<sup>146</sup> MHANY then followed the Community Land Trust model: it split the deeds for each unit, separating ownership of the homes from the land upon which the homes sit.<sup>147</sup> The deeds for the homes were provided to qualified individuals at an affordable price (and in exchange for additional sweat-equity<sup>148</sup>), while the deeds for the land remained with a community group.<sup>149</sup> To prevent new owners who had received their homes at reduced prices from getting a windfall at resale, the deeds for the homes were recorded with affordability restrictions: while owners could accumulate some equity in the home, if they wished to move, they would be forced to sell to another individual in need of an affordable unit.<sup>150</sup> Other than their deeds containing affordability restrictions and covering only the home (as opposed to the home plus the land under the home), individuals in the MHANY program benefitted from all other aspects of homeownership.<sup>151</sup> They could pass the home on to heirs, make improvements, and presumably borrow against the equity in their homes to, for example, send children to college or otherwise improve their families’ financial prospects.<sup>152</sup>

Most importantly, perhaps, the MHANY program distributed the “sticks” in the bundle in a rational manner. Individual occupiers were not unjustly enriched. At the same time, the City was pressed to take action with respect to its large stock of vacant homes. Because they are motivated by non-financial factors and are in the best position to represent and work with those living in proximity to

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146. See Hirsch & Wood, *supra* note 64, at 614–15.

147. See *id.* at 615.

148. Sweat equity “refer[s] to the hours of labor . . . homeowners dedicate to [improving] their homes.” *Sweat Equity*, HABITAT FOR HUMANITY, <http://www.habitatbroward.org/homeownership/sweat-equity> (last visited Dec. 1, 2015).

149. See Hirsch & Wood, *supra* note 64, at 615–16; see also Diamond, *supra* note 83, at 87–88, 105 (noting that the “critics of shared equity housing suggest that one of the major property sticks, the ability to increase one’s wealth from property appreciation, is lost (or at least impaired) to shared equity homebuyers,” and asserting that “[s]ince the two goals—preservation and wealth creation—cannot, in a world of finite resources, be maximized simultaneously, prioritizing one goal substantially negates the ability to achieve the other”).

150. See Hirsch & Wood, *supra* note 64, at 615.

151. *Id.* at 616.

152. *Id.* at 615.



abandoned, bank-owned properties, community groups may be the best stewards of abandoned properties.<sup>153</sup>

How would this process work? Like with adverse possession, if a bank fails to maintain a property for a defined statutory period—preferably shortened, and perhaps with a relaxed “notice” requirement, as advocated by other scholars<sup>154</sup>—community groups that demonstrate they are prepared to put the property to beneficial use could be allowed to file the equivalent of a quiet title claim, much like they could in the case of traditional adverse possession. Such a claim would divest all or some of the banks’ ownership rights and place them in the hands of a community group. The community groups could hold the property in a Community Land Trust, allowing individuals and families to build equity in a home while allowing the community to benefit from ownership of the underlying land.

Of course, our existing legal framework is “rightfully reluctant to incentivize disorder by loosening the punitive sanctions associated with property lawbreaking,”<sup>155</sup> or, in the case of adverse possession, by actually rewarding law-breaking. It *should* be hard to grab a “stick” from someone else’s bundle of property rights and add it to your own pile. Adverse possession is most appropriate and most supported by its underlying property rationales where a title owner is neglecting a property or where a property’s current use (or lack thereof) undermines community values.<sup>156</sup> Such is the case with the bank-owned, foreclosed homes in urban cores that Occupy Our Homes activists seek to possess and put to use for community-enhancing purposes.

The proposal described above, however, does not over-incentivize law breaking. The benefits of the law-breaking flow to the community as a whole, not to individuals who, unchecked by a community approach, could be incentivized towards unwanted

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153. See MADAR ET AL., *supra* note 10, at 11 (“Cognizant of the negative externalities vacant properties can impose, and motivated by non-financial factors, these [community groups] can directly address some of the most serious negative impacts [of abandoned homes] through maintenance, rehabilitation, resale to responsible owners, or demolition.”); see also Gupta, *supra* note 13, at 571 (arguing that the purchase of a house is not just a “transaction between borrower and lender, but rather . . . the entrance of [a] person into that community”).

154. See sources cited *supra* note 23.

155. Peñalver & Katyal, *supra* note 23, at 1145.

156. One attorney, working with Occupy Our Homes and the Anti-Eviction Campaign in Chicago, has argued that the legal justification for the home takeovers should not come from adverse possession, but rather, from a provision of the Illinois trespass statute that exempts someone from prosecution if he or she “beautifies” an abandoned and unoccupied property. Austen, *supra* note 8; 720 ILL. COMP. STAT. 5/21-3(d) (2013).

criminal behavior. Unlike broken windows, which, as the hypothesis goes, could lead to the breaking of other legal norms, the appropriation of property rights may contribute to order, in that community efforts to control crime could be more successful.<sup>157</sup> Occupy Our Homes activists often fix broken windows, both literally and metaphorically; in cities across the country, occupiers have repaired fences, replaced fixtures, mowed lawns, painted houses, and beautified neighborhoods.<sup>158</sup> Ultimately, by improving the abandoned homes' quality, the movement reduces the likelihood of crimes and other ills associated with vacant lots from occurring,<sup>159</sup> while also increasing the surrounding homes' values.<sup>160</sup>

Critics of the adverse possession doctrine, who would likely also be critics of the Occupy Our Homes activists, argue that, although the policy rationales for the doctrine of adverse possession may have been reasonable in post-feudal England and frontier America, such justifications are "at odds with the values held by modern society."<sup>161</sup> In her 2012 article, Florida Coastal Law School Professor Kristine Cherek argues that modern law "favors the preservation, not the development, of real property."<sup>162</sup> While it may be true that preservation of wilderness has gained traction as a policy issue, the subject of Professor Cherek's article (and this one) is vacant properties in urban cores. If left alone, such properties will not be conserved as green spaces; instead, they will continue to attract crime, lower property values for neighboring homes, and erode the fabric of communities. Although what is meant by "productive use" has changed over time (from productive agrarian use, to productive industrial use to, as is argued here, productive residential and community use), the principles that supported the adverse possession doctrine in nineteenth century America are equally relevant to the twenty-first century. Similarly, the principles that supported ACORN's and other groups' attempts to occupy abandoned homes in

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157. See Peñalver & Katyal, *supra* note 23, at 1152.

158. See, e.g., OCCUPY OUR HOMES, FRED SHRUM & OCCUPY DETROIT STAND UP TO WELLS FARGO (Feb. 15, 2012), <http://occupyourhomes.org/stories/2012/feb/15/fred-shrum-wells-fargo> (telling the story of a man who, with Occupy Our Homes' assistance, fought eviction after spending roughly \$20,000 to renovate his home).

159. See APGAR & DUDA, *supra* note 9, at 6; Han, *supra* note 32, at 315–16.

160. See *Mayor of Balt. v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 849 (2010); MADAR ET AL., *supra* note 10, at 5; Kelly, *supra* note 31, at 114; Super, *supra* note 11, at 1854.

161. Cherek, *supra* note 21, at 283.

162. *Id.* See generally, Brown & Williams, *supra* note 126 (arguing for abrogating the adverse possession doctrine).

the 1980s and 1990s have become even more relevant in the years since the beginning of the 2008 foreclosure crisis.<sup>163</sup>

#### CONCLUSION

Property law is one of the few areas of legal doctrine in which law-breakers have significant power to affect changes in legal norms. The Occupy Our Homes activists are leveraging that power to shift the distribution of ownership rights between banks and the communities in which banks operate. The results the activists seek—a re-energization of neighborhoods, a sustained commitment to affordability, and a lessening of the social ills that accompany abandoned homes—may only be accomplished if relevant legal doctrines are adjusted accordingly. Retooling the requirements of adverse possession is a step in the right direction. Placing post-adverse possession ownership rights not in the hands of individual activists, but instead in the hands of groups that are beholden to entire communities, would allow the activists the opportunity to more effectively combat the post-2008 glut of bank-owned, abandoned homes.

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163. Others may be concerned that the proposal described above would be subject to abuse. In her recent article advocating for changes in the possessory requirement in the adverse possession doctrine, Professor Sally Brown Richardson notes that abuse of the doctrine could be thwarted by limiting the applicability of a relaxed version of it to communities with a glut of abandoned homes. See Richardson, *supra* note 13, at 1385–86.