THE PROPERTIES OF INSTABILITY: MARKETS, PREDATION, RACIALIZED GEOGRAPHY, AND PROPERTY LAW

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A central, symbolic image supporting property ownership is the image of stability. This symbol motivates most because it allows for settled expectations, promotes investment, and fulfills a psychological need for predictability. Despite the symbolic image, property is home to principles that promote instability, albeit a stable instability. This Article considers an overlooked but fundamental issue: the recurring instability experienced by minority property owners in ownership of their homes. This is not an instability one might attribute solely to insufficient financial resources to retain ownership, but instead reflects an ongoing pattern, exemplified throughout the twentieth century, of purposeful involuntary divestment of land owned by members of racial minorities, particularly Black Americans. The subprime mortgage crisis, the most current manifestation of this involuntary land loss, can be attributed to property doctrine's policy embrace of markets and importation of contract principles such as the "freedom of contract." This embrace of markets and contracts ignores the reality that real estate markets are racially segregated, and due to the nature of those disparate markets, easily exploitable. The current racially concentrated subprime mortgage crisis has torn the stable property image apart by revealing longstanding truths: that fraud, exploitation, and desperation are not anomalous. These truths present a disquieting reality: that the persistent and enduring experience for minorities is instability. They also present an overlooked insight that there is a dark side of property ownership: that fraud, exploitation, and desperation are the bad that enables the good of property markets. Because this "bad" is both ubiquitous and geographically situated, it suggests that stability for some within the system of property ownership is provided at the expense of instability for others. This Article argues that we should begin to pay attention to an under-theorized stick in the bundle of property rights: "the right to keep."

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INTRODUCTION

[P]ossession [i]s protected against disturbance by fraud . . . .[1]

The more segregated that a community of color is, the more likely it is that homeowners . . . will face foreclosure because the lenders who peddled the most toxic loans targeted those communities.[2]

Race is a verb. Race is a dynamic.[3]

As of this writing, the nation is engulfed in a foreclosure crisis. Defaults on mortgage payments are resulting in thousands of actions to cut off equities of redemptions and evict people from their homes. The crisis of land loss that has followed the deflation of the housing price bubble has been stunning. This is certainly a period in history with many sobering lessons to dissect. Questions unthinkable just a few years ago, such as whether homeownership or rental housing represents the best land tenure arrangement, are on the table.[4] Before these thorny

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 207 (Little, Brown, & Co. 1909) (1881).

2. *Protecting the American Dream (Part II): Combating Predatory Lending under the Fair Housing Act: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 11 (2010) (statement of Thomas E. Perez, Assistant Att'y Gen., Civil Rights Division, Department of Justice).

3. Kendall Thomas, Dir. of the Ctr. for the Study of Law & Culture, Columbia Law Sch., Remarks at the Workshop on Property at the Association of American Law School Mid-Year Meeting (June 2010); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, DUKE L.J. 431(1990), *reprinted in* MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ W. CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 61 (1993) (citing Kendall Thomas, Comments at Frontiers of Legal Thought Conference, Duke Law School (Jan. 26, 1990)).

4. *E.g.*, Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 575-76 (2009); Arlo Chase, *Rethinking the Homeownership Society: Rental Stability Alternative*, 18 J.L. & POL'Y

questions can be answered, a fundamental question has been overlooked: why did the foreclosure crisis begin in a racialized way, and why was the legal system at such a loss to do anything to avert the crisis? The conventional understanding is that banks made loans to people to buy homes they could not afford.[5] It is also commonly assumed, but without real comprehension, that members of racial minorities were grossly overrepresented as holders of these defaulted loans.[6] But this inchoate account, without further exploration of the statistical reality, simply leaves the impression that members of racial minorities were more foolish than anyone else and responsible for their own plight. The raising of race and the silence around an explanation leaves racial presumptions to fill in the gap.[7]

But scratch the surface and the details behind the statistics reveal a different story from the one that is commonly told about foreclosure from defaults on the underlying toxic subprime loans. Most striking is a seemingly unprecedented level of exploitative, predatory conduct on the part of lenders, brokers, and thieves posing as mortgage borrowers. Also striking was the important role that the physical, spatial location in racially segregated neighborhoods played in the concentration and effectiveness of predatory behavior.[8] These are places that most tacitly and sometimes explicitly agreed to avoid; places that have been racialized Black, and either literally or figuratively classified as poor and undesirable. These are places where default and foreclosure are so normal that the recent mortgage foreclosure crisis has been considered noteworthy for moving beyond "the usual places."[9]

61, 62 (2009); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1096 (2009).

5. *See infra* note 218 and accompanying text.

6. *See infra* notes 219-24 and accompanying text.

7. *See* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 313 (1994) ("[T]he silence on race is filled with racial content as coded terms and images perform the *recitatif* of American life and law.").

8. Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 103-04 (2006) ("Subprime lending is geographically concentrated in the same minority neighborhoods once denied access to banks and excluded from federal homeownership programs because of their racial composition.").

9. It is because the "inner city" has been understood to be the usual place for foreclosures that the recent expansion of foreclosures to the suburbs is considered newsworthy. *See, e.g.*, Kara McGuire, *Late Mortgage Payments Rise in February: Minnesota's Foreclosure Crisis Continues and May Be Shifting to the Suburbs*, STAR TRIB. (Minneapolis-St. Paul), Apr. 8, 2010, at 2D; Thomas Ott & Michael O'Malley, *Housing Downturn Hits Suburbs Just as Hard: Foreclosures Jump Outside Cleveland*, PLAIN DEALER (Cleveland), Aug. 24, 2007, at A1.

It appears, therefore, that the place where the subprime mortgage crisis began presents a reality that defies every image or expectation of stability that we have for property ownership. The high rates of defaulting high-interest, structurally destructive subprime loans disproportionately held by Blacks and Latinos[10] present a troubling reality of involuntary divestment of ownership. Yet, the subprime crisis is merely one of a long and striking list of episodes of involuntary divestment from ownership of minority property owners. The instability of ownership is not unprecedented. Instead, a pattern of exploitation, predation, and minority foreclosure or eviction crises extends as far back as the post-slavery origins of sharecropping in the South.[11] This

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10. *See, e.g.*, Nicole Lutes Fuentes, Comment, *Defrauding the American Dream: Predatory Lending in Latino Communities and Reform of California's Lending Law*, 97 CALIF. L. REV. 1279, 1280–81 (2009) ("Spanish speakers were among the most victimized by predatory lenders because they were often misled about the terms of the loan."); Cecil J. Hunt, II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 213 (2003) ("The recent explosive growth in the predatory subprime market has 'created a crisis of epidemic proportions for communities of color, elderly homeowners, and low-income neighborhoods [because of] the plague of predatory mortgage lending.'" (quoting *Predatory Mortgage Lending: The Problem, Impact, and Responses: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107 Cong. 404 (2001) (statement of Mike Shea, Executive Director, ACORN Housing))); Richard Marsico & Jane Yoo, *Racial Disparities in Subprime Home Mortgage Lending in New York City: Meaning and Implications*, 53 N.Y.L. SCH. L. REV. 1011, 1016–17 (2008–09) ("Overall, African-Americans, Latinos, and residents of predominantly minority neighborhoods [in New York City] were much more likely to receive subprime home purchase loans than whites and residents of predominantly white neighborhoods. Slightly more than half of all home purchase loans to African-Americans (50.5%) were subprime. Only 10.7% of all home purchase loans to whites were subprime. African-Americans were 4.7 times more likely than whites to receive subprime loans. Nearly 37% of all home purchase loans to Latinos were subprime loans. . .. Latinos were over three times more likely than whites to receive subprime loans. . .. Residents of predominantly minority neighborhoods were 5.8 times more likely than residents of predominantly white neighborhoods to receive subprime home purchase loans.").

11. Sharecropping was a farming arrangement where Blacks carried out all steps of ownership yet remained tenant farmers living under a crushing and largely inescapable debt peonage. *See* discussion *infra* Part II.D.1.a. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991) (explaining that the conditions were so bad in the South, including sharecropping, that it led to the great migration by Blacks from South to North in the early twentieth century); ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 54 (2010) ("The Negro farm hand[] . . .gets for his compensation hardly more than the mule he plows, that is, his board and shelter. Some mules fare better than Negroes." (internal quotation marks omitted)).

pattern suggests an alternate reality of property ownership: a reality of recurring instability.[12]

From era to era, an ongoing cottage industry of exploitation has persisted where predatory entrepreneurs set up colorably legal operations to exploit weaknesses, subvert well-intentioned programs, and create an alternative universe of a market that destroys its participants. This universe includes people who range from the innocent, ill-informed, overly trusting, educated-but-tricked, to the defrauded or the victims of outright theft through forgery. Consequently, the stability that undergirds property and is prized by all is unavailable to many. The resulting persistent instability experienced by Blacks and Latinos during the subprime crisis, but particularly by Blacks over time, signals a need to view this issue through a lens of recurring exploitation that is likely endemic to contractual relations. And, just as this instability is spatially located in places identified by race and class, it is structurally located within property doctrine. As property doctrine has evolved away from old common law forms of action,[13] from very limited interpretations of rights and obligations of seller to buyer,[14] landlord to tenant,[15] and neighbor to neighbor,[16] the doctrine has consistently incorporated contractual terms and standards to facilitate alienation and support markets for real estate.[17]

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12. MONIQUE W. MORRIS, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, DISCRIMINATION AND MORTGAGE LENDING IN AMERICA: A SUMMARY OF THE DISPARATE IMPACT OF SUBPRIME MORTGAGE LENDING ON AFRICAN AMERICANS 2–3 (2009) ("Nationwide, African Americans are homeowners at a rate of 47.2 percent, compared to 75.2 percent for . . .non-Hispanic white[s]. However, this rate declined by nearly two percentage points between 2004 and 2007, as many African American homeowners have been unable to keep their homes during the mortgage crisis, largely as a result of predatory lending. . .. [A] recent study by Freddie Mac reveals that one in five subprime loan recipients *could have* received a lower-cost prime loan." (footnotes omitted)).

13. *See, e.g.*, William H. Lloyd, *Pleading*, 71 U. PA. L. REV. 26, 26–36 (1922–23) (discussing common law pleading); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 109–14 (2009) (briefly discussing history of U.S. pleading).

14. *E.g.*, *Laidlaw v. Organ*, 15 U.S. 178 (1817) (adopting caveat emptor); 27A AM. JUR. 2D *Equitable Conversion* § 1 (2011) (discussing equitable conversion).

15. *See, e.g.*, Frank F. Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENV. L.J. 387, 387 (1967) ("In the early development of cases concerning real property leases, the courts applied the strict limitations of property law and determined that no implied covenants regarding fitness of the premises for a purpose or habitation existed in a lease.").

16. *See, e.g.*, *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

17. In the landlord-tenant context, the contractual terms were instituted to fulfill substantive principles of fairness or good behavior. The landlord-tenant standards are the high watermark for incorporating business standards with a hand on the scale towards eliminating the structural bias in property doctrine for the landlord and evening

This Article proposes an inquiry into the instability of property ownership, in particular the interaction of pervasive predatory real estate arrangements with property doctrine's unquestioned policy decision to facilitate property markets by promoting alienation.[18] While property's move to reject "restraints on alienation"[19] and away from dead-hand control of land has been beneficial, there has been an unacknowledged cost from inadequate protections against predatory behavior that are directed persistently against Black property owners. By providing endless opportunities for fragmentation of ownership by virtue of financing and the multiplicity of loan terms,[20] recording act presumptions in favor of purchasers over owners[21] (thus, in effect, accepting that a certain amount of fraud is inevitable), and formalism in the common law that ignores the exploitative substance of certain real estate transactions, property doctrine not only facilitates markets but also facilitates exploitation. In particular, these presumptions and policy goals ignore the embeddedness of racism, classism, and predatory behavior in bargaining. In order to rebut this predatory behavior, we need to theorize a more precise and robust notion of an under-theorized stick in the metaphorical bundle of property rights: the right to be free from expropriation.[22] Building on the existing but underdeveloped recognition of this stick allows us to consider when and where and under what circumstances a property owner should have a protected "right to keep" their land. This is important in light of the importation of contract and market principles to better meet the needs of all types of property owners by creating protections within the currently accepted preset categories that resist and neutralize the effects of predatory

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the playing field. Nonetheless, those insights are largely confined to landlord and tenant, and some would argue do not go far enough. *See generally* David Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011).

18. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 554–55 (2001) (suggesting that the rule against restraints on alienation serves a democratic political purpose of "[s]ubjecting wealth concentrated in the hands of dynastic families to market pressures [thus] promot[ing] democratic ends").

19. *See infra* Part I.B.3.

20. *See infra* Part I.B.2.

21. *See infra* Part I.B.4.

22. Joseph Singer notes, "[p]roperty owners have the right not to have their property taken or damaged by others against their will." JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES xlv (5th ed. 2010); *see also* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1451 (1996) [hereinafter *Public Accommodations*] ("[T]he right of all persons to contract and to acquire property entitles members of the public to enter the market on an equal basis.").

behavior and recognize the special place of home to a poor or working-class person.[23]

In Part I, I discuss the stability paradigm and the lessons it provides about our common ideals for property. In Part II, I discuss the reality of instability and the lessons we learn from the patterns of land loss and methods of divestment. In Part III, I discuss how property doctrine's incorporation of market logic and a policy presumption in favor of alienation also facilitates instability. I conclude by arguing that in order to vindicate stability's promise, we must acknowledge this inherent contradiction, hold our common law understandings to higher standards, and put substantive teeth into anti-fraud provisions to protect the integrity and availability of property ownership for all.

I. STABILITY IN PROPERTY LAW

A. The Stability Paradigm in Property

In its most general sense, the meaning of property ownership arises from the relation of an individual to a perceived thing, and the virtue and significance of property is the control it affords over resources.[24] The concept of stability plays a powerful role in how we experience that control—how we define its parameters and deploy legal protection for the boundaries of what we understand property ownership to be. Though there is an extensive and robust debate over what property is—whether it is best conceived as an absolute, inviolable thing;[25] a thing distinguishable by whether it is personal or fungible;[26] a thing of natural law,[27] social relations,[28] status,[29] political institution,[30]

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23. *See* BELL HOOKS, YEARNING: RACE, GENDER AND CULTURAL POLITICS 42 (1990) ("Despite the brutal reality of racial apartheid, of domination, one's homeplace was the one site where one could freely confront the issue of humanization, where one could resist. Black women resisted by making homes where all black people could strive to be subjects, not objects, where we could be affirmed in our minds and hearts despite poverty, hardship, and deprivation, where we could restore to ourselves the dignity denied to us on the outside in the public world."). *But see* Tanya D. Marsh, *Sometimes Blackacre Is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 NEB. L. REV. 635 (2010).

24. *See* Carol M. Rose, *The Shadow of* The Cathedral, 106 YALE L.J. 2175, 2187–88, 2198 (1997).

25. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140–41 (Wayne Morrison ed., Cavendish Publishing Ltd. 2001) (1793).

26. MARGARET JANE RADIN, REINTERPRETING PROPERTY 53–55 (1993).

27. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–95 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690) (describing state of nature); *id.* at 303–20 (describing labor's role in creating property rights).

or intergenerational conflict;[31] or whether the sticks-in-the-bundle metaphor for defining property is the best[32] or the worst thing that ever happened to property[33]—there is little debate that the underlying purpose and goal of property law is to promote and support stability.[34] Stability clearly signifies an easily supportable and desirable principle, yet the concept has rarely been explored in depth. Particularly in light

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28. Joseph William Singer, *Property and Social Relations*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 8-11 (Charles Geisler & Gail Daneker eds., 2000); *see* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 774 (2009) ("[A]n owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing."); Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139 *passim* (2008).

29. *See generally* Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

30. *See generally* Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987 (2008). Under this conception, public institutions are the best allocators of property, not private actors. *Id.* at 1991.

31. Gerald Korngold, *Resolving The Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525 (2007).

32. *See, e.g.*, BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928) (acknowledging a bundle of rights that can be assembled into particular arrangements of correlative rights); WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING 10-14 (Walter Wheeler Cook ed., Greenwood Press 1978) (jural relations as precursor to bundle-of-rights metaphor); K. N. Llewellyn, *Through Title to Contract and a Bit Beyond,* 15 N.Y.U. L.Q. REV. 159 (1938).

33. *See* Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 307 (1994) ("The enlightened realists killed title by shattering it. Shattered property was disaggregated into a bundle of sticks.").

34. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 15-16 (1928) (arguing that protecting possession promotes "human economy" by "mak[ing] for certainty and security of transaction as well as for public peace"); Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2097 (1997) (arguing that property rules are intrinsic to support "stability of possession . . .recognized as one of the dominant rules of society."); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 63-64, 66-67 (2000) (identifying the common law's recognition of a limited number of types of real property as tending to promote stability and arguing that the cost and expense of legislative changes to those rules also promote stability by minimizing the frequency of changes and avoiding the common law's piecemeal approach); Rose, *supra* note 24, at 2187-88, 2197-98 (noting the purpose of a system of property ownership is to promote "individual investment, planning, and effort" and to encourage parties to learn to bargain with each other).

of the current foreclosure crisis and its racialized dimensions, it is worth considering what exactly stability means and why it is and should be valued.[35]

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35. This question reflects the debate over what is property. The debate over what property means or should mean is an ongoing one, both in academic literature as well as in the implicit conflicting assumptions animating legal disputes over competing claims to property. *See, e.g.*, BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 15–25 (1998); Grey, *supra* note 33, at 69. Thus the ownership and title concept has been nearly successfully challenged by the "sticks in the bundle" metaphor. Examples of cases using the term "sticks in the bundle" include: *United States v. Craft*, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("To borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." (citation omitted)); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."); *Severance v. Patterson*, 566 F.3d 490, 512 (5th Cir. 2009) ("It is the Fifth Amendment, then . . .that ensures that the State must respect private property by curtailing the purpose for which the State may take (be it title, physical possession, or some crucial stick from the bundle of property rights), and requiring that when the State does take, it pay for the privilege."); *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1376 (Fed. Cir. 2004) ("We determine whether an asserted right is one of the rights in the bundle of sticks of property rights that inheres in a *res* by looking to 'existing rules or understandings' and 'background principles' derived from an independent source such as state, federal, or common law." (quoting *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1030 (1992))); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) ("When viewed in the context of Plaintiffs' entire bundle of property rights (rather than solely on their assumed right to hunt), Section 3 does not effect a destruction of all beneficial use of Plaintiffs' 'parcel as a whole' because Plaintiffs still can 'use their property for ranching, farming, and other livestock operations.'" (quoting *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 852 n.14 (D. Wyo. 1994))); *AMCO Ins. Co. v. Lauren-Spencer, Inc.*, 500 F. Supp. 2d 721, 728 (S.D. Ohio 2007) ("As the Lauren-Spencer Defendants correctly point out, Harris' property rights are a bundle of rights and include the right to preclude others from advertising his images (even if misappropriated)."); *In re Las Torres Dev., L.L.C.*, 408 B.R. 876, 887 (Bankr. S.D. Tex. 2009) ("This is especially true where, as here, the Debtor is still in possession of the Rents because bare possession, alone, constitutes one stick in the bundle of sticks that comprise property rights."); *In re Jackson*, No. 05-64536, 2006 WL 3064087, at *3 (Bankr. N.D. Ohio Oct. 23, 2006) ("This argument, however, confuses two twigs in the 'bundle of sticks' that comprise property rights. Ownership and security interests are separate components, although they frequently overlap or intertwine."); *Hansen v. United States*, 65 Fed. Cl. 76, 100 (2005) ("Courts often turned to tort concepts to define the scope of property rights that comprise the bundle of sticks. In a sense, the law of property and tort are oft intertwined. Courts rely on the tort of trespass to establish one of the 'sticks' in an owner's bundle—the right to exclude."); *Heath v. Parker*, 30 P.3d 746, 750 (Colo. App. 2000) ("To the contrary,

In its most literal sense, stability could be interpreted to be fulfilled only when property is non-transferable; that is, in an absolutely stable system, property would never leave the hands of the current owner.[36] Thus, in the old English common law tradition, the vision for stability of ownership was vindicated by securing familial wealth through protection, almost exclusively, of intergenerational transfer.[37] The practice of primogeniture and entailment were two old common law devices that certainly secured stability, albeit in ways with significant costs.[38] Today, absolute stability has long been rejected because it leads to family dynasties. Instead, property utilizes an intermediate approach—qualified stability, which (1) seeks to satisfy the desire for access to acquiring property through property markets and (2) assumes that the "owner" holds the property as long as he or she desires.[39] These features of property ownership provide a psychologically and materially steadying feeling of guaranteed protection against change.[40] This stability of expectations around property ownership is considered the foundation of the operation of a democracy; it reflects underlying

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however, reasonable surface use, including access, is part of the 'bundle of sticks' of mineral claim property rights, including unpatented claims."); *Mitchell Aero, Inc. v. City of Milwaukee*, 42 Wis. 2d 656, 662, 168 N.W.2d 183 (1969) ("Ownership is often referred to in legal philosophy as a bundle of sticks or rights and one or more of the sticks may be separated from the bundle and the bundle will still be considered ownership. . .. In this case for exemption one needs more than the title stick to constitute ownership.").

36. *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 300 (1991) ("Property—land—needed to be unencumbered to avoid privilege and inequality, but it also had to be stable—that is, non-transferable—to avoid being reduced to a mere commodity, the object of acquisitive pursuit that would destroy republican virtue.").

37. *See id.* at 296 (comparing the ability to maintain family dynasties in America and England).

38. *Id.* at 297–99 (describing the antipathy and rejection of these devices in early American political thought even though their use and effect was not widespread as it was in England).

39. Epstein, *supra* note 34, at 2097 ("Thus, transactions take place only if both sides agree to them, which means that all individuals keep their holdings until they agree to part with them."); Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 190 (2005) ("Americans think of buying a home as a way to build stability—one that provides . . .a guaranteed place to live for years to come (as long as the mortgage payments are met) . . ..").

40. *See* John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463 (2006).

principles of equality in the ability to acquire, use, enjoy, and exercise the decision to alienate.[41]

1. THE COMPONENTS OF STABILITY: PREDICTABILITY AND CERTAINTY

a. Value

Abraham Bell and Gideon Parchomovsky argue that a central value of a system of property ownership is the goal of stability because "the central feature of property—[is] its function as a device for capturing and retaining certain kinds of value . . . ."[42] This consequentialist argument is consistent with most justifications for property: the justifications are neither intrinsically moral nor inherent but are pragmatically instrumental, measured by the contribution to social utility.[43] This seems somewhat odd, since the fierceness and passion that surrounds property ownership suggests more of an intrinsic moral foundation than mere consequentialist justification.[44] While instrumental definitions are less morally satisfying,[45] according to Emily Sherwin:

> the . . .many well-known justifications for legal protection of private property rights . . .can be divided roughly into right-based theories, in which property rights rest directly on the moral rights of individual owners, and instrumental theories,

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41. *See* Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 911-13 (1993) (explaining property rights' functional value in terms of promoting stability of expectations and thus incentivizing development of resources).

42. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV 531, 536 (2005).

43. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007). *But see* Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927, 1936, 1939, 1943-44 (2007) (identifying some limits of the morality of property as being the determinacy of rules causing them to sometimes diverge from their underlying moral purpose, the problem of rules taking on a moral life of their own over time; ideals of justice—retributive, corrective and distributive—working at cross-purposes).

44. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 55, 172, 175 (2d ed. 1998) (arguing in favor of intrinsic deontological justifications as superior to consequentialist justifications).

45. Though property rights raise strong feelings and a sense of intrinsic morality, see Merrill & Smith, *supra* note 43, at 1856 ("Some work by modern cognitive scientists suggests that gross violations of property rights trigger reactions in parts of the brain devoted to automatic emotions . . . ."), the justifications for property rights are largely instrumental.

> in which property rights are justified by their good consequences.[46]

As a practical matter, it may be difficult to extend intrinsic, moral justifications to property in general. It is likely that moral justifications are easier in some contexts than in others. Sherwin suggests that, while moral justifications for property within the human body are easily connected to intrinsic endowments arising from being a human being, our general understandings of property seem to make most sense when conceived of as being based on social relationships.[47] Thus, it is practical to consider stability of property ownership as being comprised of internally overlapping key features: stability of values stems from predictability of relationships between people. Accordingly, Bell and Parchomovsky's explanation of stability is relational: "[p]roperty law both recognizes and helps create stable relationships between persons and assets, allowing owners to extract utility that is otherwise unavailable."[48] Though it perhaps sounds a bit circular, in a sense, social utility and thus social welfare are promoted because individuals find them, for lack of a better term, individually and interpersonally useful.

b. Retention of possession

Perhaps the key component of the utility of stability's predictability, however, is the ability to retain ownership as long as the property owner desires. For example, it is recognized that: "[L]egal enforcement of property rights should increase the property owner's probability of retaining possession of her property . . . . The heightened protection effected by legal enforcement makes it less likely that current owners would involuntarily lose their assets."[49]

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46. Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1080 (1997).

47. *Id.* at 1086 ("[W]ithout a preestablished [sic] legal connection between person and thing, relations between people in regard to things dissolve into questions of what is best in each case.").

48. Bell & Parchomovsky, *supra* note 42, at 537–38 (footnote omitted) ("[V]alue is synonymous with utility or welfare as used in the field of welfare economics.").

49. *Id.* at 555; *see also id.* at 562 & n.164 (citing works that empirically support the view "that long-term economic growth is intimately tied with the creation and defense of stable property rights," including, Hernando de Soto, *Preface* to THE LAW AND ECONOMICS OF DEVELOPMENT, at xiii (Edgardo Buscaglia et al. eds., 1997) ("Those nations that have succeeded in developing a market-oriented economy are not coincidentally those that have recognized the need for and secured widespread property rights protected by just law.")); Paul G. Mahoney, *The Common Law and Economic*

In other words, ownership explicitly promises or suggests a right not to be unwarrantedly dispossessed.[50] Typically our notion of unwarranted dispossession is based on certain underlying assumptions. First, we assume that dispossession is a rare thing; second, that the threat of dispossession comes from a stranger with no relationship or colorable claim to the property; and third, dispossession will only take place when justified based on a legitimate claim. The current wave of foreclosures challenges traditional notions of the types of dispossession that are warranted. Particularly, with destruction of entire neighborhoods in some cities from foreclosures,[51] the quantity calls for attention to the factors that contribute to interfering with one's ability to retain possession of one's property.

c. Development

Law and development theorists echo the importance and value of stability in the international development context. These theorists posit that stable property ownership is the predicate, and the first step, to promoting market-based economic growth and development.[52] The United States is lauded for its stable system of property rights that has

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Growth: Hayek Might Be Right, 30 J. LEGAL STUD. 503, 523 (2001) ("The . . .results . . .suggest that the strong association between secure property and contract rights and growth is causal, and not simply a consequence of simultaneity."); Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV., Nov. 2002, at 22 ("The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest in economic growth where property rights are stable . . .."); Dani Rodrick, *Institutions for High-Quality Growth: What They Are and How to Acquire Them* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 7540, 2000) ("[E]stablishment of secure and stable property rights [was] a key element in the rise of the West and the onset of modern economic growth.").

50. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 871 (1979).

51. *See* Bob Paynter, *Quick Resales Heat Housing Market*, PLAIN DEALER (Cleveland), Aug. 27, 2000, at 1A (describing the impact of foreclosures on neighborhoods in Cleveland, Ohio).

52. *See, e.g.*, Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 569 (1991) ("Within the context of Eastern Europe, property and economic protections are critical to the ability to turn nations and economies around from central planning to private ordering. The key elements are stability and permanence of the property rights structure."); Christopher T. Ruder, Comment, *Individual Economic Rights under the New Russian Constitution: A Practical Framework For Competitive Capitalism or Mere Theoretical Exercise?*, 39 ST. LOUIS U. L.J. 1429, 1444 (1995) ("The . . .goal of many Eastern European countries . . .[is] to establish a constitutional system that is amenable to the development of competitive capitalism. The foundation of such a constitutional system rests on two broad objectives: the creation of stable and permanent property rights (which implicates the protection of other economic rights) . . .." (footnote omitted)).

made it an attractive site for investment. The aspect of the U.S. system that these theorists likely hope to replicate elsewhere is the seeming general truth that expectations are settled and that neither the government nor other individuals generally appropriates without paying compensation.[53] Also, transfers between individuals largely take part through arms-length transactions that are initiated and consummated with regularity and certainty.[54] Thus, the central value and assumption of stability in any country desiring investment is that if an "owner" is unlawfully dispossessed, the system will, in theory at least, reinstate you.[55] Accordingly, stability of property rights and contract rights are necessary to support the market economy and encourage people to make investments.[56]

d. Identity

But is there more to stability than its utility for market-based economic growth? According to Margeret Radin's most well-known insights about property, stability has a more profound meaning.[57] Her insights teach us that the stability heralded in property doctrine is about how we constitute ourselves and maintain our identity by holding onto those things that we value. Radin's work demonstrates that the instrumental concept that the purpose of stability in social utility is unduly narrow and limited. It does not reflect the true nature of human

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53. *See* DOUGLAS W. ARNER, FINANCIAL STABILITY, ECONOMIC GROWTH, AND THE ROLE OF LAW 48–50 (2007) (noting that financial markets flourish "in countries where legal systems enforce property rights, support private contractual arrangements, and protect the legal rights of investors").

54. *But see* Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59, 76–78 (2007) (arguing that this standardized system of exchange does not work efficiently in the case of homeownership for the poor); Carmen G. Gonzalez, *Squatters, Pirates, and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis?*, 40 U. MIAMI INTER-AM. L. REV. 239, 247–51 (2008) (critiquing misplaced assumptions about the curative effects of formal property rights and market-based prescriptions, advanced by proponents like Hernando de Soto, as exacerbating the crisis of affordable housing in Latin America).

55. *See* Bell & Parchomovsky, *supra* note 42, at 588–90 (discussing enforcement of property rights); *see also* Colin Moynihan, *Long Fight to Reclaim House Stolen in Wave of Pen*, N.Y. TIMES, Jan. 17, 2011, at A17 (describing difficulty and expense of unraveling deed theft and other mortgage fraud schemes).

56. Gregory Scott Crespi, *Exploring the Complicationist Gambit: An Austrian Approach to the Economic Analysis of Law*, 73 NOTRE DAME L. REV. 315, 336 (1997); Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 557 (2009).

57. *See generally* RADIN, *supra* note 26.

attachment to objects and land, and it places value that is significant even though it is not acknowledged in market valuations. This is consistent with the layperson's perspective of why property stability is important. Not only do ordinary people want the property and need to be encouraged to invest, they also want to be sure upon inheritance or gift that the property will still be theirs. The stability of that ownership will be the basis of every other aspect of decision-making and living in the person's life. As Radin's personality theory of property teaches us, the concept of "ownership" is a crucial aspect of how we constitute ourselves and our identity.[58]

e. Ownership and decision-making power

Debates over the proper theoretical understanding of property ownership take place largely in the background as the everyday business of landownership proceeds un-self-consciously, full of the noted contradiction and tension, both opaque and contested, yet clear as a beacon or symbol in the minds and hearts of ordinary people. Most "owners" perceive and experience a world of stable, predictable property ownership with access to all of the major and the minor sticks in the bundle.[59] They use, possess, and enjoy control over things and places, all with the ability to exclude others from entering the premises. A property owner also may alienate the property at will, either by leaving it to whomever he or she chooses by testamentary will or *inter vivos* transfer.[60] Most will sell to strangers in arms-lengths transactions guided by a real estate agent for most of the process, with few choosing to use an attorney to handle closing the deal.[61] The terms and procedures are standardized, and the process seems largely predictable.[62]

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58. *Id.* at 1.

59. One of the earliest uses of this metaphor was by Benjamin N. Cardozo: "The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The [sticks] must be put together and rebound from time to time." CARDOZO, *supra* note 32, at 129.

60. *See generally* Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 263-64 (1995) (noting that the right of free alienation was the inadvertent result of a failed effort to preserve feudalism).

61. *See generally* Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241 (1997) (exploring the shifting roles of real estate brokers and attorneys in residential real estate transactions).

62. *Id.* at 247. Although the possibility for complications from unforeseen defects are numerous, these problems are usually out of sight and thus out of mind for the ordinary property seller and purchaser.

For ordinary people, property ownership is a combination of control over both access to material value, and as a result, constituting one's personal identity, personal sovereignty, and harbor in the storm.[63] The fundamental underlying expectation is that in a shifting world of uncertainty or certain change there are some things that are fixed and unshakable.[64] Thus, the source of the stability image that property enjoys arises from people's expectations and represents a vision of individual sovereignty. These are rights that are fixed, unchangeable, and almost arising preternaturally out of natural law. The stability image also is the basis for the illusion of ownership—a collective illusion in which we all participate—that you have control, that you should be left alone in your right to claim an object or a thing as something that you alone control, and you will decide when to transfer the property holding on for as long or as short as you like.

2. STABILITY'S UNEASY RELATIONSHIP WITH THE DYNAMIC OF CHANGE

Margaret Radin's work contains another important insight about stability, different yet equally profound, that allows us to peer more closely at the contradictions within the concept. In particular, how does the stability concept incorporate the value of "change," which seems a necessary silent partner in a market-based economy? How is the ability to change ownership readily incorporated without disrupting stability's reputation as the dominant image of property? According to Radin, property works in tandem with "freedom of contract" to promote the ability to change: "'property' is the classical liberal instantiation of the need for stability of contexts, and 'freedom of contract' is the classical liberal instantiation of the need for context-flexibility. The mythology of property expresses rootedness, and the mythology of contract expresses mutability."[65] Thus, Radin makes clear that stability in property ownership is a means to the end of ourselves and our perceptions about reality, which property says can be fixed for as long as we like but which contract allows us to also make willfully mutable.

Also recognizing the concept of change in relation to property ownership, Gregory Alexander observes that early American republican

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63. *See generally* CLARE COOPER MARCUS, HOUSE AS A MIRROR OF SELF: EXPLORING THE DEEPER MEANING OF HOME 3–4, 107 (1995) (exploring how the self-image is reflected in our homes); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (positing that individuals achieve proper self-development through property rights).

64. *See* Merrill & Smith, *supra* note 34, at 66 ("Stability and change represent well-known tradeoffs in any legal system, and a system that scores high on stability is likely for that very reason to be slow to change.").

65. RADIN, *supra* note 26, at 24.

theorists were quite conscious of a tension between the principle of stability (i.e., non-transferability) and the need for a certain dynamism in property (i.e., that some transfer was necessary).[66] Today, we take that dynamism, by virtue of the principle of free alienation, for granted. Yet the concern for stability exists alongside this need for dynamism with the recognition that it is not an absolute, strict principle or value. Instead, the quest for stability has shifted to a more symbolic meaning that relates to expectations, an overall sense of wellbeing, stable property values, and predictability. The understanding is that literal, absolute stability promotes a static condition that is ultimately unproductive and destructive of society. According to Alexander, there is an inherent "dialectic of stability and change in property" that continues to this day as "how to regulate land ownership to avoid both hierarchy and over-commercialization . . . ."[67] Thus, in the transition from the pre-modern to the modern, from cultural connectedness to property, through concerns of what one generation owed the next, to property as a pure commodity, stability had a particular meaning and the dynamism of the market presented both opportunity and threat.[68]

> Stability represented adherence to shared traditions and a sense of one's place in the social order. Dynamism represented individual capacity to break free of stifling social conventions and entrenched hierarchies. Stability and dynamism, tradition and fluidity, embeddedness and uniqueness: though differently articulated, these sets of antinomies reflect cultural anxiety that we can now see as linked together.[69]

The internal tension within property, therefore, arises from the conceptual and relational tug between the reality of property as a non-fungible important thing and property as an exchangeable commodity.[70]

While alienation is widely considered to promote individual freedom and the creation of wealth,[71] it is well noted that "the free-transferability policy . . . . [presents an under-considered] social dilemma that commodifying all assets in the name of freedom of the

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66. Alexander, *supra* note 36, at 300.

67. *Id.* at 316.

68. *Id.* at 278.

69. *Id.* at 277.

70. *Id.* at 277-78.

71. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of* The Cathedral, 85 HARV. L. REV. 1089, 1111-15 (1972); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971-72 (1985).

market creates the risk of social exploitation within market relations."[72] C.B. Macpherson called this faith in the market and the belief in its absolute desirability "possessive individualism."[73] Under this notion, the only function of property is based on a concept of it as belonging to the private realm and a protection against the tyranny of the public interest, community, or government. According to Macpherson, the culture of possessive individualism plays a nearly invisible ideological role of obscuring the role and naturalizing the impact of markets on individuals.[74] Thus, what has been lost in modern property doctrine is any recognition or understanding that the dynamism of alienation also is the dynamism of instability. This instability is tacitly acknowledged, but inadequately so. Instability is ultimately unproductive for some because of the inherent opportunity and human taste for exploitation. Without open acknowledgment and management, this instability tends to destroy the same recurring groups of people in society: those who are poor in financial means or transactional sophistication and lack accepted in-group membership (e.g., some members of racial minorities).[75]

Because the policy of free alienation permeates modern property doctrine,[76] transactions—not family or personal relationships—are at the heart of modern property-doctrine policy. Nevertheless, a variety of accepted doctrines facilitate change within property law, which all combine to support the transactional vision at the heart of property's embrace of markets. Not only does the "sticks in the bundle" metaphor[77] reflect and support this transactional vision of property, but also the doctrine against restraints on alienation frees property. It essentially limits a grantor's ability to strip away an owner's decision-

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72. Alexander, *supra* note 36, at 294 n.78.

73. *Id.* at 286 (quoting C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962) (arguing that the culture of possessive individualism plays a nearly invisible ideological role of obscuring the role and impact of markets on people)) (internal quotation marks omitted). *But see* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 8-9 (1963) (arguing that capitalism leads to political freedom).

74. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 266 (1962).

75. *See* Thomas W. Mitchell, Stephen Malpezzi, & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV. 589 (2010).

76. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970 (1997); Joan Williams, *Recovering the Full Complexity of Our Traditions: New Developments in Property Theory*, 46 J. LEGAL EDUC. 596, 598 (1996).

77. *See e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (recognizing the "bundle of sticks" metaphor).

making power to transfer property.[78] Additionally, the system of recording acts facilitates alienation and a particular vision of property markets by prioritizing the bona fide purchaser over a true owner, even when he or she may have been tricked or defrauded out of his or her home.[79] Ironically, this means that recording acts may in some instances protect some of our worst inclinations.[80]

B. Implementing Stability

As a practical matter, a stable system of property ownership is a system that everyone believes in, honors, and enforces. Because a fundamental predicate for a system of property is the widespread distribution of ownership,[81] there are underlying practices that are also part of implementing stability. In order to facilitate distribution, these practices relate to physical and conceptual division and allocation of those things intended to be property.

1. FRAGMENTATION

As a physical or spatial matter, the principle of widespread distribution is reflected in longstanding practices forming our system of land development, which involves subdivision of large estates into smaller parcels,[82] making ownership accessible to the ordinary person. Physical fragmentation is obviously necessary fodder for a system promoting alienation to fulfill the general goal of widespread ownership.

Also key to the system of ownership has been the conceptual fragmentation of ownership and the disaggregation of the aspects of such ownership. The well-known metaphor of the sticks in the bundle

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78. *See* ALEXANDER, *supra* note 76, at 288–89 (explaining development of the policy explicitly recognizing the "principle of freedom of owners to dispose of their property as they wished").

79. *See* John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91, 103–04 (2002).

80. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 585–90 (1988) (discussing recording acts representing unsuccessful efforts to make crystalline rules that were then muddied by the courts attempting to the adjust them for the realities of human imperfection).

81. *See* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 141 (2000) ("Widespread distribution of property is virtually a defining characteristic of private property systems—or at least the norms that justify such systems."). *See generally* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

82. *See, e.g.*, 83 AM. JUR. 2D *Zoning and Planning* § 423 (2011) (describing subdivision regulation).

of property rights is at once a problematic yet helpful way to conceive of and delineate aspects of basic concepts of ownership. [83] It is helpful because it articulates the specific aspect of possession that is at stake in any particular exchange or dispute.[84] The bundle-of-rights metaphor was introduced as a response to the traditional definition of ownership as sovereignty[85] and to instead allow us to better delineate the precise dimensions of what is protected by virtue of being "property." The sticks force us to crystallize what property is versus what it is not. As long as the structure of property doctrine is justified by an underlying promise of stability and likely predictability, people will continue to cling to the absolute sovereignty vision of property because the view represents a bulwark against the social relations that seem to dictate a disadvantageous pattern of allocating and distributing the stability throughout the system.

The metaphor can be problematic, however, because it disaggregates aspects of ownership to the point where anything and everything is a property right, and the infinite possibilities[86] mean the

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83. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 30 (1923); J.E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711 (1996).

84. I do not agree that the right to exclude is the most important stick in the bundle. Instead, the right to possess is most important. The right to exclude is a necessary negative corollary or aspect of possession. It cannot be the most important right, however, because without any others, one has very few rights—it cannot stand on its own. The most important aspects of ownership, then, are those that can stand on their own.

85. *See generally* David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009) (exploring the paradox of Blackstone being associated both with the sovereignty notion of property as well as the bundle of sticks metaphor).

86. A fee simple absolute entitles the owner to the three primary sticks: possession, alienation, and use and enjoyment. Jeanne L. Schroeder, *The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis*, *in* LAW AND THE POSTMODERN MIND 99, 106–09 (1998) (arguing that the only three sticks that matter in the bundle of sticks metaphor are possession, use, and alienation). Each stick in the bundle is independent and does not affect the remaining legally recognized interests. *See* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413, 1512 (1992). Boyle's view is designed to contrast with the supposedly classical view of "title."

> To the extent that there was a replacement for this Blackstonian conception it was the familiar 'bundle of rights' notion of modern property law, a vulgarization of Hohfeld's analytic scheme of jural correlates and opposites, loosely justified by a rough-and-ready utilitarianism and applied in widely varying ways to legal interest of every kind.

Id. at 1459. The validity of the bundle-of-sticks metaphor has been the source of a robust debate. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26–29, 97–100 (1977); Grey, *supra* note 33, at 76–79; Charles W. Mooney, Jr.,

sum of each naked stick can add up to being greater than the whole.[87] The notion also inaccurately suggests distinctness when the rights are all tied to each other and represent protection and support of different distinctly human interests.[88] This obscures the reality that the interrelated dimensions of ownership (i.e., rights) represent different contextual policy choices at different times. As the times change, the policy choices and concerns must change as well.[89] Little thought is given to how the policies of free alienation supported by property facilitate dispossession in light of the realities of modern systems of real estate finance, real estate ownership documentation, and the prevalence of predatory behavior.

Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries, 12 CARDOZO L. REV. 305 (1990); James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471 (1990); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980); *see also* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1687-88 (1988) (property should be understood in ways that further "human flourishing"); Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 241 (1993) (because property is socially constructed, it must be defined in ways that are good for people). Jeanne Schroeder argues that the bundle of sticks metaphor was meant to deny that property is a physical object, but by using a physical metaphor of sticks, its proponents merely disassemble the object into smaller objects. Schroeder, *supra* note 33, at 243. The result is that the metaphor expands property concerns to everything, which threatens to turn all governmental actions into takings. *Id.* at 243-44 ("Thanks to 'bundle of sticks' imagery, property threatens to permeate all legal relations, making all government actions into takings.").

87. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57-62 (1985) (arguing for distinct recognition of each aspect of property as a property right); Merrill & Smith, *supra* note 34, at 33-36, 63-64 (arguing that the standardization of property rights would act as a counterweight to contract's endless combinations of rights by providing preset recognized categories); Radin, *supra* note 86, at 1675-78 (arguing against conceptual severance).

88. *See* Schroeder, *supra* note 33, at 245-46 ("Human beings are driven by an erotic desire for mutual recognition. 'Property is . . .a moment in man's struggle for recognition.' . . .Only through the possession and enjoyment of objects does the abstract person become individualized and thereby recognizable as a subject." (footnotes omitted) (quoting SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 89 (1972))).

89. *See* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1404 (2009) ("[E]xplor[ing] inalienability rules as tools for achieving efficiency or other ends when applied to resources that society generally views as appropriate objects of market transactions.").

2. THE ELUSIVE FEE SIMPLE ABSOLUTE

Through centuries of adjustment and refinement from the feudal era to the industrial era[90] to the new service economy, the system of estates has evolved to have the fee simple absolute as the symbolic centerpiece of a system of land ownership with a limited number of additional predefined categories of ownership. Most noteworthy is the modernizing of the fee simple absolute to make it the default estate, supplanting the prior common law favorite, the life estate. The fee simple absolute estate is more consistent with our transactional reality and presumptive life estates for technical defects in formal language of conveyances would only muck up the otherwise seamlessly smooth system of transfer that exists. The basic rules of property teach that the owner has a fee simple absolute, unless the grantor explicitly dictates a lesser estate, using only special, legally cognizable, magic words.[91]

To own land and declare "I have a fee simple" communicates everything about what we want land ownership to be.[92] The estate promises that one owns everything for as long as the person wants. Because the fee simple absolute is property's crown jewel, it is responsible for some of our current expectations and thus dilemmas of property.

The reality is that few homeowners actually have a fee simple absolute. Acquiring a home is a three-way transaction among buyer,

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90. *See generally* Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 433–35 (2001) (recounting the early history of the joint tenancy as the default tenancy in case of ambiguity and the rise of the tenancy in common as a way to characterize a co-ownership arrangement that failed to meet the requirements of the default tenancy: joint tenancy); Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 REAL PROP. PROB. & TR. J. 507, 558 (2003) (noting the evolution of feudal law rejecting transfer by subinfeudation to transfer by substitution leading to "the establishment of 'a capitalist free market in the land'" (quoting NORMAN F. CANTOR, IN THE WAKE OF THE PLAGUE: THE BLACK DEATH AND THE WORLD IT MADE 69 (2001))).

91. SINGER, *supra* note 22, at 505–06.

92. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L. J. 357, 359 (2001) ("Because property rights create duties that attach to 'everyone else,' they provide a basis of security that permits people to develop resources and plan for the future. . .. As a consequence, property is required to come in standardized packages that the layperson can understand at low cost. This feature of property—that it comes in a fixed, mandatory menu of forms, in contrast to contracts that are far more customizable—constitutes a deep design principle of the law that is rarely articulated explicitly.").

seller, and financier.[93] Ownership is often acquired through mortgage financing, where the "owner" grants away some of the decision-making power and control over the property to the financing entity, which has the power to force divestment should the purchaser default.[94] At best, a typical homeowner has the equivalent of a fee simple subject to an executory limitation. That means some person can divest the homeowner sometime in the future. Because the entitlement to receive payment under the loan can be resold many times over and ultimately end up in a collateralized debt obligation vehicle, backing securities whose value depends on the guaranteed stream of income based on anticipated payments due under the loan,[95] the fee simple absolute, already an arcane term, does not even begin to communicate the complexity of ownership interests reflected in a residential real estate transaction.[96]

This fragmentation of ownership is accepted as supporting stability by providing access to ownership. While it seems that our system of property is intended for everyone to enjoy stable predictability of ownership, the fee simple absolute that potentially endures forever is actually temporary for some. For those who fail to make their payments, it is understood that this multiple-party form of ownership arrangement means that the fee simple absolute can or will terminate before an owner might like it to if the conditions of the loan are not met. While the financing system does not officially alter the legal category of being an owner, it does alter the temporal relationship with the property—the length of time one can expect to enjoy it if one is unable to repay the loan or otherwise comply with its terms.[97] As a

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93. With the secondary markets and modern securitization, the fragmentation is, in reality, even greater. *See* Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2198-2213 (2007).

94. As Alexander observes, finance not only facilitated transfers of property, but also helped transform our concepts of what is property and facilitated a commodified understanding of land ownership: The fluidity of "[m]arketable interests in public debt . . .helped to create an understanding in popular thought of other forms of property, including land, as dynamic, and that understanding, in turn, affected the legal idea of property, pushing it toward the status of commodity." Alexander, *supra* note 36, at 316-17 (footnote omitted).

95. *See* William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 947-52, 959-60 (2009) (explaining the operation of collateralized debt obligations and credit default swaps).

96. *See generally* Michael Simkovic, *Secret Liens and the Financial Crisis of 2008*, 83 AM. BANKR. L.J. 253 (2009) (arguing that collateralized debt obligations and credit default swaps created hidden debt that caused the financial crisis of 2008); Paul Krugman, *Just Say AAA*, N.Y. TIMES, July 2, 2007, at A19.

97. For example, breach of a mortgage can take place for a number of reasons other than failing to make a payment. Breach can also occur for failure to maintain

result, foreclosure is a legal form of divestment that alters the fee simple absolute. The ability to enjoy potential appreciation in property value and the ability to build equity and have access to it for future use are all considered a part of property ownership, but are in fact dictated by rules and practices separate from common law property doctrine. We currently draw artificial distinctions among banking law,[98] commercial law,[99] and consumer protection laws[100] as unrelated to the incidents of property ownership and transfer. These systems of law, which either directly or indirectly mediate property transactions, are as much a part of property as the Rule Against Perpetuities.[101]

The disaggregation of ownership of the right to the loan in the current crisis has had negative effects.[102] No one in the chain of ownership permitted by the deregulated system of mortgage finance had any incentive to ensure the loan performed while the secondary system of securitization acted as if it were unquestionable that the loan would.[103] Another negative effect has been that what could have been

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homeowner's insurance or to pay real estate taxes. *See generally* Michael Giusto, *Mortgage Foreclosure for Secondary Breaches: A Practitioner's Guide to Defining "Security Impairment"*, 26 CARDOZO L. REV. 2563 (2005) (arguing that courts are inclined to recognize secondary breaches as a basis for foreclosure when the lender demonstrates good faith).

98. *See* Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-08 (2006); Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-10 (2006); *see also* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xxvii (2011), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (concluding that the Community Reinvestment Act was not a significant factor in the subprime lending crisis with only six percent of high cost loans having any connection to the Act).

99. *See, e.g.*, Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 612 (2002) (arguing that holder in due course doctrine encourages fraud); Siddhartha Venkatesan, Note, *Abrogating the Holder in Due Course Doctrine in Subprime Mortgage Transactions to More Effectively Police Predatory Lending*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 203-11 (2003) (criticizing the immunization of assignees of predatory loans).

100. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (2010) (federal legislation creating a Bureau of Consumer Financial Protection to oversee lending products to protect against bankruptcy and foreclosure).

101. *See* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1868-69 (1986) (discussing the Rule's policy justifications and arguing that the application of the Rule is far more comprehensible than commonly thought).

102. *See generally* Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008) (recommending a similar disaggregation of the concept of homeownership).

103. *See* Brian J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N.Y.U. J.L. & BUS. 549, 568-70 (2009) (demonstrating that

solid, beneficial gains in access to homeownership were recklessly and deliberately jeopardized to maximize returns on investment throughout the chain of finance.[104] As a result, gains in widespread homeownership across race and class[105] were illusory and are currently being lost through divestment at shocking rates.[106] The resulting instability violates basic norms and expectations for ownership by creating complex, invisible ownership interests in property, apart from the homeowner, that are neither comprehensible nor adequately informed about the riskiness of the underlying financing vehicle.[107] To understand how fundamental these norms and expectations are, consider Margaret Radin's argument in a different yet related context: landlord-tenant law. In arguing for security of tenure for tenants, Radin used the example of homeowners as the bellwether standard for basic expectations for ownership. She argued that "tenants should have the same range of free choice about whether they stay or go as homeowners."[108] This illustrates an unquestioned assumption that homeownership is about permanency, if desired. Because of a recurring failure to acknowledge the implications of instability through alienation and fragmentation, this assumption is unfulfilled and the promise is broken. The resulting de facto defeasible fee that most people own means an unacknowledged

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securitization (i.e., the commoditization of debt financing, disincentivized lenders to be concerned about loan quality)).

104. *See id.* at 578-80 (discussing the role of ratings agencies); *id.* at 582-92 (discussing the moral hazard incentives from securities derivatives like credit default swaps).

105. Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 191 (2007-08) ("In 1940, the white homeownership rate was forty-six percent whereas the African American homeownership rate was twenty-four percent—a gap of twenty-two percent. By 1960, the white rate had increased dramatically to sixty-four percent fueled in large measure by the FHA and VA. In contrast, while the black rate increased to thirty-eight percent, it failed in increase at the same rate as whites. In fact, the racial homeownership gap actually increased to twenty-six percent." (footnotes omitted)).

106. While there is a policy question about whether extensive homeownership is the best housing policy economically, the reality is that if you are talking about inexpensive housing, homeownership can work just fine. Expensive housing is good for very few. Yet our system of finance facilitates expensive housing and land use rules work to shut out inexpensive housing. *See generally* Adams, *supra* note 4; Chase, *supra* note 4.

107. *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, *available at* http://www.democracyjournal.org/pdf/5/Warren.pdf.

108. RADIN, *supra* note 26, at 24.

uncertainty in property ownership: the interest may terminate too soon and does not match expectations.[109]

That uncertainty is also obscured by the term "owner." That "owner" could be a misleading concept is due, in part, to the shift in the underlying theory of the impact of financing on one's estate in land from title theory to lien theory.[110] In other words, the answer to the question of who is considered an owner when there is a mortgage changed. Under English law's title theory, a person with a debt could not be considered an owner. Title theory is quite honest about the loss of rights and potential for divestment. In a pure title theory state, the mortgagee gets the right to possession before foreclosure.[111] The shift from the English law approach to the equitable lien theory approach has largely obscured what is actually taking place.

3. PROHIBITION AGAINST DIRECT RESTRAINTS ON ALIENATIONS

In addition to using fragmentation and layers of ownership interests to fulfill the policy of alienation, other doctrines prohibit actions by grantors that inhibit transfer of ownership. Most noteworthy is the prohibition against direct restraints on alienation. There are also presumptions against covenants[112] and restraints on marriage[113] as additional examples of restrictions that grantors wish to impose, but which the common law determined were systemically problematic for the obstacles they posed to alienation, which it was feared would impede property markets.

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109. *See, e.g.*, Rose, *supra* note 24, at 2187 ("The usual roles of property rules—defining rights and identifying rights-holders—not only counteract . . .[finding parties, clarifying rights] in deals, but also encourage individual investment, planning, and effort, because actors have a clearer sense of what they are getting.").

110. *See* JAMES PARKER HALL & JAMES DEWITT ANDREWS, AMERICAN LAW & PROCEDURE, REAL PROPERTY, TITLE OF REAL ESTATE, MORTGAGES, MINING AND IRRIGATION 232–33 (1910).

111. *See* DAVID A. SCHMUDDE, A PRACTICAL GUIDE TO MORTGAGES AND LIENS § 1.04, at 7 (2004). Returning to the pure title theory approach would likely, however, cause disincentives to finance ownership because it would highlight what you are not getting with all the headaches and obligations of ownership.

112. *See, e.g.*, *Yogman v. Parrott*, 937 P.2d 1019, 1023 (Or. 1997); *Forster v. Hall*, 576 S.E.2d 746, 750 (Va. 2003) (disfavoring restrictions on the free use of land); *see also Foods First, Inc. v. Gables Assocs.*, 418 S.E.2d 888, 889 (Va. 1992) (covenants must be construed strictly against the grantor).

113. See *Lewis v. Searles*, 452 S.W.2d 153, 155–56 (Mo. 1970) (discussing the traditional prohibition on restraints on marriage as void against public policy, yet upholding the restraint against marriage because it had a legitimate purpose of providing support while single).

4. PRESUMPTIONS AND PROTECTIONS—RECORDING ACTS

Our system of land records to keep track of title and our recording acts, which seek to encourage owners to utilize the land records system, are important parts of promoting alienation.[114] It is generally assumed that the problems presented by our woefully old-fashioned land records systems[115] have been smoothed out somewhat by the industry of title insurance, but that is not quite the case.[116] A number of recent news stories have shown that some property owners have been subject to a crime sometimes referred to as "deed theft," whereby they either are tricked into signing a document transferring their property or a deed to their property has been forged and used to fraudulently transfer ownership.[117] This theft by deed is a truly astounding fact, particularly

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114. Recording acts in Pennsylvania date back to 1715. CHRISTOPHER FALLON, THE LAW OF CONVEYANCING IN PENNSYLVANIA 329 (1902). One of the earliest recording acts is from the Massachusetts Bay Colony. Linda Little Carloni, Comment, *The Use of Extrinsic Evidence to Interpret Real Property Conveyances: A Suggested Limitation*, 65 CALIF. L. REV. 897, 916 (1977). Recording acts are in derogation of the the traditional common law first-in-time-rule. 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.02[3][b] (Michael Allan Wolf ed., 2009). The more common view, however, is that these statutes are remedial and should be liberally construed. ALLEN AXELROD, CURTIS BERGER & QUINTIN JOHNSTONE, LAND TRANSFER AND FINANCE: CASES AND MATERIALS 534 (2d ed. 1978) (suggesting that recording acts were suited to a rural sparsely populated country and contribute to expense and complexity). This raises the question of who bears the burden of that complexity and who benefits.

115. *See* Rose, *supra* note 80, at 586 (describing the recording system as "a saga of frustrated efforts to make clear who has what in land transfers").

116. *See* Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1629 (2008) (arguing that title insurance is an example of the "numerous technological and policy changes in the past half century that have lowered information costs relating to property transactions").

117. *E.g.*, Nathan Gorenstein, *Notification System Aims to Combat Fake Deeds*, PHILA. INQUIRER, Mar. 25, 2004, at B03; Matt O'Connor, *2 Indicted in Scheme to Gain Home Titles; 18 Residences Targeted in City, South Suburbs*, CHI. TRIB., June 23, 1999, at 3; William Sherman, *Brownstone is 'Stolen' with Fake Deed, DA Sez*, DAILY NEWS (New York), Apr. 7, 2009, at 45; William Sherman, *It Took 90 Mins. to 'Steal' Empire State Building*, DAILY NEWS (New York), Dec. 2, 2008, at 6 [hereinafter *Empire State Building*] Ironically, the term "property crime" is most commonly associated with theft or vandalism to home or chattel property, like a car. But the acts that involve tricks and property suggest that the term property crime is also appropriately associated with theft of title. The tricks include Familial Trick, Acquaintance Trick, Rescue Desperation Trick, and Blackmail Trick—buying property low and sitting on investment property in hopes the market will go up. The trickery can extend to financing fraud. Banks are also tricked into financing properties with over-inflated appraisals or fake sales transactions. The term "trick" really means stealing property by getting the person to cooperate against his or her intention. *See Cedar Rapids Nat'l Bank v. Am. Sur. Co. of N.Y.*, 195 N.W. 253, 255 (Iowa 1923) ("If the false pretenses induce the owner to part with his property, intending to transfer

considering that it can take significant time and money for ousted homeowners to get their homes back.[118] If, however, they were tricked and the transfer was to a bona fide purchaser, then under accepted principles they can lose their home permanently, with their only recourse being damages from the perpetrator—not always a likely result.

The basic consequences of recording acts are as follows: "[t]he recording system serves two basic purposes": (1) "it protects existing owners from losing their property to later purchasers" by providing constructive notice; and (2) it protects new buyers by allowing them to qualify for bona fide purchaser protection after careful title searching reveals no prior interests.[119]

In the first-year Property course, law professors have the unenviable task of introducing students to a difficult concept to grasp: the grantor *O* has the power to convey property to a first person, let's say *A*, and then for whatever reason—fraud, deceit, caprice, or good-faith mistake—has the ability to re-convey the property to a second person, *B*. In other words, *O* has the power to convey property twice. Not only does *O* have the ability to engage in scurrilous behavior, but also a stranger has the ability to cheat *O* out of his property—by fraud, deceit, trickery, or misrepresentation—and sell it to a third person, and *O* will not be able to recover his property.[120] Part of the outcome can depend on whether the transferee qualifies as a bona fide purchaser and whether the transfer-by-trick was procured by forgery or fraud.[121] Thus

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both title and possession, the crime is cheating by false pretenses. If, on the other hand, one by fraud, trick, or false pretense induces the owner to part merely with the possession of his property, there being no intent to pass the title, and the party who receives it took it with intent fraudulently to convert it to his own use, the crime is larceny.").

118. *See, e.g.*, *Elderly Victim Recovers Home Pilfered by Phony Bishop*, DOWNEY PATRIOT (June 16, 2011), http://thedowneypatriot.com/view/full_story/14351754/article-Elderly-victim-recovers-home-pilfered-by-phony-bishop (district attorney successfully moved to have forged deeds voided three years after elderly homeowner lost home); Allan Lengel, *FBI Probes Va. Company's Workers in House Swindle: Lawsuits Outline Scheme to Forge Deeds to Steal Vacant Properties*, WASH. POST, Mar. 13, 2008, at D1 (noting it took two-and-a-half years of litigation to recover property stolen with forged deeds).

119. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 25.02 (2d ed. 2007).

120. *See, e.g.*, *Empire State Building*, *supra* note 117.

121. Fraud is defined as "[a] false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury." BLACK'S LAW DICTIONARY 594 (5th ed. 1979). "Forgery, in addition to being a fraud or misrepresentation, is the execution of a document by a person other than the person whose signature is required by another

a forged deed or instrument is per se void for two interrelated reasons, one implicit, one explicit: (1) the old-fashioned reasoning that the forged document cannot pass a property interest because the forger had nothing to place,[122] and (2) the more indirect assumption that a forger cannot protect him or herself from the forgery and is innocent while the defrauded person had a hand in her own misfortune.[123] While her consent may have been fraudulently obtained, she gave consent nonetheless and could have protected herself by investigating or seeking legal advice.[124]

As recent cases of deed theft indicate, the distinction between fraud and forgery are often so slim as to be meaningless. Similarly, the principles and policies that govern the fraud-forgery distinction do not apply with post-foreclosure bank sales. As between the two, the owner and the bank, the equities are in favor of the purchaser, which in the case of foreclosure sales is the bank.[125] As a consequence, recording acts reflect an unquestioned principle that contains a market-smoothing mechanism—in the case of a dispute, recording acts are tailored to protect buyers and sellers, but not owners. Thus fraud, despite our protestations to the contrary, is part of property. Ultimately, there has been a social decision within property doctrine to sometimes ratify fraud—the basic issue of why *O* can pass property twice. Also, the fraud-forgery distinction, where a forged deed is void but a fraudulent deed is voidable, also reflects social decisions in favor of the market and presumptions of capability that provide less protection for the

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person with the intent to deceive." Oscar H. Beasley, *Fraud and Forgery, in* TITLE INSURANCE 1990: THE BASICS AND BEYOND 223, 225 (Practising Law Inst. 1990).

122. *See, e.g.*, *Martin v. Carter*, 400 A.2d 326 (D.C. 1979) (co-owner may not pass title via deed forging signature of co-owner); *Zurstrassen v. Stonier*, 786 So. 2d 65 (Fla. Dist. Ct. App. 2001) (finding against a subsequent purchaser without knowledge, in a dispute over ownership of a parcel of land, because co-owner forged signature of other co-owner on deed).

123. *See, e.g.*, *McCoy v. Love*, 382 So. 2d 647, 649 (Fla. 1979) (upholding the effectiveness of a deed procured by fraud reasoning the elderly, illiterate grantor had "the responsibility of informing herself as to the legal effect of the document she was signing").

124. *Id.*

125. *See, e.g.*, Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1420–24 (2004) (describing how the special problems for non-professional bidders at foreclosure auctions bring less than market prices and disincentives for lenders to correct the process and observing "the American foreclosure process almost always disadvantages borrowers and subordinate lienholders").

defrauded, even though they may literally have been incapable of protecting their interests.[126]

According to Richard Epstein, "the core function of the law is to protect all persons and their property against the force and fraud of another."[127] While the core function is to protect us from force and fraud, the law has to accomplish this goal by drawing a line between acceptable force, fraud, and coercion. The line between these categories of unacceptable behavior is drawn in a way that fails to acknowledge that force and fraud will be concentrated towards one end of the spectrum, or to say it another way, concentrated racially, by class and geography. The outcome of abuse of recording-system flaws is that a predator may succeed in seeking to capture value, yet we place the burden to avoid the predator on the person seeking homeownership. Particularly, this raises a fundamental question of how much of the ability or need to trust do we undervalue in property law?[128]

Recording acts reflect an unquestioned principle that a market-based property system must contain a market-smoothing mechanism. In the case of a dispute, recording acts are ultimately tailored to protect buyers and sellers but not owners. As a consequence, recording acts facilitate the property markets, but also can and do undercut property ownership. Recording acts promote commerce, but sometimes at the expense of the individual. In times of extreme real estate markets or when there is equity value in homes, predators find it attractively profitable to try to take people's homes or strip the equity out of them.[129] The prohibitions against fraud are moral in nature[130] and do not

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126. Timothy Arnold Barnes, *The Plain Meaning of the Automatic Stay in Bankruptcy: The Void/Voidable Distinction Revisited*, 57 OHIO ST. L.J. 291, 306-07 (1996). "*Void* in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it; *voidable* exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it." *Id.* at 306 (quoting BLACK'S LAW DICTIONARY 1573 (6th ed. 1990)). "In the case of a voidable act, such an act is no less in violation of legal principles than those acts which are simply void. The difference is that in the case of a voidable act, courts generally let sleeping dogs lie; that is, they leave the contract alone unless a party objects." *Id.* at 307 (footnote omitted).

127. Epstein, *supra* note 71, at 970.

128. *See* Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641, 669, 684–86 (2011) (arguing that the subprime crisis's underlying failure of regulation is due to the social distance caused by the extreme level of income inequality).

129. *See, e.g.*, Peter S. Goodman & Gretchen Morgenson, *Saying Yes to Anyone, WaMu Built Empire on Shaky Loans*, N.Y. TIMES, Dec. 28, 2008, at A1 (describing how Washington Mutual's lending practices during the real estate boom led to its collapse).

130. Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J.

fit well with today's instrumental rationale for property. If there is to be a place for morality, it will require reining in the transactional nature of property.

II. THE DARK SIDE OF STABILITY: INSTABILITY

A. Mapping Race, Class, and Land Loss

In 2009, the Queens Museum featured an exhibit created by artist Damon Rich depicting the scale and geographical distribution of mortgage foreclosures in New York City.[131] A scaled wooden replica of the city, originally constructed for the 1969 World's Fair, was marked with tiny red flags to indicate the location throughout the city of homes whose owners were facing foreclosure.[132] Countless red flags, like tiny bleeding wounds to the physical landscape, were spread throughout the city, with noticeable clusters in certain distinct places.[133] The most striking cluster of flags—"the ground zero of foreclosures"—was located in the Jamaica neighborhood in the borough of Queens.[134] In a city of renters, this neighborhood had once been an area of comparatively high homeownership that was also largely minority.[135]

Investigative news reporters pulled the files on each foreclosure filing on homes in the neighborhood and conducted exhaustive mini-investigations of the stories behind the documents and statistics.[136] They

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157, 160 (2001) ("At early common law, the only kind of fraud that was criminalized was the narrowly defined offense of false weights and measures—against which ordinary prudence was considered insufficient to defend. All other business transactions were subject to a broad rule of *caveat emptor*. As commercial relations became increasingly complex . . .the paradigm of 'lying' began to be replaced by the paradigm of 'misleading.' Today, the definition of what constitutes deception in offenses like mail fraud, securities fraud, and the Model Penal Code's theft by deception exhibits a much more flexible formal structure and moral content than ever could have been anticipated at common law.").

131. *Red Lines Housing Crisis Learning Center*, QUEENS MUSEUM ART, http://www.queensmuseum.org/red-lines-housing-crisis-learning-center-2 (last visited May 19, 2011). For photographs of the exhibit, see *id.*

132. Patricia Cohen, *Mapping a Bird's-Eye View of Foreclosure Misery*, N.Y. TIMES, July 8, 2009, at C1. The exhibit was part of an educational and illustrative installation of how real estate finance has evolved and contributed to the current foreclosure crisis. *Id.*

133. *Id.*

134. *Id.*; *see* Erik Engquist, *Jamaica Area Is Ground Zero of Foreclosure Crisis*, CRAIN'S N.Y. BUS., Dec. 23, 2007, at 26.

135. Engquist, *supra* note 134.

136. *See, e.g.*, Jess Wisloski et al., *The Tragic Toll of Housing Nightmare*, DAILY NEWS (New York), June 28, 2008, at 8 (detailing results of investigation of ninety-eight foreclosures in four-block area in Jamaica, Queens, from Linden

tracked down the former owners and/or residents of properties in the community and painstakingly constructed a vivid picture of each of the owners' untold stories. [137] At that time, within a three- to four-block radius, the reporters found ninety-eight foreclosed properties, and among those properties they found a variety of tales of woe.[138] Many of the stories were of exploitation, high-pressure tactics, and ruinous terms. Every foreclosure involved a subprime loan with predatory terms that was obtained by predatory tactics.[139] A variety of exploitative, high-pressure sales tactics, and sometimes outright fraud or even forgery, were employed—all aimed at making money through owners taking on loans and paying high fees that they could not really afford.[140] In some, but not a few, extreme cases, the fraudsters had either directly stolen houses by forging deeds or stolen mortgage proceeds (and defrauded banks) by using forged or fraudulent documentation with straw purchasers to falsely obtain mortgage loans.[141] Often these crimes were carried out against the elderly, sometimes by family members.[142] Predators posing as contractors would offer to do repairs and present an associated realtor or mortgage broker to agree to ruinous financial debt for phony repairs.[143]

Boulevard to the north; Foch Boulevard to the south; and 145th, 146th, 147th, and Inwood streets; west to east). The *Daily News* usually provides the news of the moment rather than in-depth investigative reporting. Nevertheless, the pervasiveness of the foreclosures was such that the newspaper was prompted to investigate.

137. *See, e.g., id.*

138. *Id.*

139. *Id.*; *see* MORRIS, *supra* note 12.

140. Wisloski et al., *supra* note 136; *see* MORRIS, *supra* note 12, at 3.

141. Wisloski et al., *supra* note 136; *see* Laura Tierney, *Truth Is Stranger Than Fiction: Tales from the Title Trenches*, *in* COMMERCIAL REAL ESTATE FINANCING 2006: WHAT BORROWERS AND LENDERS NEED TO KNOW NOW 75, 84–91 (Practising Law Inst. 2006); Kipp Manwaring, *On the Front Lines of Real Property Fraud*, ADVOCATE, Feb. 2005, at 13.

142. *See* Wisloski et al., *supra* note 136. The investigation revealed concerted attempts to defraud the low income and the elderly. *Id.*; *see also* Robert Gearty & Greg B. Smith, *Vultures Still Feast: Scammers Target Homeowners Frantic to Stay & Wipe'em Out*, DAILY NEWS (New York), Nov. 29, 2009, at 22 (a year later, reporters found twenty seven more foreclosures in the four-block area); *cf.* Phil Fairbanks, *Mortgage Task Force to Probe Foreclosures, Fraud; Significant Problem with Subprime Loans Found in Certain Low-Income Neighborhoods*, BUFFALO NEWS, Mar. 1, 2010, at A1 (noting formation of "a Mortgage Fraud Task Force to uncover civil and criminal wrongdoing among brokers, lenders, and buyers" based on the belief that (1) the foreclosure problem in Buffalo is worse than expected, and (2) the problem is not fully understood because it is concentrated in poor, minority neighborhoods).

143. *See* Robert L. Rose, *Unwary Homeowners Falling Prey to Improvement-Finance Schemes*, WALL ST. J., July 28, 1986, at 17.

Thus, the current general foreclosure crisis began with a subprime loan crisis that had an inexplicably racialized pattern. Blacks and Latinos were demonstrably overrepresented in the ranks of subprime borrowers, receiving some of the worst loans ever originated with patently unsustainable balloon payments.[144] This happened in a frenzied, hubristic, deregulated, and fragmented mortgage-loan system that minimized accountability and sought only bodies to sign loan documents.[145] How those bodies became overwhelmingly black and brown ones is a testament to the dynamic of race in the paradigm of stable property ownership. The Black experience has been a story of a quest for all of the promise and expectation of property ownership as a method of wealth creation, but more so as a repudiation against and protection from subjugation. There are countless untold stories of Blacks acquiring property, successfully holding it, and passing wealth down to succeeding generations.[146] But the whispers of stories about sundown towns and Rosewood[147] and Tulsa[148]—situations where Blacks obtained full ownership of property and yet had physical violence used against them by jealous White neighbors to literally dispossess them and run them out of town—are well-known.[149] However, these experiences have not been incorporated into the lexicon of the story of property ownership and what it means in the United States.

B. History of Persistent Instability for Some Black Property Owners

With the advent of the policy of free transfer, the reliance on arms-length transactions as the basis of property relationships, and the

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144. *See* Kastely, *supra* note 7.

145. *See, e.g.*, Michael Corkery, *Fraud Seen as a Driver in Wave of Foreclosures—Atlanta Ring Scams Bear Stearns, Getting $6.8 Million in Loans*, WALL ST. J., Dec. 21, 2007, at A1 (describing how lenders reduced barriers to credit by, for example, offering "stated-income" loans, or "liar's loans," which required no proof of income).

146. *See generally* LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH: 1790-1915 (1990).

147. *See* MANNING MARABLE, THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN LIFE 238-40 (2002) (describing 1923 massacre by Whites of approximately 200 Black residents, followed by Black residents' properties being illegally seized).

148. *Id.* at 240-41 (describing 1921 riot in which 10,000 Whites looted and burned Tulsa's "Black Wall Street" killing approximately 300 people and destroying more than 1200 homes with tacit approval of state and local officials).

149. *See* SCHWENINGER, *supra* note 146, at 79-80; Todd Lewan et al., *Torn from the Land: Landownership Made Blacks Targets of Violence and Murder, an AP Investigation Shows* (pt. 2), AUTHENTIC VOICE (Dec. 3, 2001), http://www.theauthenticvoice.org/PDFs/TornFromTheLandPart2.pdf.

incorporation of fluid real estate markets as a policy goal into property doctrine, the stability paradigm currently gives short shrift to certain realities: a dark side of property markets and its impact on ownership. The dark side of property ownership is that some may involuntarily lose their property for failure to pay the carrying costs of the property, such as loan payments and property taxes. This is largely uncontroversial and accepted as a consequence of the bargain the purchaser made when obtaining the property. With an ongoing foreclosure crisis taking place at present, that painful, disruptive, and destructive reality is all too apparent.[150] But the reality of involuntary loss of land has also incorporated the dynamic of race and predation in a way that should no longer be confined to the shadows of property doctrine, but rather should be brought out in the open and considered for what it means about the true nature of stability and instability that different people experience based, not on what they have, but on who they are.

C. The History of Foreclosure Crises: Overrepresentation of Minorities

The racial dynamic in the stability paradigm has been consistent over time, yet overlooked. Operating in tandem with a predatory corollary, the racial dynamic has had devastating results. As the following sections will demonstrate, the migration of Southern Blacks to the North in search of economic opportunity brought new predatory opportunities arising from racial residential segregation and exclusion from mortgage financing.[151] In the 1950s, installment land-sales contracts were used to exploit Blacks who were shut out of receiving mortgage financing because of their race.[152] In the 1960s, in the aftermath of the passage of the Fair Housing Act,[153] there was a mini-foreclosure crisis as the first serious attempts to make opportunities for homeownership available to Black Americans led to a predatory episode

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150. Our agreement that foreclosure is okay goes away when there is a massive event of widespread foreclosure problems. Then the rules are adjusted through legislative efforts to protect homesteads. *See* Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1629-30, 1633-34 (2010) (detailing early and current federal response to the mortgage crisis and attempts to encourage voluntary renegotiation of mortgage loans). *See generally* Joseph William Singer, *Property Law and the Mortgage Crisis: Libertarian Fantasies and Subprime Realities*, 1 PROP. L. REV. 7, 12 (2011) (discussing estates and alienability).

151. *See* discussion *infra* Part II.D.

152. *See* discussion *infra* Part II.D.1.b.

153. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-19 (2006)).

that resulted in divestment.[154] In cities like Buffalo, Memphis, and Chicago, there was a problem in the depressed housing markets that supported fraudulent or exploitative flipping schemes in the 1990s.[155] Maryland's unique system of ground-lease homeownership was exploited in the 2000s to divest people of their homes through simple landlord-tenant eviction procedures to reclaim the land and the improvements installed upon it.[156] During the hot real estate markets of the 2000s, in rural areas, heir property was subject to predatory abuse of co-owned, family property.[157] Today in the aftermath of the crisis we see the trauma and devastation of experiencing foreclosure worsened by foreclosure rescue fraud.[158] And, possibly worst of all, we have seen a particularly inventive form of acquisition, best described as predatory buying, where the predators are the buyers who operate as part of a network of "investors" to trap unwary homeowners into real estate contracts with executory periods that give buyers sole control over getting to closing.[159]

D. Instability Stories

1. CAPTIVE MARKETS

a. Sharecropping and land peonage

The most well-known historical episode of exploitative behavior in land relationships for Blacks post-slavery extends back to the sharecropping era. During this era, Blacks, newly freed from slavery, and their descendants were required to turn to sharecropping, where they lived in a transactional web of post-slavery predatory behavior.[160]

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154. *See* ALYSSA KATZ, OUR LOT: HOW REAL ESTATE CAME TO OWN US 1-3 (2009). *See generally* BRIAN D. BOYER, CITIES DESTROYED FOR CASH: THE FHA SCANDAL AT HUD (1973).

155. *See* discussion *infra* Part II.D.3.

156. *See infra* text accompanying notes 176-82.

157. *See* discussion *infra* Part II.D.4.b.

158. Foreclosure rescue fraud was an even worse form of predatory exploitation, the goal of which was equity stripping. The predators peruse the public records to be able to carefully time the hunt and kill off their prey with unerring precision and heartlessness; the scheme is carefully timed to mislead and manipulate fear and lack of knowledge. *See* Seth Yaffo, *Beware the Dotted Line: Foreclosure Rescue Fraud in Maryland and the Growing Effort to Combat It*, 37 U. BALT. L. REV. 113, 114-17 (2007).

159. *See infra* text accompanying notes 194-200.

160. It should be noted that a not insignificant number of Black people were able to somehow save money and obtain land. Anna Stolley Persky, *In the Cross-Heirs*, A.B.A. J., May 2009, at 44, 46 ("According to the Land Loss Prevention Project

They labored uncompensated for a share of the crop; they purchased equipment and seed from merchants who charged higher prices for items bought on credit and got crop liens (exorbitant liens on future crops) and property liens on other personal property.[161] Today Black farmers have continued to experience discrimination in acquiring crop financing from the U.S. Department of Agriculture.[162] This has contributed to dramatic losses in Black rural landownership,[163] which has been worsened by exploitative and predatory land transaction behavior by developers, leading to the loss of heir property by manipulation of co-ownership rules to precipitate partition sales.[164]

b. Installment land-sales contracts

Another legacy of the captive market for land ownership experienced by Blacks was the popularity of the use of installment land contracts, or rent-to-own property-transfer arrangements. During the post-World War II era, not only were Blacks locked out of mortgage financing and thus homeownership,[165] but also they were locked into a

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. . .of the 15 million acres of land acquired by African-Americans after Emancipation, about two million remain owned by their descendants."); *see also* Lewan et al., *supra* note 149.

161. Nier, *supra* note 105, at 156–57 ("Indeed, it was possible that a crop could be subject to four separate liens, including: a landlord's lien for rent; a landlord's lien for an advance; a merchant's lien for an advance; and a laborers' lien for wages.").

162. *See* Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L & POL'Y REV. 333, 333 (2001).

163. Charles Nier offers a compelling account of the level of effort, sacrifice, and subterfuge it took for sharecroppers to assemble cash away from the hostile gaze of Whites intent on keeping them in impoverished servitude. Nier, *supra* note 105, at 162.

> In Natchitoches Parish, Louisiana, Daniel and Rose Trotter, with the assistance of numerous relatives, labored for fifteen years as renters on five different plantations in an effort to save $700 for a down payment to purchase some land. In addition to farming, both Daniel and Rose Trotter performed other odd jobs in an effort to save money for a down payment, including: selling eggs, raising and selling pigs, sewing dresses and jeans, 'fixing miller machinery,' 'fixing water clock,' and fixing guns. The Trotter's many years of toil was rewarded in 1900 when they were finally able to purchase thirty-five acres of land.

Id. at 163–64 (footnotes omitted). According to Nier, "throughout the South, by 1910, African American land ownership in rural areas was twenty-one percent." *Id.* at 167–68.

164. *See* Mitchell, *supra* note 18, at 511; *see also* John G. Casagrande Jr., Note, *Acquiring Property through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV., 755 (1986) (recommending use of existing common law alternatives like owelty and allotment as an alternative to partition sales).

165. Nier, *supra* note 105, at 185 ("[D]uring the time period from 1930 to 1960, scholars have demonstrated that 'fewer than one percent of all mortgages in the

pervasive, institutionalized system of neighborhood racial segregation, with all but a few neighborhoods literally off-limits to Black residents.[166] Being locked out of the mortgage-lending market made Blacks vulnerable to predatory schemes that used fragmented ownership as a substitute for bank financing and provided a ready vehicle for fraud and exploitation.[167] For example, the installment land contract system in cities like Chicago was deliberately used to inflate prices charged and divest Blacks of their considerable down and installment payments in order to allow the seller to have the lucrative opportunity to resell or flip the property to another dupe.[168] The rent-to-own agreements were styled as ownership on installment: legal title was not vested in the buyer until the last payment was made, even if years later. Breach of the contract terms, however slight, including one missed payment, would be sufficient default for eviction like an ordinary tenant. All equity, in the form of down payments and installment payments, would be forfeited to the seller.[169]

The installment land sales were predatory in the worst way.[170] Consider Beryl Satter's account of the case of Albert and Sallie Bolton. They were evicted from their home that they had purchased on installment. They paid $13,900 for a "cramped, one-hundred-year-old wood-frame house."[171] The sellers had purchased the property the week before for $4,300.[172] The person who sold them the house never revealed that he was not the agent, as he represented himself to be, but was in fact the building's owner.[173] They signed an installment land sale contract with the seller's assurances that he would help them obtain a

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nation were issued to African Americans.'"(quoting DANIEL L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 7 (1995))).

166. DAVID M. P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 4–9 (2007).

167. *See* BERYL SATTER, FAMILY PROPERTIES, RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 3–6 (2009).

168. *Id.*

169. Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. Q. 313, 319 (1979).

170. *See Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd on other grounds*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied* 400 U.S. 821 (1970); *see also* Note, *Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The* Contract Buyers League *Case*, 80 YALE L.J. 516, 540–42, 558 n.143 (1971) (arguing that this behavior should be considered racial unconscionability). For an earlier fictional account of the installment land-sales contract scheme used against recent Eastern European immigrants, see UPTON SINCLAIR, THE JUNGLE (Harper & Bros. Publishers 1951) (1905).

171. SATTER, *supra* note 167, at 3.

172. *Id.*

173. *Id.* at 4.

mortgage, which at the time was nearly impossible to do. After a substantial down payment, they defaulted and were evicted.[174] As the attorney for the Boltons summed up for a news story at the time: "Contract sellers do not in fact sell the home to a Negro, . . .[t]hey use the home as bait to defraud the Negro out of a substantial sum of money and then push the Negro out into the street [in order to] defraud another party."[175]

In Baltimore, a similar exploitative financing arrangement was carried out through similar abusive practices, yet using a variant of the fragmented land-ownership arrangement: the ground lease.[176] It too was a financing vehicle of last resort, attractive to Black homebuyers who either could not obtain traditional financing or needed a reduced purchase price.[177] The seller retained the ownership of the underlying ground while the homeowner retained ownership of the improvements.[178] Constrained to live in "the ghetto" and without other

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174. *Id.* at 39. According to Satter, bringing the forcible entry and detainer action was swift and cost $4.50; bringing a foreclosure action would have cost $100 to $300. *Id.* at 57.

175. *Id.* at 5 (internal quotation marks omitted). The Sheltons, another family who acquired a house in as egregious an arrangement as the Boltons, successfully made their payments without fail for six years. *Id.* at 65. Because the buyer's default was part of the scheme, the seller went to extraordinary means to push them into default. *Id.* The seller changed their locks to their home because of some fictional problem he created about money owed to the federal government, a problem which he promised to fix in return for them signing a contract. *Id.* The contract turned out to be a quitclaim deed. *Id.* They ultimately lost the home, which was worth $3,500 even though they had been charged $9,950 and paid $8,743 in installments and made $2,300 in improvements. *Id.*

176. *See* MARY ELLEN HAYWARD & CHARLES BELFOURE, THE BALTIMORE ROWHOUSE 12–15 (1999) (discussing origins of ground rent in Baltimore); Garrett Power, *Entail in Two Cities: A Comparative Study of Long Term Leases in Birmingham, England and Baltimore, Maryland 1700-1900*, 9 J. ARCHITECTURAL & PLAN. RES. 315, 320–22 (1992) ("In Baltimore the ground rent system proved instrumental in lining the alleys with small dwelling houses held by industrious workers on long-term subleaseholds. The reduction in size and the pay-as-you-go financing made them affordable, and since the subleases were renewable forever, they were the next best thing to fee simple ownership. . .. Baltimore's ground rents . . .are [now] an endangered species. Twentieth century forces push them toward extinction."); *cf.* Kenneth N. Gilpin, *Victor Posner, 83, Master of Hostile Takeover*, N.Y. TIMES, Feb. 13, 2002, at A29 Wall Street corporate raider Victor Posner dropped out of school at the age of 13 and began working for his father's grocery store. *Id.* Using the money that he earned, Posner built run-down, low-cost housing and sold it at less than market value to Blacks, while retaining ownership of the land beneath the homes. *Id.*

177. *See* Power, *supra* note 167, at 318.

178. *See* HAYWARD & BELFOURE, *supra* note 176, at 12–13; *see also* Power, *supra* note 176, at 320 ("The biggest difference between Baltimore and Birmingham, however, was the role of ground rents in the investment market. The genius of the Baltimore ground rents was that once created they became highly negotiable. They required little active management and in the event of nonpayment they were a first lien

access to financing because redlining had made mortgage loans nearly impossible to obtain in cities, many Blacks acquired homes through the ground-lease method.[179] As late as the mid-2000s, these ground leases were the vehicle for additional predatory behavior. "Investors" would purchase the reversionary interests and the attendant right to collect rents under the lease and then engage in deceptive behavior to prevent the homeowners from being actually able to pay the lease payments.[180] Often, the notices were sent to collect rent on long-dormant ground leases to people who did not understand that they had a ground lease and ignored the notices. In two reported instances, homeowners were evicted from the property for failure to pay rent because they were in arrears for as little as $500.[181] Under the eviction process, ground-lease landlords gained repossession of the ground and any improvements erected thereon. Though the resulting forfeiture was immense, judges felt they had no choice but to treat the arrangement as a simple bargain gone bad.[182]

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and well-secured."); Harold Seneker, *Why Victor Posner Is Riding High*, FORBES, Oct. 29, 1979, at 36 ("Another thing that makes prospective corporate victims uncomfortable is Posner's now-legendary beginning: selling houses to blacks in Baltimore's ghettos in the early 1950s, but not selling the land under the houses (the ground rents did much to make him a multimillionaire in Miami Beach instead of a struggling real estate broker in Baltimore)."). The ground rent is a holdover from British colonial rule and is limited mainly to Maryland and parts of Pennsylvania. HAYWARD & BELFOURE, *supra* note 176, at 12–13. Ground rent allowed the owner to speculate without spending any money, because the house could be built and sold before the first ground rent was due. *Id.* at 22. The ground rents were negotiable and became the builders major profit source and a supply of capital for other projects. *Id.* at 165. Financing was unavailable to Blacks at the turn of the century. *Id.* at 126, 155. Segregation restricted Blacks, who made up one-fifth of the population, to live on one-fiftieth of the land. *Id.* at 171.

179. *See* ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 103, 168–70 (2010) (noting the use of installment land-sale contracts as well as ground leases).

180. *See* Fred Schulte & June Arney, *The New Lords of the Land: A Small Number of Investors Who Own Many Baltimore Ground Rents Often Sue Delinquent Payers, Obtaining Their Houses or Substantial Fees*, BALT. SUN, Dec. 11, 2006, at 1A.

181. Fred Schulte & June Arney, *On Shaky Ground: An Archaic Law Is Being Used to Turn Baltimoreans out of Their Homes*, BALT. SUN, Dec. 10, 2006, at 1A.

182. *See id.* One judge told a homeowner at an ejectment proceeding: "You're in a tough spot because they're acting in accordance with the law, and the law does allow them to impose fees . . .How much of the $1,837 can you pay?" *Id.* (internal quotation marks omitted). The homeowner wrote the leaseholder a check for $1,500 after the hearing and kept her home. *Id.*

2. EMERGING MARKETS (SECTION 235: 1968'S PROGRAM OF HOMEOWNERSHIP FOR THE POOR)

The pervasiveness and variety of predatory land dispossession stories seem to indicate that they were largely a consequence of discriminatory treatment and the exclusion of Blacks from the system of property ownership that denied them access to financing.[183] Yet efforts to include have also been fraught with instability. Following the adoption of the 1968 Civil Rights Act, there was a foreclosure crisis when Federal Housing Administration (FHA) insurance was finally made available to Blacks.[184] In the early 1970s, the Housing and Urban Development Act of 1968 (HUDA) established programs to spur low-income housing construction, such as Section 235, which made interest subsidies available to enable low- and moderate-income families to purchase houses.[185] Problems with the HUDA included "[c]umbersome regulations and rigid property standards that could not be met by inner-city properties [and which] steered the program to the suburbs."[186] The Section 235 program was later found to have been used by the FHA "to perpetuate racially segregated residential patterns in metropolitan areas."[187] Property flipping was a prevalent abuse in the program. Redlining by private lenders was also a prevalent abuse.[188]

> Even when there were no deliberate abuses, underwriting standards in many instances were lax. Borrowers were underwritten to carry debt service and housing costs that

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183. As Joseph Singer observes, the implicit stick in the bundle, the right to acquire property, was secured by the Fair Housing Act. *See* Joseph William Singer, *Rent*, 39 B.C. L. REV. 1, 34 (1997) ("[P]ublic accommodations laws and fair housing laws substantially limit the owner's right to exclude nonowners on the ground of race or other protected categories, such as sex or religion. . .. They do so to ensure that each person has the right to acquire property without regard to race."); *see also* Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 145, 147 (2008) (making a similar argument in the context of the Civil Rights Act of 1866 about the right to acquire goods).

184. *See* KATZ, *supra* note 154, at 9-10.

185. Sylvia C. Martinez, *The Housing Act of 1949: Its Place in the Realization of the American Dream of Homeownership*, 11 HOUSING POL'Y DEBATE 467, 472 (2000) ("Yet for all its failings, the 235 program provided the one and only possibility for many families to become first-time home buyers. Between 1970 and 1973, it financed some 142,000 to 193,000 homeownership units a year. By 1973, it had insurance in force for more than 588,000 units.").

186. *Id.* at 472 n.6.

187. *Id.* at 472.

188. *Id.* at 472 n.4.

> would not support family emergencies or repair costs. . .. The stories of low-income families losing hard-earned savings after their homes were foreclosed were legion.[189]

The structure of the Section 235 program led to an all-too-familiar predatory scenario. When Section 235 loans were made, participants were required:

> to pay a fixed percentage of their incomes for a home purchase regardless of the selling price of the house. . .. Thus, buyers had no real incentive to negotiate for lower prices or better terms, and honest appraisers had incentives to report the highest value that could be justified. Dishonest appraisers had strong incentives to collude with sellers. . ..[190]

Hearings held in 1972 before the Senate Judiciary Committee documented "egregious examples of racial discrimination" and "flagrant abuses" involving the program.[191] There were a number of horror stories involving bank-initiated redlining,[192] collusion between FHA staff and lenders to falsify purchaser and appraisal information, and property flipping.[193]

Today, predatory practices with respect to low- to moderate-income homeownership by Blacks in racially segregated neighborhoods continue. A recent, particularly troubling example of predatory behavior has been a phenomenon coined as "predatory purchasing."[194] This involves an investor-buyer—usually part of an organized group of people who style themselves as real estate investors—who creates a scheme and set of contractual documents to find "undervalued"

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189. *Id.* at 472.

190. John M. Quigley, *A Decent Home: Housing Policy in Perspective*, *in* BROOKINGS-WARTON PAPERS ON URBAN AFFAIRS 53, 61-62 (William G. Gale & Janet Rothenberg Pack eds., 2000).

191. Martinez, *supra* note 185, at 471-72.

192. *Id.* at 472 n.4 ("In Boston . . .a coalition of lenders, the Boston Banks Urban Renewal Group, established a loan pool for low- and moderate-income purchasers and delineated where the funds could be spent, thereby limiting the area where African-American families could live (a practice known as 'redlining').").

193. *Id.* ("In some cities, FHA staff shared office space with lenders. Loan, appraisal, and income information was falsified. Property flipping was also cited as an abuse. In Boston, a home purchased from a white family for $14,000 was sold to an African-American family on the same day for $22,000.").

194. Brian Parkinson, Caveat Venditor: Predatory Purchasing in the Post-Boom Residential Real Estate Market 41, 41-43 (2009) (unpublished note) (manuscript on file with author).

property and acquire it for less than it is worth in the hopes of selling it for more than it is worth later.[195] The investor-buyers use deceptive and exploitative contractual terms to extend the executory period to psychologically or financially exploit the seller's desire to close on the sale. [196] Once the predatory "buyer" has gotten the seller to the point of desperation, he or she is able to obtain the property at a price the investor considers quite lucrative. The property is then flipped to other investors who then sell the property for a much higher price, thus reaping a windfall.[197] Thus, this exploitative real estate purchase contract locks unsuspecting property owners into destructively exploitative agreements and allows the "investor" buyer to use extended delay to force the seller to accept as little as possible for his or her home.[198]

What is noteworthy is that this example of real estate investment is not a marginal or fringe endeavor. In order to perpetuate this arrangement, at least one real estate "school" exists to instruct investors on how to target low-income homeowners (sellers) to enter these agreements (which are not recorded in the land records office).[199] Guest lecturers at the school include some of the city's most respected and prominent attorneys and politicians.[200] How the exploitative part of this endeavor escapes them is hard to understand until one considers the opposite possibility: that exploitation is normal and necessary to property markets.[201]

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195. *See id.* at 42–43.

196. *See id.* at 52–54.

197. *See id.* at 55–56.

198. *See id.* at 54.

199. *Id.* at 42.

200. *Id.* at 49.

201. Redevelopment and highway-building are additional examples of the instability of Black land ownership. Keith Aoki, *Race, Space, and Place: The Relation between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 768 (1993) ("[T]he poor, who tended to be disproportionately racial and ethnic minorities, suffered in the brave new urban world built over their former homes. From 1949 to 1961, urban renewal displaced 85,000 families in 200 American cities, while federally funded renewal and highway programs displaced about 100,000 families and 15,000 businesses per year." (footnote omitted)). Blacks have been divested of their property and community through eminent domain, whether excluded or included within what is supposed to be a stable, predictable system of ownership. This further reveals the tension between the presumption of free alienation and the policy goal of stability. The question is: how much exploitation is necessary?

3. DOWN MARKETS AND PROPERTY FLIPPING

Down or depressed real estate markets as well as hot real estate markets seem to present equally attractive opportunities for predatory behavior. In the late 1990s, when real estate markets were depressed,[202] and had been so on and off since at least the 1970s, cities with very depressed real estate markets, like Baltimore,[203] Cleveland,[204] Atlanta,[205] Chicago,[206] and Buffalo,[207] were hotbeds of property-flipping schemes.[208] Property flipping has in recent years been celebrated in media by television shows with the same name as a positive phenomenon.[209] In its ideal form, the property flip provides a public service to the real estate market—renovating an outdated and sometimes dilapidated home while allowing the flipper to sell the newly refurbished house and profit by the increment between acquisition cost and selling price. But property flipping has a more nefarious manifestation as well. In the context of central cities with large stocks of dilapidated, sometimes-vacant, or abandoned housing, property flipping in its more negative connotation involves acquiring a low-cost home, possibly, but not necessarily, doing cosmetic repairs, and then reselling the property quickly, usually within two months or less "at a

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202. *But see Barkley v. Olympia Mortg. Co.*, No. 04 CV 875 (RJD)(KAM), 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007) (example of a property-flipping scheme in New York City).

203. John B. O'Donnell, *Housing Prices Soar, Sometimes in a Day*, BALT. SUN, Aug. 1, 1999, at 1A (noting that flipping contributes to Baltimore being a "hot spot for mortgage fraud").

204. Bob Paynter, *Quick Resales Heat Housing Market: Investors Reaping Fast Money Draw Activists' Anger*, PLAIN DEALER (Cleveland), Aug. 27, 2000, at 1A.

205. David Pendered, *Low-Cost Housing Efforts Hit Wall: Affordability Fades as Rehabs and Mortgage Scams Raise Property Values*, ATLANTA J. CONST., Apr. 19, 2004, at 1E.

206. *See* MINORITY STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS OF COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., PROPERTY "FLIPPING": HUD'S FAILURE TO CURB MORTGAGE FRAUD 18–19 (Comm. Print 2001).

207. Deidre Williams, *City Aims to Make Flipping Flop: New Database Designed to Help Task Force Speed Crackdown on Scams Hitting Hard in Housing Market*, BUFFALO NEWS, Nov. 26, 2005, at A1.

208. *See The Monitor*, BANKING & FIN. SERVICES POL'Y REP., Apr. 2010, at 19, 21 ("A fraudulent property flip is a scheme in which individuals, businesses or straw borrowers buy and sell properties among themselves to artificially inflate the value of the property.").

209. *E.g.*, *Flip That House*, TLC, http://tlc.discovery.com/fansites/flipthathouse/flipthathouse.html (last visited May 19, 2011); *Flip This House: About the Show*, A&E TV, http://www.aetv.com/flipthishouse/flip2_aboutshow.jsp (last visited May 19, 2011).

substantial and fraudulently inflated mark up."[210] The rapid turnaround "is oftentimes a sound indicator that the resale is being accomplished through falsely inflated appraisals, sham second mortgages, false deposits, phony gift letters and loan applications littered with misleading and deceptive credit and financial information."[211]

The unwitting purchaser is most often an inexperienced, first-time homebuyer with limited income.[212] During the last property-flipping craze, inexperienced investors were also often victims. Usually they were primarily working class and would be "enticed into buying blocks of houses—three to ten at a time—with the understanding that they [could] receive cash back at settlement and incur little or no long term financial risk."[213]

The pervasiveness of these flips victimizes the individually defrauded purchasers, who are not only financially ruined, but also divested of successfully reaching the goal of stable ownership of material resources essential to attain that protected status entitling one to protection from change. The resulting foreclosures also poison the

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210. Joseph L. Evans, *Property Flipping in Baltimore: A Prosecutorial Perspective*, MD. B.J., Mar./Apr. 2002, at 36, 37 ("[In a five-year period] more than 2,500 Baltimore City properties . . .[were] bought and quickly resold for at least double the original purchase price.").

211. *Id.* at 37. According to Evans, property flipping cannot be carried out without the collusion of real estate professionals. *Id.* at 38. An appraiser would typically give a false high appraisal and then the seller would present a mortgage broker who arranges for financing at the falsely high level, usually on terms the buyer could not really afford. *Id.* Later, when the buyer tries to refinance, the true appraisal leaves them upside down in the house, which usually results in default. *Id.*

212. *Id.* at 37; *see also id.* at 38 ("These appraisals oftentimes falsely represent the identity of the present owner, the property's sales history, the prevailing prices for residential property in the neighborhood and the nature and background of other properties used as comparable sales. . .. The mortgage brokers [then] submit loan application packages . . .contain[ing] false information about the purchaser-borrower's credit history and financial status. [They] can contain false explanations about past credit problems and can supply seller-second mortgage and down payment information when the mortgage broker has reason to know that the down payment came from the seller and the take-back mortgage is not real. [They] can also falsely depict the tenancy or leasehold status of the property if it is an investment deal."); Stanley I. Foodman, *Predatory Lending and Mortgage Fraud*, 126 BANKING L.J. 254, 264–68 (2009) ("Property flipping is nothing new; however, once again law enforcement is faced with an educated criminal element that is using identity theft, straw borrowers, and shell companies, along with industry insiders, to conceal their methods and override lender controls."); Elizabeth Renuart, *Toward One Competitive and Fair Mortgage Market: Suggested Reforms in* A Tale of Three Markets *Point in the Right Direction*, 82 TEX. L. REV. 421, 426 (2003).

213. Evans, *supra* note 210, at 37 ("[Blue-collar investors were] led to believe that upon assuming ownership of the houses, the rental income [would] cover the debt service [and] that the value of the house [would] increase over time so that the investor [could] always sell the house to recoup his investment.").

struggling neighborhood.[214] Vacant homes and absent residents are physically toxic to neighborhood life due to the stagnancy of what one would consider a functioning and desirable residential experience. It is also toxic to a functioning and desirable opportunity to access property ownership through the market.[215] This is further compounded by the sheer number of flips that were concentrated in the same geographical area in central cities' neighborhoods, which happened to be the ones that are segregated Black, making it difficult for subsequent purchasers to distinguish valid sales from invalid flips.[216] With the flip transaction made to seem normal, these neighborhoods become a buffer for the entire metropolitan area's system of property ownership.[217] Predatory activity can take place here protected by the very systems that are ostensibly designed to discourage this activity. Destructive, abnormal behavior becomes standard or normal.[218]

The key to the success of fraudulent flipping schemes seems to have been the down market that existed during the 1990s, which resulted in comparatively inexpensive real estate in then-economically devalued inner-city (racially segregated) neighborhoods. Yet, the prevalence of very similar schemes in up markets indicates that the value of the real estate presents an opportunity for the methods used to deploy fraud and exploitation. Therefore, whether real estate is cheap

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214. *See, e.g.*, Thomas Ott & Michael O'Malley, *The Ruin Spreads Far and Wide*, PLAIN DEALER (Cleveland), Jan. 24, 2008, at A1 (describing effects of widespread foreclosures in Cleveland and its suburbs).

215. Thomas J. Fitzpatrick IV & O. Emre Ergungor, *Slowing Speculation: A Proposal to Lessen Undesirable Housing Transactions*, FOREFRONT, Winter 2011, at 20, 20-22.

216. Evans, *supra* note 210, at 39.

217. *Cf.* David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 441-42 (2000) ("[R]esidential spatial arrangements constituted the institutionalization of middle-class ideal structures . . .[and] deference to middle class structures, in the face of a variety of legal challenges, was for decades undisputed, and it legitimated the public and private forces that constructed separate worlds."); David D. Troutt, *Katrina's Window: Localism, Resegregation and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1110-11 (2008) ("[I]n the social identification of space and safety . . .a suburban locality's police powers are routinely used to affirm expectations segregated by both race and class.").

218. Evans, *supra* note 210, at 39 ("[O]nce the snowball starts, it becomes an avalanche so that property databases become polluted with flips thereby making additional flips appear to be normal transactions. Neighborhoods deteriorate because of vacancies and foreclosures which make more houses available to be snatched up by flippers. Unethical business practices become so customary that any, normal moral compass that an appraiser, settlement agent or mortgage broker may have, becomes skewed.").

or expensive, there seems to be an opportunity for predators.[219] The question that remains is: how does the identity of the defrauded purchasers and their geographical connection to segregated communities continually provide an opportunity for fraud and exploitation, suggesting the problem is greater than any technical fix can cure? As the following discussion will show, even though we now supposedly exist in a regime where there is a unified, racially integrated scheme for property financing and ownership, the reality is that today's problems are troublingly reminiscent of an era when things were much worse. We are still on a quest to discover the source of this recurring story of fraud and exploitation.

4. UP MARKET EXPLOITATION

a. Subprime mortgage loan foreclosures

The land divestment stories recounted thus far indicate that predatory land loss is neither unique nor limited to a bygone era. The hot market (i.e., rapidly appreciating property prices) also played a role in the most recent episode of exploitative behavior. For example, the loss of "heir" property through partitioning[220] has been attributed to hot markets that make more land than usual capable of producing quick and high returns. In some ways, the recent subprime loan and foreclosure crisis is a product of a hot real estate market. Of course, that is only part of the explanation. We must consider the relevant aspects of what

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219. A significant problem seems to be the extent to which certain real estate law procedures are manipulated. For example, Christia Pritts recommends that if deeds were required to be recorded within a certain time period and the prior purchase price were required to be disclosed, subsequent buyers would have protection against flippers by allowing them to discover how little the seller had paid for the property. Christia A. Pritts, *Forcing Property Flippers to Show Their Hand: The Prior Purchase Price Disclosure Requirement*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 446, 457–60 (2002).

220. Todd Lewan & Dolores Barclay, *Torn from the Land: Today, Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land* (pt. 3), AUTHENTIC VOICE (Dec. 9, 2001), http://www.theauthenticvoice.org/Torn_From_The_LandIII.html ("Moreover, black landowners cannot always count on their own lawyers. Sometimes, the Commerce Department study found, attorneys representing blacks filed partition actions that were against their clients' interests."). As investigative reporters observed:

> Blacks have lost land through partitioning for decades; the AP found several cases in the 1950s. But in recent years, it has become big business. Legal fees for bringing partition actions can be high–often 20 percent of the proceeds from the land sales. Families, in effect, end up paying the fees of the lawyers who separate them from their land.

Id.

happened to the homeowners in Queens. In another immediately preceding era,[221] Jamaica, Queens, had been redlined by banks as ineligible or undesirable for mortgage lending.[222] Part of what seems to be relevant to the most recent crisis is the unprecedented "housing bubble." Fueled by easy access to credit throughout the entire globe, rates of real estate investment soared, and housing prices rose precipitously throughout the 2000s.[223] The subprime crisis also followed a historic push to increase homeownership for Blacks and Latinos to correct the legacy of inequality and discrimination that kept their homeownership levels low.[224] The symbolic meaning of attaining homeownership as well as the tangible benefits of building equity convinced and allowed many to become homeowners for the first time.[225] The popular conception often repeated in popular media is that the crisis was precipitated because banks were forced to lend to unqualified minorities.[226]

According to Alyssa Katz, the lesson of the subprime crisis is that minority subprime borrowers were targeted because they represented a

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221. This is the era preceding the Fair Housing Act, the Community Reinvestment Act, the Home Mortgage Disclosure Act, and the Equal Credit Opportunity Act.

222. *See* Joseph P. Fried, *Bank Redlining Still Prevalent, Loan Critics Say*, N.Y. TIMES, Dec. 25, 1989, at 36; N.Y.C. COMM'N ON HUMAN RIGHTS NEIGHBORHOOD STABILIZATION PROGRAM, REDLINING IN SOUTHEAST QUEENS: A STUDY OF THE MORTGAGE LENDING PRACTICES OF THE DIME SAVINGS BANK OF NEW YORK IN THE COMMUNITIES OF LAURELTON, CAMBRIA HEIGHTS, ROSEDALE AND BROOKVILLE (1977), *available at* http://www.nyc.gov/html/cchr/pdf/redlining_in_southeast_queens.pdf.

223. *See* Robert Hockett, *A Fixer-Upper for Finance*, 87 WASH. U. L. REV. 1213, 1255–60 (2010).

224. *See* KATZ, *supra* note 154, at 3–26 (describing the campaign to increase homeownership that spanned a number of presidential administrations). The story of this push is contested and the dispute is related to the larger yet-to-be-answered question of what caused the mortgage financial crisis in general. *See* Charles W. Murdock, *Why Not Tell the Truth?: Deceptive Practices and the Economic Meltdown*, 41 LOY. U. CHI. L.J. 801, 854–56 (2010). For a comprehensive list of all of the competing theories about the causes of the financial crisis, including cheap credit, deceptive practices, excessive optimism, deregulation of the financial industry, and a list of other reasons, see Randall D. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 B.Y.U. L. REV., 421, 427–30. Other accounts say there was a confluence of social intentions and hard business reasons to mask deregulation of the financial industry that would promise economic rewards beyond belief.

225. *See* KATZ, *supra* note 154, at 3–26.

226. *See, e.g.*, Charles Krauthammer, *Catharsis, Then Common Sense*, WASH. POST, Sept. 26, 2008, at A23; Thomas Sowell, *Government Regulations Nurtured Subprime Mortgage Crisis*, BALT. SUN, Aug. 8, 2007, at 11A; Peter J. Wallison, *Barney Frank, Predatory Lender*, WALL ST. J., Oct. 16, 2009, at A19.

growth opportunity.[227] Because the White homeowner market was saturated, those in search of profits through mortgage lending largely had to focus on under-served markets for profitable growth opportunities.[228] Thus, the accounts that suggest that banks were forced to lend to these markets are factually wrong. Blacks were sought out as borrowers for hard business reasons rather than coercion in service of social policy.[229] There was huge profit to be made from expensive subprime loans. Blacks and Latinos were targeted by census tract and ZIP code to receive these loans.[230] "The marketing of subprime loans [was] highly aggressive, usually commission-based."[231] Thus the nature of the subprime crisis indicates an organized, systemic paradox—efforts of inclusion presented an opportunity to exploit.[232]

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227. *See* KATZ, *supra* note 154, at 23–24.

228. *Id.* at 24.

229. *See* Kristopher S. Gerardi & Paul S. Willen, *Subprime Mortgages, Foreclosures, and Urban Neighborhoods* 6–7 (Fed. Reserve Bank of Atlanta, Working Paper 2009-1, 2009) (showing that minority homeownerships created with subprime mortgages have proved unstable during periods of rapid price declines).

230. *See City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009); *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702 (D. Md. 2008) (suit alleging FHA violation); Complaint at 10–15, *City of Minneapolis v. TJ Waconia, LLC*, 2008 WL 925273 (Minn. Dist. Ct. Apr. 2, 2008) (No. 27CV0887880); Complaint, *City of Buffalo v. ABN AMRO Mortg. Group*, No. 002200/2008 (N.Y. Sup. Ct. Feb. 20, 2008), *available at* http://www.hppinc.org//_uls/resources/Buffalo_Lawsuit.pdf; *see also* Julie Kay, *Empty Homes Spur Cities' Suits*, NAT'L L.J., May 5, 2008, *available at* http://www.hppinc.org/_uls/resources/Buffalo_Lawsuit.pdf; Amos Maki, *Council Says OK to City Lawsuit*, COM. APPEAL (Memphis), Jan. 7, 2009, *available at* http://www.commercialappeal.com/news/2009/jan/07/council-says-ok-to-city-02/ (noting approval by Memphis city council for suit against national lenders); Peter Vernon, *Atlanta Pursues Lenders that Caused Foreclosed Homes*, BANK FORECLOSURES SALE (Apr. 22, 2009), http:// www.bankforeclosuressale.com/wp/article-0422696.html (noting approval by Atlanta city council).

231. Daniel Lindsey, *Prevent People from Wrongfully Losing Their Homes: A Primer on Mortgage Foreclosure Defense Practice*, CHI. B. ASS'N REC., Oct. 2007, at 38, 38.

232. According to declarations by two former Wells Fargo employees, they targeted Black ZIP codes and Black churches for subprime loans, including steering otherwise prime borrowers into subprime loans. Complaint at 30–36, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702 (D. Md. 2009) (No. 1:08-cv-00062-BEL). One Wells Fargo employee revealed:

> Wells Fargo targeted African Americans through special events in African American communities called 'wealth building' seminars and targeted African American churches. Wells Fargo steered minority borrowers with prime credit into subprime loan products, and it did so by incentivizing its loan officers to originate the highest volume of subprime loans possible.

Gary Klein & Shennan Kavanagh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 NE. U. L.J. 111, 143–44 (2010) (footnote

Compounding the incentive to exploit was the disaggregation of ownership of the loans between brokers, lenders, servicers, and Wall Street investors. This multiple, fragmented ownership interest in a loan meant that no one along the chain had any long-term interest in the loans themselves and little incentive to verify their quality or duration.[233] But the lack of any individual interest in stability of the loans meant that there was actually a paradoxical interest in instability. The need for new customers fostered a boom in refinancing as debt was recycled again and again.[234] Thus, there was a systemic need for a stable instability: a need that the money funding the loans turn over quickly and that if (and when) the borrower defaulted, the return of the property to the bank provided more opportunity for profits to be had from reselling the homes. The subprime crisis and the mortgage crisis amply demonstrate that extreme booms lead to extreme busts. The mortgage crisis also amply demonstrates that Blacks and Latinos for a number of systemic reasons dwell in the midst of an unstable property ownership reality,[235] the frontier of a land ownership regime that is usually stable everywhere else. They also live with the consequences of this unstable reality.

b. Legacy of captive markets: partitioning of "heir" property

Continuing the rural legacy of exploitative social relationships centered around race and land has been a variant of predatory purchasing that does not involve a real estate transaction per se, but instead one where the vagaries of property law are manipulated to divest co-owners of inherited property from their homes. Real estate developers have capitalized on partition laws for co-owned property and used it to divest longstanding family owners of their property by exploiting the rules for land that has passed through intestacy to a group

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omitted) (citing Affidavit of Elizabeth M. Jacobson ¶¶ 26–30, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702 (D. Md. 2009) (No. 1:08-cv-00062-BEL)).

233. *See generally* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1277–78 (2009) (explaining how securitization encouraged loan originators to pass the risk of inadvisable loans down the fragmented chain of ownership).

234. *See id.* at 1265 (describing how securitization involved reselling loans repeatedly).

235. *See* Gerardi & Willen, *supra* note 229, at 2 ("[H]omes purchased with these types of [subprime] mortgages are lost to foreclosure much more frequently than those purchased with prime mortgages."); *see also id.* at 10, 16–18 (evidence from Massachusetts suggests that subprime lending did not, as commonly believed, lead to a substantial increase in homeownership by minorities but instead generated turnover in properties owned by minority residents).

of heirs. As Thomas Mitchell has amply documented, the developer usually acquires a share from an heir, who may have even been unaware of his or her ownership interest, and then uses the share to petition for partition.[236] Because the courts are unwilling to consider partition in kind or, in some cases, appropriately deem it impracticable, the courts order partition sales. The property is put up for auction, where the only bidder able to afford the acquisition price is the unscrupulous developer.[237] The original occupants are typically unable to afford the price to purchase the property at auction. The estimates of changes in rural Black land ownership are staggering: of "15 million acres of land acquired by African-Americans after Emancipation, about 2 million remain owned by their descendants."[238] Partition sales are certainly responsible for part of this loss.

The causes are varied but unfamiliarity with property law leaves Black landowners vulnerable to fraud when they are presented with misleading legal documents and sign them without knowing that they are triggering a partition action.[239] Co-owners who live far away in other cities may not even know that they own an interest in the land, but may unwittingly accept payment for the interest without being aware of the consequences to the co-owning occupiers of the land.[240] The primary cause of the vulnerability to exploitation has to do with the use of an accepted but less-than-optimal vehicle of passing ownership of land through intestacy.[241] Studies indicate this may be in part a

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236. Mitchell, *supra* note 18, at 508.

237. Lewan & Barclay, *supra* note 220; Persky, *supra* note 160, at 46.

238. Persky, *supra* note 160, at 46; *see also* Lewan et al., *supra* note 149 ("The number of white farmers has declined, over the last century too, as economic trends have concentrated land in fewer, often corporate, hands. However, black ownership has declined two times faster than white ownership . . . .").

239. Lewan & Barclay, *supra* note 220.

240. *See id.*

> Land traders who buy shares of estates with the intention of forcing partition sales are abusing the law, according to a 1985 Commerce Department study.
>
> The practice is legal but 'clearly unscrupulous,' declared the study, which was conducted for the department by the Emergency Land Fund, a nonprofit group that helped Southern blacks retain threatened land in the 1970s and '80s.

Id. For example "[t]he Becketts . . .lost a 335-acre farm in Jasper County, S.C., that had been in their family since 1873. And the Sanders clan watched helplessly as a timber company recently acquired 300 acres in Pickens County, Ala., that had been in their family since 1919." *Id.*

241. *See* Mitchell, *supra* note 18, at 521.

reflection of lack of financial resources to access legal representation.[242] Others are reluctant to leave wills, even where there are resources, for fear of causing discord within the family.[243] The statistics indicate that forced partition sales have been a significant aspect of Black rural land loss.[244] The properties have gone on to be turned into industrial developments, hotels, and housing developments worth millions of dollars.[245] The former owners have been left with nothing but a legacy of lost family history and investment.

The hidden facilitator, however, has been property law. Though resorting to market-based property mechanisms, such as the partition sale, seem expedient and fair, they are actually a mismatch for the interests that one would usually expect to be protected by property law.[246] For example, the whole regime of co-ownership is based on the idea that many people have access to and control of a resource. In the case of family ownership, property law has traditionally sought to enable the family to manage property on behalf of family interests. Thus, it seems that the formalism of the ownership of a number of shares should not be used to defeat the interests of the persons who reside on the farm and are responsible for the management and upkeep, not having sought or received compensation for their efforts.[247] All of

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242. Lewan & Barclay, *supra* note 220 ("[S]tudies show black landowners in the South are especially vulnerable because up to 83 percent of them do not leave wills—perhaps because rural blacks often lack equal access to the legal system."); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 596 ("More extensive empirical research would help legal scholars determine whether the fourteen cases analyzed by the AP serve the role of a miner's canary or whether the AP cases are simply dramatically heartrending, but ultimately unrepresentative.").

243. Persky, *supra* note 160, at 46.

244. Lewan & Barclay, *supra* note 220 ("Mitchell and others who have studied black land ownership estimate that thousands of black families have lost millions of acres through partition sales in the last 30 years."); Persky, *supra* note 160, at 46.

245. *See* Dolores Barclay et al., *Torn from the Land Series* (pt. 1), *in* THE AUTHENTIC VOICE 185, 187–88 (2006).

246. *See* Mitchell, Malpezzi, & Green, *supra* note 75, 610, 617–18 (arguing that the partition sale is a type of forced sale to which lower and middle income property owners are disproportionately exposed and likely to receive wealth-depleting, below-market compensation for the value of their property); *see also* Mitchell, *supra* note 18, at 556 (highlighting the inadequacies of tenant in common law as compared to condominium and cooperative ownership law which allows "property-owning groups" to utilize consensual agreements to limit the rights of alienation to "promote 'community'").

247. Consider pre- and post-colonial systems of land tenure loosely referred to as "family land" in the Caribbean and Africa. *See* DEMYSTIFYING THE MYSTERY OF CAPITAL: LAND TENURE AND POVERTY IN AFRICA AND THE CARIBBEAN 151 (Robert Home & Hilary Lim eds., Cavendish Publishing 2004) (describing how family land practices continue to survive in the Caribbean and Africa); NEGOTIATING MODERNITY:

these are values that are perfectly cognizable within property, but the market mechanism of using a sale to divest the occupants shows property law's implicit presumption in favor of instability.

E. The Racially Predatory Dynamic: The Role of "Othering" in Good Faith and Fair Dealing, or "Markets Need Suckers"

The stories of the Black experience with entering into market relationships for land ownership compellingly reveal that markets, in order to provide profit, are based on (1) what can be nicely referred to as information asymmetries[248] and (2) a consistent lack of good faith and fair dealing. The covenant of good faith and fair dealing is implied in every contract and attempts to set a threshold standard of behavior for the parties rather than allow them to resort to formalism to engage in insincere, opportunistic breach.[249] Contract law is traditionally silent about the level of good faith and fair dealing required at contract formation.[250] Although strict freedom-of-contract principles might suggest that voluntary choice or assent is all that is required, there is a basic, implied assumption or expectation that people will enter into contracts with those from whom they can expect good faith and fair dealing. Yet bad faith, unfair dealing, and exploitation are an under-appreciated reality of contracting for people who are susceptible to

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AFRICA'S AMBIVALENT EXPERIENCE 179–82 (Elísio Salvado Macamo ed., 2005) (describing the evolution from communal forms of land tenure, where family consent was required for transfer, even of self-acquired land, to a more individualized system). *See generally* Jean Besson, *Symbolic Aspects of Land in the Caribbean: The Tenure and Transmission of Land Rights among Caribbean Peasantries*, *in* PEASANTS, PLANTATIONS AND RURAL COMMUNITIES IN THE CARIBBEAN 86 (Malcolm Cross & Arnaud Marks eds., 1979) (explaining land tenure, transfer, and inheritance in a number of West Indian countries).

248. According to Raj Patel, "we do not pay the social costs of the way we eat," for example. *Morning Edition, Capitalism Overload and the Value of Nothing*, (NPR radio broadcast Jan. 4, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=122125016. In his book, he considers the alternatives to the free market for valuing resources. "We know the price of everything and the value of nothing." RAJ PATEL, THE VALUE OF NOTHING: HOW TO RESHAPE MARKET SOCIETY AND REDEFINE DEMOCRACY 3 (2009). He notes that Greek democracy never had elections; the Government was run by citizens. *Morning Edition*, *supra*. According to Patel, "we've been deskilled by our transformation into consumers rather than citizens." *Id.*

249. *See* U.C.C. § 1-304 (2005); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). *See generally* GRANT GILMORE, DEATH OF CONTRACT (1974).

250. *See* Stephen A. Plass, *Bargain Avoidance in a Competitive Bargain Market: The Car Sales Conundrum*, 2 WYO. L. REV. 1, 5 (2002) ("Principles of good faith and the honesty associated with it respond more to the 'performance' and 'enforcement' aspects of the deal and offer little help with 'formation misconduct.'" (footnotes omitted)).

being "othered."[251] Indeed, some are consistently othered while some are consistently "we'd" or "us'd." For example, Beryl Satter observed that the contract for deed exploiters in Chicago reserved one form of behavior for the Blacks and one for everyone else.[252]

Why? The explanation is tri-fold. Carol Brown's work illustrates one partial explanation: cultural affinity. Brown argues that racial exploitation in transactions is influenced by the cultural distortion and perceptions on behalf of lenders that discount objective loan qualifications and override them with negative racial stereotypes.[253] In effect, the identity of the "in group" is created by those who are kept out. This is a related but modified concept of Cheryl Harris's "Whiteness as Property" proposition.[254] Instead, this is "Whiteness as the Identity That Binds Us." That means that market transactions are culturally specific in ways we have yet to fully acknowledge. Property doctrine, which has evolved to facilitate market transactions, thus inevitably facilitates culturally or racially specific market transactions.

A second explanation is provided by Carol Brown and Beryl Satter's related theories about how group formation involves identifying who is entitled to good behavior and who is a ripe target for predatory behavior. Satter notes that the problem seems to be that "professional bulwarks of a stable community—bankers who loaned, realtors who guided, and attorneys who advised—all turned into predators when the client was black."[255] She notes the contrast between the Real Estate Board's Code of Ethics, which encourages ownership and stability, and speculators, often made up of the city's White professional class, who "sold properties on terms that made home ownership almost impossible."[256] According to Satter, "the city's white professional class saw [blacks] as entirely outside the bounds of ethical consideration. In the white-dominated fields of real estate, law, and banking, professional

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251. *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); EDWARD W. SAID, ORIENTALISM (1978).

252. SATTER, *supra* note 167, at 69.

253. *See* Carol Necole Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907, 951 (2010). Brown explains how cultural affinity theory illustrates that whites tend to be endowed with positive perceptions and blacks with negative that may be used to ignore credit deficiencies for white and ignore ample credit qualifications for Blacks: "lenders discriminate against borrowers with whom they do not have a cultural affinity or experiential background because they find it more difficult, specifically more costly, to evaluate these borrowers' creditworthiness when compared to borrowers with whom they share the same cultural affinity." *Id.*

254. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993).

255. SATTER, *supra* note 167, at 64.

256. *Id.* at 69.

ethics applied to whites only. . .. [Thus] the treatment that . . .black clients received broke no rules at all."[257] Satter's work also illustrates that predatory behavior is simply fun.[258]

The other prong of the explanation of othering in good faith and fair dealing is an instrumental, economic explanation illustrated by Ian Ayres's work on car dealerships and racial discrimination in bargaining and contracting: markets need suckers. His study documented persistent "revenue-based" discrimination against Blacks during auto purchasing, findings which are quite relevant for understanding the "why" of predatory behavior towards Blacks. The key insight from this concept is that "race and gender serve as proxies to inform sellers about how much individual consumers would be willing to pay for the car."[259] According to Ayres, "market competition among [car] dealerships . . .reinforce[s] the opportunities for statistical discrimination."[260] Ayres's research generated anecdotal evidence suggesting that:

> at some dealerships up to 50 percent of the profits can be earned on just 10 percent of the sales. Profit concentrations of this magnitude are crucial in understanding why competition does not eliminate revenue-based price discrimination. From a dealer's perspective, bargaining for cars is a "search for suckers"—a search for consumers who are *willing to pay* . . ..[261]

Thus a Black customer, by virtue of his or her racial identity, wears on his or her face a stereotype of a fruitful prime target for a sucker sale. Ayres recommends that reform is needed to eliminate car "dealer[s'] incentive[s] to price discriminate . . .[by making] it profitable for dealerships to commit instead to low-markup, high-

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257. *Id.*

258. *Id.* at 74. ("It was like people who like to go out and shoot lions in Africa. It was the same thrill . . .. The thrill of the chase and the kill." (internal quotation marks omitted)).

259. IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 52 (2001).

260. *Id.* at 80.

261. *Id.* at 81–82 (emphasis added) (footnote omitted). Ayres further observes:

> [D]ealerships are willing to force the majority of consumers to endure frustrating and socially wasteful bargaining in hopes of finding those few high-profit sales that disproportionately contribute to their bottom line. For the dealers, the competitive incentive to move away from bargaining to a stated-price system simply may not be compelling because dealerships would thereby lose the profits from sucker sales.

Id. at 82 (footnote omitted).

volume strategies."[262] This insight is useful in the predatory land bargaining category because it confirms what is easily intuited from anecdotal experience: there is a big "sucker" factor in markets, and based on actions of a few, predictions are made about entire groups based on stereotypes. It is financially worthwhile for those in search of profitable bargains to search for those high-profit people.

Property law cannot be understood separately from the reality of markets for property. Though the goal of property is access, stability, and the ability to alienate, the underlying theory of markets requires some instability in property ownership separate and apart from any individual decision to alienate. In other words, it does not seem profitable enough to wait for someone to initiate voluntary arms-length agreements to transfer ownership. Thus, actors seek to find ways to facilitate or hasten transfer of property out of someone's hands into their own. It is therefore important to exploit disparities in information in order to create profitable, exploitable disparities in power. Race is a roadmap for easy profit through fraud and exploitation. Unsurprisingly, segregated communities serve as prime hunting grounds to locate appropriate collections of suckers.[263]

F. Racial Geography: Stability of Using Race as a Predictor of Opportunities for Profit

1. RACIAL SEGREGATION MAKES IT SIMPLE

Property ownership varies based on racial geography. There is a difference in duration, quality of life, and protection of civil liberties: the distribution of the sticks in the bundle varies by the physical space one occupies.[264] Reciprocally, geography is determined by race and class. It became part of the profit model to identify and target "customers," victims, or shills by race. While law and development theorists posit that stable property ownership is the predicate to development, not all communities enjoy that kind of stable ownership or beneficial development. Instead, Black communities are often, to a

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262. *Id.* at 126.

263. *See, e.g.*, Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL'Y 121, 124, 152 (2009) (discussing the ability for anti-discrimination and consumer-protection law to address the use of racially targeted geo-demographic marketing).

264. *See, e.g.*, Jonathan Glick, *Gentrification and the Racialized Geography of Home Equity*, 44 URB. AFF. REV. 280, 280 (2008) ("[G]entrification is restructuring racial disparity in home equity building . . .affecting the relative wealth levels of Black and Latino homeowners . . .. [G]entrification encourages net migration toward other parts of the metropolitan area where home equity gains are lower.").

lesser or greater extent, disconnected from the mainstream of the economy, and by virtue of their disconnection and racialized identity, more prone to exploitation. The result borne of an ultimately zero-sum game perspective is destructive, unsustainable, and unfair. This raises the questions how and why?

Much literature explains how: the legacy of overt and covert systemized practices and laws has given rise to significant racial and economic segregation in the United States.[265] Today, many seemingly neutral legal rules reinforce these geographically predictable realities of segregation in and between cities and suburbs[266] (although that reality is becoming more heterogeneous in certain respects as elite suburbs are able to retain their exclusive, predominately White character, but working-class, inner-ring suburbs abandoned by Whites are increasingly Black).[267] This overall racialized landscape has been created through legal and extra-legal devices to shape geographical reality and limit behavior to racialized geographic patterns, such as racially restrictive covenants and government-sponsored racially exclusionary redlining.[268] It has been maintained by land use and zoning rules that unquestioningly ratify the exclusion of multi-family housing to protect middle- and upper-class homeowners and promote environmental racism through expulsive zoning, locating undeserving or hazardous uses in and near Black communities.[269] Local government jurisdictional practices such as municipal underbounding,[270] the

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265. *See* FREUND, *supra* note 166, at 41-42.

266. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 241-45 (1985) (describing the use of zoning to perpetuate racial and economic segregation in cities and suburbs).

267. *See* MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 40 (2002) (using the incidence of federally subsidized school lunch as an indicator of decline of older, working class, inner-ring suburbs).

268. *See* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 111-18 (2004) (describing the federal government's role in housing finance, highway construction, and public housing construction that was racially segregative).

269. *See, e.g.*, Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 757-64 (1993) (describing the disparate denial of protective zoning to Black communities); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 792-98 (1998) (explaining the political economy of locating undesirable hazardous land uses in Black and Latino communities).

270. *See* Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1101-15 (2007) (describing the phenomenon of legally unincorporated rural areas occupied by Black communities, contiguous to existing predominately White towns, that are impoverished and

city/suburb divide, and free incorporation of towns lead to hoarding of tax resources[271] and make segregation seem natural and inevitable. Integration through gentrification also seems natural while it capitalizes on racial segregation's depressive effect on inner-city property values. It also is often spurred on by property value appraisal practices that use a type of "gerrymandering" to create White comparables and separate property markets.[272] Even commercial retailers and residential real estate developers use a scientific method, geo-demography, to evaluate race and class characteristics to make location decisions.[273]

2. THE RECIPROCAL BENEFITS OF AN UNSTABLE FRONTIER

Ironically, there is a benefit of this unstable reality to the system. A decayed frontier provides a ready contrast to the idyllic suburbs or the cool, "hip-happening" urban neighborhood while also providing a ripe opportunity for low-cost, depressed-value, and high-profit-potential acquisition. The fact that some properties can be sold above any reasonable market value to certain unsuspecting buyers suggests that opportunity for growth and profit must, to some extent, happen at the expense of others. The result is that our group expectations, racial segregation, and a market unfettered by protections for owners against the ease of alienation result in a recurring crisis of stability in the same places over different periods of time. Thus, the most ironic aspect of this contradictory reality is the possibility that the reality of instability for some may promote stability in the rest of the system. Thus, one disadvantage structurally reinforces the other.

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shockingly underdeveloped because they are separated from the municipal services and access to governance that otherwise would make sense).

271. The federal government encouraged the free incorporation of towns so they could zone exclusively. *See* Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1258 (2008) (noting the Standard State Zoning Enabling Act issued in 1926 by the U.S. Department of Commerce "made clear that zoning was no longer the exclusive prerogative of the cities, but could be freely exercised by any incorporated municipality"); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 19-23, 39-58 (1990) (describing the interrelationship of local fiscal disparities in property-tax-based education funding and exclusionary zoning as illustrative of the significant race and class inequities and inefficiencies of local control); *see also id.* at 111 ("Contemporary federal doctrines of local government law and state-local relations are highly congruent with the localism that marks most state legal systems.").

272. *See generally* GUY STUART, DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY (2003).

273. See Audrey G. McFarlane, *Who Fits the Profile?: Thoughts on Race, Class, Clusters, and Redevelopment*, 22 GA. ST. U. L. REV. 877, 884-86 (2006), for an extensive explanation of this method.

If instability is endemic to property law, then it must reshape our understanding of what property law is about and what it is protects. Rather than protecting stability for all, property law protects stability for some at the expense of predictability for others. As demonstrated by the alternative reality to property ownership, the instability and stability inherent in property ownership seems largely due to the fact that property principles are designed to encourage investment and promote markets. Markets inherently need instability, which is supplied by a number of factors. People are mobile and wish to sell or acquire. Also, circumstances change and people have a financial need to sell. As a systemic matter, Beryl Satter's thorough description and documenting of the installment land-sales system illustrates the twin paradox that is at work: a racially associated decline was financially lucrative and was accompanied by an inherent systemic reinforcement by virtue of the financial benefits provided through a transfer of resources to White professionals, which thus reinforced their financial resources.[274] According to Satter, many of the city's prominent citizens, "attorneys, bankers, realtors, and politicians alike" were involved.[275] There was also a functioning secondary market where the "contract paper" was sold off to investors. The investors, typically including professionals such as doctors and lawyers, received an income-generating contract, and the speculator received more cash to acquire more houses.[276] Also, the speculator provided a service to Whites who owned properties in redlined neighborhoods. Even though they paid below market, they at least provided an option to the White property owner to get his money out of the property and move to the suburbs.[277]

To the extent instability is structural and is predictably destructive and reinforcing of racial and economic disadvantage, it strips the moral and instrumental underpinnings of the stability justification underlying property as a democratic institution for distributing material wealth in a society through widespread ownership. As the subprime crisis and the larger mortgage foreclosure crisis are teaching us, too much instability threatens to up-end the system and turns property markets into a force for destruction rather than one for good or social utility. All of property law's protections for the owners left standing lose their moral force and

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274. SATTER, *supra* note 167, at 6.

275. *Id.*

276. *Id.* at 59.

277. *Id.* at 71–72. According to Satter, this was but a part of the "broad range of complicity" from the not insignificant profits the speculators brought to the city's banks to the captive, explosive market for housing for Blacks created by redlining (both by the FHA and the banks) to the "ordinary white Chicagoans who harassed black families who dared move into their neighborhoods." *Id.* at 75.

justification. At the very least, we must acknowledge that property's instability effectuates redistribution. Security in one area is obtained at the expense of insecurity in another. That inherent instability has been largely ignored is an invitation to look at history and more broadly at the destabilizing effect of markets on property ownership. There should be no reason for property ownership to be as spatially contextual as it is. It is due, in part, to race and class segregation and the fact that certain property owners do not do well in market transactions. Yet, it may also be due to the instability inherent in property doctrine's embrace of property markets. The "why" of instability is that property markets need turnover for growth. Even though rapid turnover is destructive, and if large enough, systemically destabilizing, the need and impetus towards these behaviors have been so consistently prevalent in so many different contexts that property doctrine must begin to take note.

III. THE MISSING STICK IN THE BUNDLE: THE RIGHT TO KEEP

As this Article has demonstrated, property as viewed through the stability paradigm delivers far less than it promises.[278] A land-ownership system based purely on a policy to foster real estate markets through unfettered alienation has led to not only a foreclosure crisis, but also to a crisis in the legitimacy of a property system premised on the rhetoric of stability. The systemic pervasiveness of dispossession or defeasance of property ownership, particularly when concentrated in particular social subgroups, presents a grave threat to the coherence of property as a social institution in a democratic society. Just as the transition from family dynasties recognized the toxicity for society as a whole of pure or absolute stability, so must we recognize the toxicity for recurring groups of people of absolute fluidity of alienation. Instability is part of property, but incorporating the exploitation by the humans who make up the real estate markets means the system is off balance. Though the dynamic of change is necessary in a system predicated on alienation, when that dynamic is premised on outsized, destructive profits, it undermines the foundations of property. Distorted notions of "freedom of contract" have left property powerless to make good on its premise of stability.

Carol Rose's seminal work on the interaction of crystalline, hard rules and muddy, flexible equitable principles based on reasonableness

278. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1011 (2009) ("[The subprime crisis] challenges our conceptions of both property and property law. How should property law respond to this crisis in property ownership?").

or fairness provides a clear map for the way to rebalance the "yin" of stability with the "yang" of instability.[279] She found that hard-edged, crystalline rules arise to sharply define rights and entitlements when parties do not have long-term relationships, trust, or familiarity with one another.[280] Eventually these rules give way to judge-made modifications after the unanticipated effects of hardship and forfeiture from the strict application becomes apparent.[281] Accordingly, today, property rules have been hard-edged and insufficiently attentive to the needs of non-repeat-player bargaining parties, as exemplified by the experience of Blacks and Latinos over time in the real estate market. Rose argues that we tend to have both types of rules over time, depending on the historical cycle.[282] The muddiness has not happened sufficiently in this context. The historical cycle which we are currently experiencing is one that geographer David Harvey has argued is characterized by an economic system dominated by "accumulation by dispossession."[283] Therefore, building on Rose's insights, when considering a hardship or forfeiture by a homeowner, it makes sense, at a general level, to refine a stick in the bundle while blurring a crystalline rule.[284]

> "When a court introduces ambiguity into the fixed rules that the parties initially adopted, it in effect reinstates the kind of weighing, balancing, and reconsidering that the parties might have undertaken if they had been in some longer-term relationship with each other."[285]

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279. *See* Rose, *supra* note 80.

280. *Id.* at 602–03.

281. *Id.* at 600 ("Fools on the one side and sharp dealers on the other . . .are central players in the crystal-to-mud story, because they are the characters most likely to have a leading role in the systematic overloading of crystalline rules.").

282. *See id.* at 595 (citing P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 146–49 (1979)).

283. *See* DAVID HARVEY, THE NEW IMPERIALISM 137–82 (2003).

284. Ayres and Talley describe adverse selection and moral hazard as twin evils: remedying one improvidently can inadvertently lead to the other. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1085 (1995) ("Attempts to remedy adverse selection often exacerbate moral hazard. . .. Thus, policymakers often face a trade-off in choosing legal rules to constrain the twin evils." (footnote omitted)).

285. Rose, *supra* note 80, at 608–09. "Mud rules mimic a pattern of post hoc readjustments that people *would* make if they were in an ongoing relationship with each other. People in such relationships would hardly dupe their trading partners out of their titles, sell them defective goods, or fail to make minor readjustments on debts." *Id.* at 602.

The first step in addressing the imbalance between stability and instability is to look to the sticks-in-the-bundle metaphor, which although reflecting a transactional vision of property, is quite helpful in delineating what we ought to get when we get property. The experience of minorities in property markets illustrates that the right to alienate involves both an implied right to acquire[286] and a right to keep. The concept of the right to acquire recognizes that the Fair Housing Act's anti-discrimination principles in real estate transactions mean that the principle of anti-discrimination advances a notion of a legally protected right to acquire property without one's racial identity (or other protected identities) being a factor in the seller's decision not to sell.[287]

Fundamentally, the notion that there is a "right to keep" is an important recognition of another important, under-theorized stick in the bundle of property rights. It is a necessary corollary of all of the other sticks in the bundle because it is fundamental for continuing to own property. The ability to continue to own property until one is ready to part with it reflects and maintains social relations between people. This right to keep could be secured by legislation, but also should be explored by critically examining ways for the courts to use common law equitable principles to refuse to recognize transactions and instruments that involve exploitation and develop robust notions of quasi-fraud.

Therefore, the right to keep is a logical extension of another aspect of a stick in the bundle, the right to be free from expropriation. This "stick" or "strand" in the bundle of property rights has focused primarily on the right to be free from a landowner taking over portions of your parcel through encroaching structures.[288] Yet the recurring

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286. *See Public Accommodations*, *supra* note 22, at 1451.

287. *Id.*

288. *See, e.g.*, *Urban Site Venture II Ltd. P'ship v. Levering Assocs. Ltd. P'ship*, 665 A.2d 1062, 1063, 1065-67 (Md. 1995) (noting that "[t]he preferred remedy for encroachment is an injunction ordering removal of the encroaching structure" but refusing to order removal of parking garage that minimally encroached on an adjoining parcel because the encroachment was innocent, the cost to the owner was minimal ($200) and the cost of removal was high ($500,000)). A number of property doctrines also reflect the implicit guarantee of the right to be free from expropriation. The longstanding recognition of the tort of trespass, see RESTATEMENT (SECOND) OF TORTS § 158 (1965), and actions to recover real property such as the actions of ejectment or to quiet title reflect the basic guarantees of property ownership. *See, e.g.*, *Woodland Grove Baptist Church v. Woodland Grove Cmty. Cemetery Ass'n*, 947 So.2d 1031 (Ala. 2006) (suit to quiet title to cemetery); *Tioga Coal Co. v. Supermarkets Gen. Corp.*, 546 A.2d 1 (Pa. 1988) (extensively discussing the relationship of ejectment and adverse possession). Also, the disfavoring of ouster in the law is reflected by rights to regain access to property where one has been wrongfully ousted by a co-owner, and ouster by a prior adverse possessor disables the availability

stories of exploitative property relationships strongly indicate the concern for and interest in expropriation is broader. The hungry animal at the gate for someone's home is ever present. The history of Blacks and property ownership makes equitable goals and principles important. First, starting out as property themselves, Blacks have tried to acquire the promised autonomy, wealth creation, and independence of private property ownership, but they have been subject to a specific kind of predation reserved especially for them.[289] Culturally, they are not deemed as part of the group that deserves fair treatment, and in fact they are treated as if they deserve exploitation. When such a situation recurs again and again over time to the point that it becomes part of the business model, equity is called for. Blacks in transactions are treated as objects and not subjects. If we look at this from an equity perspective, the historic significance of equity demands that the history of racism and segregation should be an important basis for invoking equitable considerations.[290] The history of Black ownership in the United States teaches us that the right to keep must be directly considered and protected.

Another place from which to construct or assemble a more open recognition of the implied right to keep should be through contract's unconscionability doctrine. Property doctrine works in tandem with contract doctrine to define the methodology and vehicle for transfer of interests in property. Whereas transfer was limited by particular relationships during the feudal era, the era of free transferability in service of markets is characterized by no limits on parties or terms or division of interests.[291] A dramatic importation of contract principles into property took place when the Implied Warranty of Habitability was

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of tacking together adverse possessory periods of time. *See, e.g.*, *Woodland Grove Baptist Church*, 947 So.2d at 1036 (explaining the purpose of suit to quiet title); *Sack v. Tomlin*, 871 P.2d 298, 306 (Nev. 1994) (a cotenant out of possession has the right to receive rent if there has been ouster). If someone attempts to swindle or take your home, the crime of deed theft is intended to protect against attempting to steal property through fraud, forgery, or trick. *See, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Jituboh*, No. 28958,2006, 2009 N.Y. Misc. LEXIS 726 (Sup. Ct. Mar. 24, 2009) (discussing options to protect against deed theft).

289. *See* discussion *supra* Part II.D.1.

290. This notion is well-supported by established maxims of equity such as: "equity delights to do justice and not by halves," 30A C.J.S. *Equity* § 129 (2007), "equity will not suffer a wrong to be without a remedy," *id.* § 130, "equity regards that as done which ought to be done," *id.* § 131, and "equity regards substance rather than form," *id.* § 133.

291. *See* Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 494-502 (1989).

read into every residential lease agreement.[292] If we return to Judge Skelley Wright's opinion reading contract principles into the landlord-tenant relationship, we see that the doctrine was created for a progressive purpose: to advance property doctrine into more rational recognition of the realities of modern property ownership and to rebalance assumptions and expectations that more closely reflect best practices from contract law.[293] This was a groundbreaking thought because contract principles, in effect, read plausibly beneficial norms into property in two respects. On the one hand, they introduced an aspect of the norm of gentlemanly behavior and expectations formerly reserved to the wealthy; they elevated the tenant to a customer and the landlord to a proprietor. On the other hand, they also introduced process-based norms of arms-length bargaining, that the bargained contract is the good contract because the process ensures that the outcome reflects the parties' intentions. For better or worse, the doctrine was meant to assure tenants that they had a right to expect a specific product that met minimum standards of decency.[294] The stories demonstrate that episodes of divestment recur again and again for particular groups of people. Nothwithstanding the process assumptions, the realities of markets are different. Rather than gentlemanly behavior, exploitation and searching for exploitable contracting parties is the norm.

A. Unconscionability and the Inequality of Bargaining Power

Unconscionability doctrine is well known for displacing a fundamental assumption of equality in bargaining power between the parties to a contract.[295] Arms-length bargaining is assumed to bring

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292. *See Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080 (D.C. Cir. 1970).

293. *See id.* at 1080 ("[T]he old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds. Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities . . ..").

294. As discussed above, the implied warranty of habitability faces structural and procedural limits that have rendered it ineffective and subordinating to the population of tenants it was meant to serve. *See* Super, *supra* note 17, at 430–37 (arguing that low-income tenants should not be required to pay rent into escrow to invoke contractual tenant defenses).

295. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 537 (1967) ("It is out of these special attributes of land, making up the *Gestalt* of real property (as opposed to the 'goods' of the Code), that there arise those repeated dramatic vignettes with which the Chancellors were continually faced—the abused old and unsophisticated young, the slicker and the

about a result that reflects the intentions of the parties and makes both better off, while promoting social utility.[296] But because markets depend on imperfection (i.e., information asymmetries), bargaining, in effect, brings the exploitative nature of the market[297] into the property relationship. The relatively few cases indicate that the protection of unconscionability doctrine is weak.[298] This probably makes ironic sense since unconscionability doctrine runs directly counter to the underlying needs for exploitability. It is as effective as the takings doctrine in that it tries to define where someone has gone too far.[299] Unconscionability doctrine as a private-takings principle signals aspirationally when someone has gone too far. The facts from the stories of the Black experience of owning property are well known, with the exploitative aspects justified by "freedom of contract" where the common law explicitly endorses the use of informational disadvantages on the implied theory that it leads to an efficient result.[300] Economic market theories use perfect markets as their models (assuming rational bargaining parties and no asymmetries in the information possessed by

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farmer, the money lender and the expectant heir. This cast of characters, to a large extent determined by the nature of the commodity, led to the various forms of overreaching which, while not quite adding up to fraud or duress, formed the pictures of bargaining processes which the chancellors declared 'unconscionable.' But mark: *all of these are pictures of individual overreachings.* In other words, more important than the uniqueness of each piece of land (but connected with it) is *the uniqueness of each land transaction.* The dramatic situations which were presented and decided under the equity unconscionability doctrine were most particularly those kinds of overreaching which take place, and can only take place, when there *is* individualized bargaining. The equity criteria are fitted only to nonmass transactions." (footnote omitted)).

296. Spencer Nathan Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. OF LEG. STUD. 17, 22 (1988) ("[F]reedom of contract doctrine should not be accepted as a validating principle for contracts which arise as a result of exploitation. . .. [T]he most significant problem . . .is . . .formulating a coherent definition of exploitation. Such a definition is essential in order to maintain the limited nature of the claim.").

297. *See* PIERRE BOURDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY 17, 89–90 (2005) (arguing that markets are socially constructed and that the housing market is entirely constructed by the state).

298. *See, e.g.*, Leff, *supra* note 295, at 536 ("Most important, real property is likely to be the only thing that relatively unsophisticated people have which is worth tricking them out of. Farmers have farms and old ladies have old homesteads. The equity cases are replete with factual patterns involving the old being bilked, and farmers sweet-talked into ruinous trades. Courts would be most solicitous to impede land transfers by the poor sillies of the world." (footnotes omitted)).

299. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

300. *See* U.C.C. § 2-302 cmt. 1 ("The principle is one of prevention of oppression and unfair surprise and not [one] of disturbance of allocation of risks because of superior bargaining power.").

them).[301] Unconscionability doctrine's narrow definition of inequality of bargaining power is harmfully inadequate however because: (1) it requires subjects of exploitation to prove they were dumb and weak (i.e., "suckers") in order to fit within the doctrine's guidance to judges about when to scrutinize a transaction more closely,[302] and, failing that, (2) it allows contract law to be otherwise predicated on a myth of equality, which reinforces the hand of the stronger bargaining party by treating the sucker's uninformed decision as a voluntary choice that he or she has made. [303] Freedom of contract makes inequalities of fortune and outcome the just result of this exercise regardless of whether it occurs to the same people again and again with unquestionably exploitative behavior involved. Thus, freedom of contract currently means freedom of exploitation. When property incorporates contract principles, it incorporates this reality, which is in direct contradiction to our high hopes for property's stability paradigm.

Unconscionability doctrine, as it is currently configured, ultimately serves a role of preserving dispossession opportunities. By incorporating contract and free-alienation policies, property supports and facilitates a systemic need for profitable exploitation. It is a limited exception to the notion of freedom of contract that has the added benefit of preventing embarrassment of the system. It protects the system from exposing the systematized, rank, unjustifiable exploitation of so many transactions into which Black people enter. The concept of inequality of bargaining power dances around the issue: it ignores the predation of some on others because of factors the latter cannot control, over which they do not exercise voluntary choice. The inclination towards predation on certain people has to be taken into account. Perhaps we need to recognize that, while theoretically anyone can be a predator and anyone can be a target, the evidence shows that predators' selections for targets use the consequences of exclusion to Blacks to target and pillage at will. In the case of the recent subprime crisis, they did not stop until a worldwide credit crisis occurred and the game was over.[304] For now.

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301. *See, e.g.*, Joseph Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information,* 71 AM. ECON. REV. 393 (1981).

302. *See* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 935 (1997).

303. *See* Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 670–73 (2009).

304. See, for example, *supra* note 158, for discussion of foreclosure rescue fraud.

B. Fix Contract Doctrine: Shift the Burden of Proof of "Unconscionability" for Enforcement

In contract doctrine, courts do not examine the fairness of a particular transaction, except where the enforcing party seeks specific performance, which can only be granted if the contract is fair.[305] According to Emily Sherwin, this departure from treating contract as a matter of voluntary exchange can be explained by an unstated recognition that the announced legal rules for binding, enforceable contracts may be publicly useful for guiding the conduct of contracting parties.[306] But equitable considerations like fairness can be drawn upon by judicial decision-makers when they are called on to enforce rules and avoid specific enforcement in favor of a damages remedy.[307] Thus, fairness considerations are available in contract enforcement, albeit under limited circumstances. As she observes:

> courts continue to say there is a distinction in the moral standards applicable to legal and equitable relief; opinions repeatedly assert that specific performance is discretionary and may be withheld on the basis of unfairness that would not affect a damage remedy. The second *Restatement* also preserves the special standard for equitable relief in unquestioning terms.[308]

Emily Sherwin has also discussed a separate but compelling concept in the context of property doctrine: the "incidents of ownership" concept.[309] These incidents of ownership are governed by freedom of contract and the right of alienation. Her point relates to the assumed ability, under freedom of contract's assumption of voluntary choice, of an individual owner to decide whether to sell or buy. Sherwin's observations, when combined, suggest that the incidents of ownership are governed by freedom of contract, but a supposed right of alienation (ie. power to transfer) could be extended to protecting the decision-making power of whether to sell or buy. Understanding the full incidents of ownership should enable courts to take into account equitable considerations implicit in the notion of a right to keep. Thus

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305. *See* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 258-59 (1991).

306. *Id.* at 306.

307. *Id.*

308. *Id.* at 261 (footnote omitted).

309. Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1092-93 (1997).

recognition of the right to keep would involve shifting unconscionability's inquiries to rebalance in light of the realities of bargains between repeat industry players and novices to land transactions. The key may also be to begin to assign responsibilities for bargaining to each party to consider the other's welfare.[310] Thus, in order to neutralize the negative impact of the market, we need to consider shifting the presumptions in contract enforcement to meaningfully take into account unconscionable terms (e.g., toxic subprime loans); unconscionable relationships (e.g., repeat players, such as brokers who overreached); and unconscionable outcomes (e.g., disproportionate loss as compared to the nature of or reasons for the breach). In addition, we could also switch the presumptions in unconscionability doctrine and shift the burden to put the onus on sophisticated repeat players to prove their deals are fair.[311]

C. Fix Property Doctrine: Consider Restraining Alienation—Quia Emptores Meets Numerus Clausus

The Statute Quia Emptores of 1290[312] paved the way for alienation as we know it today by prohibiting subinfeudation and authorizing alienation by substitution.[313] "A tenant could no longer convey part of his estate but could convey *all* of it by means of a substitution of holders of the tenancy. . . ."[314] The goal was to preserve the rights of the landlord, but it inadvertently paved the way for the end of feudalism and the rise of property markets. Implicit in the Quia Emptores was the notion that there should be a limited number of property

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310. I borrow this insight from Peter Gerhart, Professor, Case Western Reserve Univ. Sch. of Law, Remarks on Exclusion and the Duty to Others at the Association for Law, Property, and Society Annual Meeting, Workshop on Property, Georgetown University Law Center (Mar. 5, 2011). His remarks were based on his forthcoming book *Property and Social Morality.*

311. *See* Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 83 (2008) ("[C]aveat emptor in its pristine common law form is deemed inapposite for the modern residential real estate transaction, yet perfectly suited for the real estate transactions that took place as the doctrine was originally developed and applied. *It is the change in the very nature of the real estate transaction that caused the doctrine of caveat emptor to become inapposite for real estate transactions.*" (emphasis added)).

312. Quia Emptores, 1290, 18 Edw., c. 1 (Eng.).

313. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 298 (3d ed. 1990); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 716 (5th ed. 1956).

314. Jeffrey G. Sherman, *Can Religious Influence Ever Be "Undue" Influence?*, 73 BROOK. L. REV. 579, 586 (2008).

relationships.[315] Contract law allows as many relationships to be established by the bargaining parties as they desire. This does not acknowledge the high stakes and special nature of land ownership in particular. Thus, it makes sense to recognize that where someone's home or residence is at stake, there must be more consideration or protection.[316]

The right to keep in the family residence context could also be protected by animating state courts' equitable jurisdiction. For example, a court could recognize the longstanding recognition of presumptions against forfeitures in a case where exploitative or discriminatory treatment is found. For example, certain Fair Housing Act cases have found that exploitative dealing that uses race for targeting is a form of discrimination that could violate the Act.[317] Similarly, the Civil Rights Act of 1866 protections would also be implicated by such exploitative behavior.[318] Another option would be for courts to invoke equitable principles to avoid penalties where the mortgagee can be or otherwise has been made whole. For example, in a number of cases where people

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315. Merrill and Smith have commented the most extensively on this implicit principle in their seminal article about the *numerous clausus* principle. Merril & Smith, *supra* note 34, at 11–25.

316. For example, under some state laws, debtors are allowed a homestead exemption that allows the exclusion of the primary residence from attachment in a Chapter 7 bankruptcy proceeding. *See* Victor D. López, *State Homestead Exemptions and Bankruptcy Law: Is It Time for Congress to Close the Loophole?*, 7 RUTGERS BUS. L.J. 143, 165 (2010) ("[C]itizens of Arkansas, Washington D.C., Florida, Iowa, Kansas, Oklahoma, South Dakota, and Texas enjoy an unlimited personal exemption for the equity in their primary residence."). *See generally* Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245 (2006) (examining the homestead exemption as a political movement and a reflection of complex contradictory social policy).

317. *See* Howell, *supra* note 8, at 104 ("Although geographic discrimination alone is not actionable under the Fair Housing Act (FHA or Title VIII), if a lender exploits historic racial segregation by marketing higher-priced loans to minority neighborhoods to profit from borrowers' lack of other options, such profiteering may constitute actionable housing discrimination." (footnote omitted)). Howell notes, however, that traditional housing discrimination doctrine is conceptually limited in its underlying legal theory "to combat the new exploitation paradigm of housing discrimination." *Id.* at 105.

318. These FHA cases are yet in their early stages of recognition of exploitive dealing as a form of discrimination disparately impacting blacks. *See id.* at 137–42. Based on the narrowing trajectory of other anti-discrimination doctrines in the courts, this approach is likely subject to reversal once it becomes successful. For a discussion about why the doctrine has been narrowed by courts in other areas of novel discrimination claims like race or sexual harassment, see generally Rhonda M. Reaves, *One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839 (2004).

defaulted on longstanding mortgage loans, the banks may in fact have already received payment for the balance of the loan, yet interest, penalties, and fees are a good proportion of the arrears. Similarly, in the ground-lease eviction cases in Baltimore, when owners were surprised by ground leases and lost their homes for nominal sums of money, equitable principles of fairness, proportionality, and unjust forfeitures or enrichment should be invoked to avoid unjustifiable and senselessly harmful outcomes.[319]

The examples of ways for courts to utilize the common law to avoid unjust results with negative systemic implications abound. Courts have already construed exploitative sale-leasebacks as equitable mortgages.[320] Constructive trust doctrine has been utilized to protect ownership of property in situations where ownership interests were outweighed by forfeiture concerns. [321] A variant of this doctrine could be used in racially segregated communities that are subject to being targeted for predatory behavior. Such property would thus not be foreclosed upon without the review and approval of a trustee or the court. Another creative approach could be to require that anyone dealing with homeowner-occupiers in racially segregated communities would be held to a fiduciary standard—that freedom of contract cannot apply to racially segregated property owners in exploitative arrangements.

D. Limit Disaggregation and Fragmentation: Lessons from Primogeniture

Though primogeniture was an institution with repugnant discriminatory aspects and was focused primarily on preserving family dynasty, it still has lessons for the case of the rural Black landowners who are losing property through partition sales. It should not be that a stranger can use the formal rules of property to defeat the very power

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319. *See generally* Thomas P. Egan, *Equitable Doctrines Operating against the Express Provisions of a Written Contract (or When Black and White Equals Gray)*, 5 DEPAUL BUS. L.J. 261 (1993) (extensive discussion of common law equitable policies against waiver, forfeiture, and unjust enrichment to resolve contract disputes contrary to the express provisions of the contracts).

320. *See Koenig v. Van Rekken*, 279 N.W.2d 590 (Mich. Ct. App. 1979) (construing a sale-leaseback arrangement as an equitable mortgage arrangement); *Swenson v. Mills*, 108 P.3d 77 (Or. Ct. App. 2005) (construing a sale-leaseback arrangement as an equitable mortgage arrangement); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.2 cmt. a (1997).

321. *See, e.g.*, *Rase v. Castle Mountain Ranch, Inc.*, 631 P.2d 680 (Mont. 1981) (holding that a purchaser of land underlying cabins owned by residents who had only a revocable license to the underlying ground was obligated to allow cabins to remain on land under a theory of constructive trust for the benefit of the cabin owners).

of informal rules of familial co-ownership of property. Just as primogeniture required an estate to be kept whole as it passed through the family, so too should there be a recognition within co-ownership and partnership doctrine that when there is a family involved, there should be a substantive presumption, first in favor of the family, and second in favor of the current occupants of the property.[322] Otherwise, the wealthy investor/developer can appropriate the family's right to decide when to sell and force a sale, with the help of property doctrine and the courts, to him or herself. Such a destructive result can and should be avoided.

E. Reexamine Recording Acts Presumptions with Respect to Fraud

It also makes sense to more openly acknowledge that, though we universally condemn fraud, we tacitly understand it to be a part of human nature and need to plan for the ubiquity of fraudsters.[323] We do not often consider, however: what is attractive about fraud and who is likely to be a fraudster?[324] In some ways, one plausible view of fraudsters is that they promote economic activity through exploiting naïveté. A related view is that some forms of fraud involve risk-taking—the thrill of the challenge.[325] For example, Satter documents that there is a certain thrill to predatory behavior.[326] The speculators

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322. For an example of a step in this direction, see UNIF. PARTITION OF HEIRS PROP. ACT (2010), *available at* http://www.law.upenn.edu/bll/archives/ulc/utcpa/2010am_approved.htm.

323. Radin observes indirectly that conservative property theory does not "tell us what to do if we think all property holdings now extant in the actual world do not rest completely on chains of just transfer, but rather are all tainted by past fraud and violence." RADIN, *supra* note 26, at 25.

324. *See* Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN ST. L. REV. 189, 214 (2008) (arguing that securities fraudsters suffer from Antisocial Personality Disorder and are "probably 'hard wired' to commit manipulative crimes"). Satter makes an interesting observation about how people react differently to adversity. While her father had experienced a crippling childhood disability and had been exposed to gross anti-Semitism, his exposure to his father's social idealism "inspired in him a profound empathy for the oppressed." SATTER, *supra* note 167, at 31. She noted that some of her father's childhood acquaintances, and later his colleagues who also experienced a very harsh upbringing during the Depression, viewed the world in terms of "victims and victimizers . . .those who 'worked the system' and those who were destroyed by it." *Id.* According to Satter, these men were determined not to be on the victim side of the dividing line. *Id.*

325. Grace Duffield & Peter Grabosky, *The Psychology of Fraud*, TRENDS & ISSUES CRIME & CRIM. JUST. (Austl. Inst. of Criminology, Canberra, Austl.), Mar. 2001, *available at* http://www.aic.gov.au/publications/current%20series/tandi/181-200/tandi199.aspx.

326. SATTER, *supra* note 167, at 74.

engaged in predatory behavior both for the money, and simply because they enjoyed it.[327] The psychology is such that it also represents a desire for control—ego power, power over people, and situations. The sad part of fraud is that to a great extent we blame the victim for complicity. Though weak restraints lessen inhibition to commit fraud,[328] there is a sense that everyone does it, and it represents astute business acumen. As indicated by those who are likely to be defrauded—the elderly, naïve, indiscreet, lonely, and depressed[329]—recommended solutions for face-to-face fraud, such as education, are likely insufficient.[330] Education in the face of fraudulent, predatory behavior is the equivalent to locking doors while the system gives certain people a passkey. For example, if certain people have a personality passkey by virtue of their persistence, then the problem is not really lack of education, but a failure in a surveillance and enforcement regime.[331]

One approach might be to more carefully delineate the protections for property owners that are implicit corollaries of the recording acts, akin to a dormant recording act. The recording acts, adopted as part of

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327. *Id.*

328. Duffield & Grabosky, *supra* note 325, at 6 ("[T]here are many situations in which personality and motivations lie beyond the reach of policy. In these cases, those who would prevent and control fraud must look to reducing opportunities and to exercising a degree of surveillance.").

329. Peter Grabosky & Grace Duffield, *The Red Flags of Fraud*, TRENDS & ISSUES CRIME & CRIM. JUST. (Austl. Inst. of Criminology, Canberra, Austl.), Mar. 2001, at 5–6, *available at* http://pandora.nla.gov.au/pan/10850/20110202-1704/www.aic.gov.au/publications/current%20series/tandi/181-200/tandi200.html ("Although confidence men may portray their victims as corrupt and greedy many of these victims are somewhat passive people who were either naïve or indiscreet in money handling. In some cases they were also found to be lonely and depressed. This was particularly characteristic of elderly women who were victims of face-to-face fraud." (citations omitted) (citing RICHARD H. BLUM, DECEIVERS AND DECEIVED: OBSERVATIONS ON CONFIDENCE MEN AND THEIR VICTIMS, INFORMANTS AND THEIR QUARRY, POLITICAL AND INDUSTRIAL SPIES AND ORDINARY CITIZENS 69 (1972))).

330. *Id.* at 6 ("Regardless of the fact that some people in the community seem to be more vulnerable to face-to-face fraud than others, the most effective bulwark against face-to-face fraud is to educate prospective victims about the risks which they face. Consumer awareness is the first line of defense, and responsibility for this must be widely shared. First and foremost, the individual consumer has a responsibility to become informed of the risks involved in commercial transactions, and of what steps to take to protect oneself. Government agencies and industry associations are ideally situated to impart information to consumers and to alert them to pitfalls in the marketplace.").

331. *See* Barnard, *supra* note 324, at 193, 220–21 (arguing that habitual securities fraud recidivists are largely unaffected by traditional approaches to law enforcement such as monetary penalties, injunctions, or incarceration.). The author hypothesizes that offenders in this group, much like sex offenders, may be "hard wired" to engage in fraudulent behavior. *Id.* at 214. She proposes a series of new enforcement strategies to deal with this predatory population. *Id.* at 223–26.

every state's property rights management system, require recording property transfers in the land records office in order for bona fide purchasers to be protected against conflicting claims. While bona fide purchasers are immunized for transfers to them, insufficient protections exist for the true owner who may be defrauded out of their property. As a matter of property, morality, and ethics, and as a necessary corollary to these extraordinary protections, there should be a dormant recording act right for true owners that (1) the land records system will stay updated and consistent with current technologies and course of dealings that are predominant in the day; and (2) true owners will be indemnified by the state for loss of their property that thieves using the open access to information were able to carry out by virtue of that access.

CONCLUSION

Principles in support of alienation have allowed property to lessen dead-hand control in favor of the market.[332] More thought must be given to how the policies of free alienation supported by property facilitate that dispossession in light of the realities of modern systems of real estate finance, real estate ownership documentation, and the prevalence of predatory behavior.

Fundamentally, the notion that there is a right to keep is an important recognition of an important aspect of property rights. It is an implied yet necessary aspect of all of the other sticks in the bundle because it is fundamental for continuing to own property. The ability to continue to own property until one is ready to part with it reflects and maintains fair and sustainable social relations among people. Thus, alienation needs to be both promoted yet scrutinized for reasonable ways to restrain it. When financing facilitates a multiplicity of new property relationships via contract that are not self-evident to owners and are misleading, they contradict the very notion underlying the protections property is supposed to provide. Existing notions of stability underlying property doctrine, particularly the qualified right to keep, should be utilized by courts to avoid unjust results, especially where legislatures or regulatory bodies have been paralyzed to step in. The protections sketched here are not without flaws, but are simply intended to free our thinking about the potential of existing law. At a minimum, however, the notion of a right to keep forces us to think about ways to ensure that instability is no longer disproportionate and destructive, and

332. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985) ("Inalienability can be defined as any restriction on the transferability, ownership, or use of an entitlement.").

that all homeowners have a right to keep their property so long as they desire and have complied with reasonable financing terms. Not only will they be the beneficiaries of their investment-backed expectations in property ownership, regardless of race or geography, but the system of property ownership will regain its moral foundations, and its contributions to society will be beneficially and fairly distributed.