ON PROPER[TY] APOLOGIES AND RESILIENCE GAPS

Marc L. Roark[*]

I. INTRODUCTION

In 2021, the local Salvation Army office in Savannah Georgia proposed a plan to build a new homeless shelter on a plot of land located less than two miles from the downtown district. Subsequently a group of citizens organized as the Weeping Time Coalition argued that the property where the homeless shelter was to be built was part of a larger track of land where the largest sale of human slaves in U.S. history was conducted. The weeping times sale took place on March 2 and 3, 1859 and sold 436 humans to speculators.[1] It was the largest recorded slave auction in U.S. history, attracting buyers from all over the U.S.[2] According to one historian, eager buyers filled every hotel room in Savannah Georgia prior to the two-day sale.[3] The total proceeds of the sale netted the Butler family $303,850, while separating those sold from the only home they knew.[4] The Weeping Times coalition advocated that the property should not be used as proposed and violated local zoning ordinances that protected known historic sites. On October 4, 2021, the Coalition filed a lawsuit alleging that the city acted with "a malignant act of nonfeasance" and elsewhere with "misfeasance" when it sent the site report on the parcel of land to the office of state archeology rather than the state historic preservation division to evaluate the historic ties of the land to the weeping times

[*]Louisiana Outside Counsel of Health and Ethics Professor of Law and Senior Fellow, Native American Law and Policy Institute, Southern University Law Center and Affiliated Associate Research Professor, University of Pretoria, S.A. Many thanks go to Maylan Cruickshanks (L'23) for her assistance in editing this article. Funding to support this Article was provided by Southern University Law Center with special thanks to Chancellor John K. Pierre. The Louisiana Outside Counsel of Health and Ethics Professorship is made available through the State of Louisiana Board of Regents Support Fund.

[1] *See* ANNE CAROLINE BAILEY, THE WEEPING TIME: MEMORY AND THE LARGEST SLAVE AUCTION IN AMERICAN HISTORY 3 (Cambridge University Press 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

sale.[5] Those claims were contested as both the city and the Salvation Army produced reports and chains of title suggested that the land at issue was not joined to the land associated with the Weeping Times sale until later in the 19th century. Still, the proposed homeless shelter site was implicated in the weeping times sale, as contemporary advertisements indicated that special access to the Racecourse was provided through a road cut across the proposed shelter site.[6]

Today, the site where the weeping times sale occurred (formerly known as the Ten Broeck Racecourse)[7] is located across the highway from the proposed shelter site. The site is adjacent to three neighborhoods – West Savannah, Hudson Hill and Woodville – each predominantly black and minority serving communities with a household median income of $22,578, less than half the median household income for the City of Savannah.[8] The communities trace their history back to the origins of Savannah as a British Colony in 1733 when Chief Tomochichi of the Yamacraw tribe is said to have

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[5] Petition for Mandamus, *The Weeping Time Coalition v. Mayor and City of Savannah*, Civil Action No. SPCV21-01042-CO (Superior Court Chatham County Georgia 10-4-2021).

[6] One such advertisement that was submitted by the Weeping Times Coalition was an ad from the *The Daily Georgian* dated December 25, 1857, that said "members and their families and invited guests alone, will be admitted at the members' gate, on the Augusta Road. The Public gate is upon the Louisville Road." The coalition argued that the advertisement suggested that the private members gate access (where the proposed shelter site was located) was a part of the property that comprised the old Racecourse, rather than separate. *See Petition*, paragraph 14.

[7] The Weeping Times sale was not the first time that enslaved persons were brought to the Racecourse. In 1818, the U.S.S Dallas, a revenue cutter ship intercepted the cargo ship known as The Antelope, transporting enslaved persons in contravention to the ban on the International Slave Trade. Jonathan Bryant in his history of the Antelope case *The Dark Places of the Earth: The Voyage of the Slave Ship Antelope*, notes that the slaves being transported on the Antelope originating from Spanish, Portuguese and U.S. vessels were held at the Racetrack while their case before the U.S. District Court heard claims relating to their status. Bryant notes that these persons were marched two miles from the Savannah waterfront to Savannah's horse racing track, where housing had to be constructed to house the captives. Bryant notes that the original plan was for the captured persons to build their own shelter, but that they were too weak and small from the journey to do the work. JONATHAN M. BRYANT, THE DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP ANTELOPE 94-95 (Liverright Publishing Corp. 2015). *See also* JOHN T. NOONAN JR., THE ANTELOPE: THE ORDEAL OF THE CAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS 45 (University of California Press 1977) (noting that the Africans were entrusted to the Marshall for the District of Georgia who provided accommodation on the race grounds of Savannah "where an impromptu shelter known as the 'the African encampment' grew up."). For a discussion of the case relating to the interests of the captured Africans and their claims for freedom, see Mark Roark, *Slavery, Property & Marshall in the Positivist Legal Tradition*, 2 SAVANNAH LAW REVIEW 45 (2015).

[8] City of Savannah, *The Hudson Hill/Bayview Neighborhood Plan* (June 2019).

deeded the site of the City of Savannah and areas to the east to James Ogelthorpe's Company, retaining the areas to the West for the Tribe.[9] The Tribe occupied those lands until 1757 when they were then distributed to the colonies and their members. During that period, the area became thriving rice plantations; notably the Vale Royal Plantation and Hermitage Plantation sat on lands that made up the West Savannah Neighborhood and Woodville neighborhood. In the 20th Century, the area became industrialized and with that, housing was formally built on the neighborhood sites known as Woodville, Hudson Hill, and West Savannah.[10] Housing was built for both black and white workers, though under the Jim Crow segregation requirements, were separated from one another.[11] To that end, black workers were given inferior homes and living conditions than their white counterparts.[12] While White workers could largely afford to engage in the larger Savannah market for goods and services, the black residents were mostly isolated from other black thriving areas, such as Frogtown located closer to downtown Savannah. In that time, a thriving group of small black businesses emerged.[13]

Between the 1930's and 1970's U.S. Housing and Urban policy dramatically reshaped the area not only physically but also demographically. In 1940, the City of Savannah built Yamacraw Village, a public housing site on the former Heritage Plantation land and located next to West Savannah.[14] The second was Francis Bartow Apartments, originally constructed as defense housing for workers in the ship building division, it eventually became a low-income neighborhood for whites.[15] Later, the housing would be acquired by the Savannah Housing Authority and was occupied almost exclusively by black families.[16] By the 1960s the neighborhoods had nearly fully transformed into predominantly black communities. In 1960, the department of transportation began construction on interstate 16 and

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[9] City of Savannah, *The Hudson Hill/Bayview Neighborhood Plan*, Hudson Hill Community Organization at 7 (June 2019).

[10] *Id.*

[11] Lindsey Grovenstein, *A brief history of West Savannah and why it matters*, THE SAVANNAHIAN (July 5, 2021).

[12] *Id.*

[13] *Id.*

[14] *Hudson Hill/Bayview Neighborhood Plan*, *supra* note 9.

[15] *Id.*

[16] *Id*.

its adjacent arms, including Interstate 516.[17] By its completion, I-516 separated not only the neighborhoods from each other, but also cut directly through the Francis Bartow property, eliminating several apartment buildings in its wake. [18] Eventually, the Bartow property would be demolished in 2001, leaving the property vacant until the Salvation Army proposed building a new Homeless shelter on its site.[19]

While much of the discussion around the Salvation Army tract of land has been centered on the accuracy of the Weeping Time Coalition's claims that the site deserved protection as a historic monument[20] – there is a deeper property story at play in this narrative that goes beyond the weeping time but implicates it all the same. That is what are to do with Property's memory – its capacity for holding onto the effects of the past, while claiming the neutrality of markets.[21] This story is an American story, and one that has a common lineage.[22] Property's role in the racialized imprint of relegation, disenfranchisement, and relegation of the poor continue to mark the landscapes of communities like West Savannah.

First, many of the people that live in West Savannah are the ancestors of former slaves, those who the law of property deemed to

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[17] Grovenstein, *supra* note 11.

[18] For a discussion of how highways were used to separate black communities, see RICHARD ROTHSTEIN, COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 127 (Liveright Press 2017) (describing the use of the Federal Interstate system as a "slum clearance tool" which impacted predominantly African American communities); JOSEPH F.C. DIMENTO AND CLIFF ELLIS, CHANGING LANES: VISIONS AND HISTORIES OF URBAN FREEWAYS 143 et seq., (MIT Press 2013) (describing tales in three cities of highways serving as "daggers in the heart of town," dividing communities and promoting racial boundary making).

[19] Brandy Simpkins, *Proposal for new Salvation Army shelter leads to heated City Council discussion*, CONNECT SAVANNAH (December 16, 2020).

[20] Max Diekneite, *Weeping Time Coalition trying to halt Savannah homeless shelter development in court*, WTOC11 (February 21, 2022); Christian Felt, *Weeping Time Coalition continues to pursue acquiring historic land for preservation*, FOX 28 SAVANNAH (May 12, 2022); Larry Gordon, *Weeping Time Coalition: The enslaved built Savannah. Their memory deserves more than plaque,* SAVANNAH MORNING NEWS (March 16, 2022); *see also* THE WEEPING TIMES COALITION [available at] https://theweepingtimecoalition.org/ ("We stand together in protest and solidarity of any development on this sacred land.").

[21] Eduardo M. Peñalver, *Property's Memories*, 80 FORDHAM LAW REVIEW 3 (2011).

[22] Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICHIGAN L. REV. 1695, 1701 (2021) ("In the beginning, a series of property-law choices systemically excluded people of color from original agricultural ownership. This original sin of racialized exclusion still stains the entire project of American property law…Our property system is still designed to keep property in these racialized patterns.").

be capable of being owned and not capable of owning. [23] Indeed, property served to relegate slaves as property instead of humans capable of asserting rights, and therefore incapable of legally asserting benefits of their labor during the years where slavery was legal. Designating humans as something to be owned and limiting access to economic growth for individuals and communities manifested itself in a variety of ways.[24] For example, the North Carolina Supreme Court in *State v. Mann* reasoned that owners of slaves have the absolute power to discipline slaves in whatever manner they deem fit – even if it results in the death of the slave.[25] Likewise, Morris notes that laws relating to violence against slaves by third persons were designed to "prevent damage to the slaveholder" not protect the slave from violence for his own protection.[26] Scholars have pointed to how owners manipulated the ties of kinship with their slaves (propagated from relationships with female slaves they owned) were used to not only solidify power but also to disenfranchise their enslaved children from

[23] Thomas Morris explores the implications of property within the various American slavery regimes in his book *Southern Slavery and the Law* 1619-1860. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860, 62 (University of North Carolina Press 1996). For a discussion of how the law of property has informed international definitions of slavery in the Vienna Slavery Convention of 1926, *see* Jean Allain & Robin Hickey, *Property and the Definition of Slavery*, 61 THE INTERNATIONAL AND COMPARATIVE L. Q. 915, 925 (2012) (setting forth attributes of property law and theory that define traditional human slavery, such as controlling resources, use, enjoyment, and ability to alienate); *see also* Robin Hickey, *Seeking to Understand the Definition of Slavery,* in J. ALLAIN (ed.), THE LEGAL UNDERSTANDING OF SLAVERY (Oxford University Press 2012) (describing how property law was instrumental in defining slavery for purposes of the 1926 Vienna Convention on Human Chattel Slavery).

[24] The eradication of slavery after the Civil War implicated property in two fundamental ways regarding former slaves. First, under the Thirteenth Amendment to the Constitution, laws vesting control of humans as property were no longer enforceable. Second, under the Fourteenth Amendment, former slaves were entitled to the enjoyment of their labor as well as rights to own property themselves. For a discussion of the implication of the Civil War Amendments and the question of property *see* Mark Roark, *Loneliness and the Law: Solitude, Action, and Power in Law and Literature*, 55 LOY. L. REV. 45, 65-68 (2009).

[25] State v. Mann, 13 N.C. 263 (N.C. 1830). In *State v. Mann*, however, the facts were not those of an overzealous owner extracting discipline, but rather the owner (Mann) shot a slave after he failed to follow his directions. Scholars through the years have noted the property effects of the Mann case. For example, Stanley Elkins observed that the case suggested the completeness of the slave's life falling under the master's "dominion." Eugene Genovese noted that this case reflected the logical completion of recognizing humans as property interests rather than humans as members of the community. Mark Tushnet pointed out how the case reflected judges' tendencies to view the law's regulation of the slave relationship strictly as a market transaction rather than something else, adding that judges were reticent to reform this view. MARK TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860 (Princeton University Press 1981).

[26] MORRIS, *supra* note 23, at 196.

generational wealth of the owner.[27] This relegation of status had far reaching impacts beyond the lives of the slaves themselves, but to the generations that followed who were excluded from opportunities to build on intergenerational wealth.

Property continues to disenfranchise individuals from communities leaving them less financially capable of growing their communities. One pernicious instance where property regimes were used to disenfranchise black ownership was in the case of partition sales when black families were excluded from seeking financing from banks. Thomas Mitchell explored the role of these sales to prey on African American owners. Mitchell observes that in the 1910 Agricultural census, black families owned between sixteen and nineteen million [28]acres of agricultural land. By the 1997 census on agricultural land, that number had dwindled to fewer that 16,500 black owners holding less than 1.5 million acres of land - or a loss of more than 90% of the rural land owned by black families in 1910 – many of which have been lost to force sales. The conditions that led to these forced sales were built out of a lack of access to credit necessary to improve property or to grow agricultural operations that plagued black ownership since the early twentieth century. In that context, opportunistic land speculators used devices like partition to force sales by acquiring the interest of one family member who wishes to exist the tenancy. In that context, neither seller nor the remaining cotenants were aware of the financial pressure the sale to the outsider may cause. As Mitchell notes, "[u]nbeknownst to the family member, the buyer often takes the interest with the underlying motive of seeking a partition sale."[29]

In the urban context, for properties like those found in West Savannah, the fractionation of ownership along with the disenfranchisement from finance sources and other institutions that serve to prop up white property interests meant that property either faced similar speculative preying as rural holdings, or simply fell into disrepair and blight from lack of access to resources to maintain the

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[27] Dylan C. Penningroth, *The Claims of Slaves and Ex-Slaves to Family and Property: A Transatlantic Comparison*, 112 AMERICAN HISTORICAL REV. 1039 (2007).

[28] Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 Wis. L. Rev. 557, 563-564 (2005).

[29] Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Ownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001).

property.[30] The pernicious practice of redlining effectively eliminated FHA backed loans from many geographic areas like West Savannah, meaning that borrowers had to pay more to access credit, or just simply were excluded from credit altogether – leaving them with the unlikely scenario of paying for major improvements out of pocket.[31] The severe fractionation of interests meant that no single tenant stood to profit from coordinating the many interests necessary to improve the property and either gather the resources or seek contribution from fellow owners. Many times, the property was allowed to deteriorate or fall prey to local tax liens from nonpayment.[32]

Moreover, property was complicit in the relegation of communities of color as neighborhoods were divided and then demolished in the wake of urban blight removal, highway development, and economic growth.[33] The proliferation of slum clearance policies advocated by the Federal Government largely targeted communities that were comprised of black or predominantly black residents. As those spaces were cleared, public housing structures that were primarily geared towards white working-class families replaced the former tenant housing structures. In the 1950s, the integration of black families in public housing paired with the innovation of the automobile triggered white flight from communities. Since white families continued to earn higher salaries, the proliferation of highways and cheap automobiles meant that white families were no longer beholden to public housing to afford living near the city. Questionable real estate practices such as block busting furthered the growth of suburbs as a white enclave away from the poverty of the urban center. White flight that resulted meant that public housing complexes (and whole communities) were characterized as mostly

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[30] *See* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (University of North Carolina Press 2019); DOROTHY A. BROWN, THE WHITENESS OF WEALTH 65-66 (Crown Publishers 2021) (describing the different impacts of structures supporting white ownership and their absence in black ownership).

[31] *See* ROTHSTEIN, *supra* note 18; s*ee also* TAYLOR, *supra* note 30; BROWN, *supra* note 30.

[32] *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 718 (1973) (noting that many urban areas that are considered blight suffer from high degrees of fractionated ownership where the costs of mobilizing large groups of people are too high for effective private bargaining); Lisa T. Alexander, *Hip Hop and Housing: Revisiting Culture, Urban Space, Power and Law*, 63 HASTINGS L. J. 804, 822 (2011) (connecting the existence of urban blight with property and community loss in urban areas).

[33] *See e.g.,* ROTHSTEIN, *supra* note 18, at 127; DIMENTO AND ELLIS, *supra* note 18, at 143.

spaces for black families. HUD policies that limited access to borrowing for owners in black communities, intrinsic policies that limited access to funds by black borrowers, and *de facto* rules that continued segregated practices of communities meant that black families were largely relegated to certain spaces – many of which were economically less convenient, offered fewer services, and generally warehoused poverty while also warehousing race.

It is precisely for these reasons that we need to take a broader view on property and the wide-ranging impacts that property has on people in our communities. Where one lives impacts the kinds of housing they have access to, the security of tenure in that housing, the types of schools their children attend, the propensity for interactions with the criminal justice system, and much more.[34] In sum, we need to redraw the lines around which we see property – not as an empty vessel in which the ideas of society are poured in over time to reflect back to us in that moment, but rather as an endogenous institution that not only reflects back our stated norms, but reflects back to us our passive values – the ones which are hidden from view but for the scars its leaves on the landscapes around us. This article describes how resilient property theory offers a way forward for conceiving and thinking through problems like the site described above and how cities and communities can deploy it for sustainable paths forward.

This article is divided into two parts. The first part unpacks the problem of property's memory – how that memory pervades our attempts to progress socially – and how we justify turning away from the impacts of property choices. The second part describes resilient property theory and the rationales that support it. It also applies resilient property theory to the Savannah site described in this introduction raising three critical questions that Resilient Property Theory brings to the forefront.

II. THE MARKET SHAPE OF PROPERTY APOLOGIES

Both reparations and land reform are property apologies. Land reform movements seek to reset land distribution to account for a variety of outdated limits that continue to make land acquisition,

[34] *See generally* MATTHEW DESMOND, EVICTED (T.H.E. CROWN PUBLISHING GROUP 2017); DAVID A. SCHULZ, COMING UP BLACK; PATTERNS OF GHETTO SOCIALIZATION (PRENTICE-HALL 1969); EVA ROSEN, THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD (PRINCETON UNIVERSITY PRESS 2022).

wealth accumulation,[35] and social and political participation less obtainable by some in a society. Some of those problems include imperialism and disenfranchisement of indigenous populations,[36] slavery and other racialized exclusions from participation in ownership regimes, patriarchy and other forms of gender or juvenile exclusions,[37] religious cleansing and faith-based exclusionary practices, and much more. Property's memory makes these exclusionary structures last long after the society has moved beyond the regime that favored certain members over others.[38] Recognizing that land structures that favored certain classes and groups are never fully reformed by market forces, land reform movements seek to reset land relationships to align with the social expectations promoted in free and fair democracies. Similarly, reparations focus on building a better future by correcting past injustices. Those injustices may be the exclusion from economic markets due to status, compensation for past atrocities, or compensation for past due value, including the value of forced labor. Both reparations and land reform are tools for implementing transitional justice where groups have been systemically disadvantaged.[39] The marriage of reparations with land reform has been described as essential to fill the gap of restoring dignity that was lost from prior exclusionary regimes.[40]

The U.S. is not the only state to deal with lingering effects of racism. South Africa's Apartheid regime continued into the 1990s when political reform movements began to gain traction. Those reform movements gained the support of the international community which instituted economic sanctions to force the Apartheid government to the table. As discussions furthered and the Apartheid regime was accepted

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[35] Jakobus M. Vorster, *The Ethics of Land Redistribution*, 34 J. OF RELIGIOUS ETHICS 685, 685 (2006) (noting that land redistribution seeks to correct the wrongs that have left communities without land, where "they remain poor and cannot execute their family rights.").

[36] *Id.* ("The restitution of land ownership has become a central political issue in virtually all of the countries that were under colonial rule. Colonial powers and settlers from outside dominated the property and ownership arena for many centuries.")

[37] *Id.* at 685 (noting that women and children experience acute vulnerabilities highlighted by the lack of access to property).

[38] Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL LAW REVIEW 4 (2009).

[39] Andrew Dusek, *Ill Fares the Land: Reparations for Housing, Land and Property Rights Violations in Myanmar,* 30 HARV. HUMAN RIGHTS J. 129, 130 (2017).

[40] BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 4 (Oxford University Press 2014).

as unsustainable, the animus then turned to the question: what shall we do with property?

Land reform in South Africa in the lead up and following the adoption of the new Constitution reflected how land reform was navigated on a hybrid scale between the state, society, and market as it impacted land claims. Andre Van der Walt captures the nuances of how these arguments were postured in his book *Property at the Margins*. One such movement (we'll call the Neutral Property Approach) devalued the role of law in promoting apartheid agendas, suggesting that the apartheid regime was a social problem, but not a legal problem, and that disrupting the legal rights that existed would create unnecessary chaos and disorder. [41] Van der Walt observes that this framing of reform "accepted the necessity and even the inevitability of transformation," as long as it was a political and not a legal process.[42] This perspective accepted as a precondition that law itself was an "objective" value, separate from the unjust social conditions that gave rise to apartheid.[43] Viewing the legal claims of property owners as separate from the validity of the state in which they were based meant that reforms in property should be *prospective*, rather than reorganizing existing rights. This version of reform acknowledged as a rhetorical limit that the injustice of apartheid impacted the social organization of the state but did not affect the legal organization of the state – including the recognition of legal claims to property. It also recognized that property's distributive scale was limited to abilities to access markets in the future.

A different movement (we will call the Property as Order approach) did not object that private property claims were complicit in promoting apartheid regimes. This movement promoted the continuation of private property rights because of concern over the potential turmoil that land reform, which was not limited to prospective claims, would bring on the state. Van der Walt notes that proponents of this approach recognized the need for limited reforms as long as they did not disrupt stability or security. [44] This view tied the

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[41] A. J. VAN DER WALT, PROPERTY IN THE MARGINS 5 (Hart Publishing 2009) (citing J.M. Potgieter, *The Role of the Law in a Period of Political Transformation: The Need for Objectivity*, 54 THRHR 800, 802 (1991) ("It must be stressed that the basic assumption that the South African legal system as a whole has become illegitimate is unfounded. The crisis in South Africa lies primarily in the socio-political rather than the legal sphere.")).

[42] *Id.* at 5.

[43] *Id.* (citing Potgieter, *supra* note 41, at 802).

[44] *Id.* at 4.

stability of existing property rights with the capacity of the state to engage in distributive outcomes alongside political and social transformation. Importantly, this version of critique in land reform expressed concern that "outside investors" would be frightened away if private property rights and private ownership was disrupted.[45] This argument drew on the nature of private property to navigate as a conduit for various scales of investment: that the stability of private property in the country furthered the investment of outside interests, which in turn would reduce poverty by ensuring economic development and growth within the country. To that end, advocates of this approach sought protections within the new Constitutional structure (on the hierarchical scale) to ensure that private property would be secured rather than threatened by transformation.

Finally, some proponents suggested that private property was irrelevant to reform since private property was irrelevant to the goals of reform (the Property Misdirection Approach). One line of argument sought to protect private property interests in land reform by *deemphasizing* the role of private property in economic redistribution. The argument went that private property was not the primary vehicle for investment and that any transformational movement should be directed to economic growth rather than distribution. Importantly, this version of land reform saw the resources of land reform accessible by the state as finite, and therefore private property should be seen as a lower priority on the distributional scale by the state.[46]

What each of these approaches attempt to do is decenter reform away from pre-existing land interests, shielding property claims from other aspects of distribution. In doing so, they offer distinctive views of property through the lens of the state, society, and the market. For example, in the property as neutral literature, property and the market exist outside the control of the state and will self-correct as the state corrects its views on race. In this way, the function of the state in self-correcting is to ensure that barriers like racial exclusion are no longer enforced legally on would-be property possessors. In contrast, the property as order arguments located property as a specific institution of the state and as such was complicit in the implementation of an apartheid regime. However, while property was certainly involved in

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[45] *Id.* at 4 n. 10 (citing P. Du Toit, *Vrai oor Hanekom se Gondhervorming*, Finances & Tegniek (June 15, 1995) at 37.)

[46] *Id.* at 5 (citing Michael Robertson, *Land and Human Rights in South Africa (A Reply to Marcus and Skweyiya)*, 6 SAJHR 215, 219 (1990).)

promoting apartheid, as a subordinate institution of the state, property was a part of the order keeping function of the state, which remains viable and necessary in a dynamic state. Thus, the state should preserve property for the sake of order keeping, while reforming property from within. Moreover, the market itself is a conduit for the resources of both order and prosperity and the state needed the ordered system of property as a conduit for outside resources. Finally, one set of arguments disregarded the impact that property has on the needs of people and suggested that it would be a waste of time trying to reform property. This view did not offer an apology for property's role in apartheid, but rather saw property as a distraction to other pressing needs. For example, in the chart below, I illustrate how state, society, and market values emerged in arguments against land reform as actors sought to describe property's role in apartheid as either neutral (not actually having a role); as order producing (culpable, but necessary); or as irrelevant.

	State	**Society**	**Market**
Property as Neutral	Property exists outside the organization of the state. Apartheid was a state problem.	Property is morally neutral and not complicit in the Affairs of Apartheid	Markets are morally neutral like property. They will self correct.
Property as Order	Property is an essential institution of the state. The State can reorganize property.	Property was complicit in apartheid. But the need for stable property regimes for ordered society outweighs disruption of the property regime.	Property is a conduit for outside resources. Thus for morally good resources to enter, Property must be preserved.
Property is irrelevant	Property is below the	The property effects are the	If other social areas

	financial needs of the state. The State should not waste resources correcting property.	outcome from accentuating property regimes rather than other resources	and financial investments are fixed, property will fall in line.

In the U.S., reparations, rather than land reform, have taken the long-standing form of apology-making around racial harms. Alfred Brophy distilled the arguments against reparations in his 2006 book *Reparations: Pro & Con* into four main streams: (1). Reparations are unenforceable because reparations were immoral or never due; (2) reparations have already been provided to prior victims; (3). Reparations are politically impracticable or unworkable; and (4) Reparations are divisive and misdirect our attention away from other more important matters.[47] Like the Apartheid arguments, these arguments against reparations draw moral conclusions about the nature of property as it exists through the lens of the state, society, and the market. For example, those that argue against reparations because they lack moral enforceability or legal enforceability draw on legal arguments that rely on fault as the lynchpin for legal liability. The argument proceeds that before someone can be legally liable for claims by another, they must be a source of harm and be found at fault. In this version of anti-reparations arguments, since the current state was not at fault for harms, its citizens cannot be held liable for claims.[48] Moreover, if the basis for claim is that the harms benefit individuals or society, that the market distribution of those benefits has so watered down their effect that its unjust to hold individuals responsible. In contrast, the arguments that suggest past reparations have been paid and are sufficient piece together a version of the state and market where the state having acknowledged culpability provides for welfare access which in turn serves as a wealth transfer from white descendants to black descendants. These transfers allow black participants to participate freely in the market to correct past exclusions.[49] Finally, the reparations are harmful arguments may acknowledge past effects of

[47] ALFRED L. BROPHY, REPARATIONS: PRO AND CON 75-94 (Oxford University Press 2006).
[48] *Id.* at 75-77.
[49] *Id.* at 81-85.

slavery, but like the property is irrelevant arguments in the South African land reform context, they argue that supporting reparations is harmful and counterproductive.[50] In this view, the state can accept responsibility for past wrongs, but reject the need to repair them because the greater needs of society outweigh compensating descendants of slavery. Part of those harms would be disruptions to markets that rely on certainty for functionality. As above, when we chart the role of state, society, and markets in arguments against reparations, we see a similar pattern where individuals sought to insulate property by either requiring fault, by suggesting that any harm has already been compensated, or by suggesting that efforts to redirect resources was misguided.

	State	**Society**	**Market**
Reparations require Fault	The current state is not at fault. The current members of the state are not connected to the harms of slavery	Current members of society are not responsible for harms of the past state.	Market's are inherently neutral actors and therefore any benefits reaped from slavery have been distributed beyond those at fault.
Past Reparations were Paid and are sufficient	The state was complicit but has paid for its past harms through welfare programs.	Society transfers wealth from descendants of white owners and white members of society to black members through welfare	While the market is neutral, welfare enables all participants to participate in the market to correct past exclusion.

[50] *Id.* at 85-92.

		programs	
Reparations are Harmful	The State may have been complicit in slavery but supporting reparations would be more harmful	The financial benefits of reparations do not outweigh the social costs.	Forcing reparations would be disruptive to the markets and other harming to innocent individuals.

Importantly, while both land reform talk and reparations talk has had their moments in the last thirty years in South Africa and the U.S. respectively, neither movement has been able to implement its desired outcome. What each of these movements have in common is that the response to them have often been built on redirecting claims away from the state's role in supporting these initiatives to reasons why the state should not get involved.

One reason for this limitation is the instinct to frame problems through ideologies and narratives first, rather than asking how interests map onto the thing or people. When we bring these challenges into view of impacts on land and the people that have relationships to the land, the arguments for land reform/ reparations begins to be shaped not by what we think property is, but rather by what we see property doing. This paper urges a realist account of land and land relationships that effectively balance the needs of the state, society, and markets in sorting through questions of past harm. In doing so, two broad principles should be valued as they relate to land. First, that land and land regimes should be promoted to support democratic legal systems, not the other way around. Second, that land has a memory that continues to resurface past harms long after the action that causes those harms ends. When problems focus on validating claims to property, rather than starting from the point of view of what property does, it enables those harms to regenerate through the property – and replicate themselves over and over. Each of these points I discuss in part III. Before that though, we need a method to arrive to that point. I suggest resilient property's method assemblage approach is right for the task.

III. PART TWO: RESILIENT PROPERTY THEORY AND MAPPING THE PROBLEM SPACE

Property theory has often circulated around two key loci: the structure of property (how property works)[51]; and the normative underpinnings of property law (why we have property).[52] A strand of property scholarship focused on the 'property/sovereignty' debate[53] has focused on the legitimacy of state action or forbearance with respect to private property. However, property scholarship has, typically, given relatively little direct consideration to the *nature* of the imagined "state," which lurks in the background of these debates; to differences in the nature of the state across jurisdictions; or to how the nature of the (liberal) state has changed over time—and the implications of these changes for property theories, laws and practices. This is perhaps unsurprising in light of the starting point for liberal theories of *private* property law, within the "private realm." Yet, as major transformations in state-society relationships have re-configured the contexts in which property law now operates, the approach and methodologies of property scholarship and the theories we construct to understand, interpret, and explain property require fresh attention. Resilient property theory offers a realist perspective that draws our attention to what property is doing.

The need for a new approach and methodology to tackle property law's wicked problems is vital in light of the centrality of property problems to the challenges facing late-liberal states since the

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[51] The form and structure debate focuses on questions of 'ownership/dominion' versus the 'bundle of sticks' theory. *See, e.g.,* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16-59 (1913). The liberal conception of the 'standard incidents of ownership' in the context of English law was famously articulated by Tony Honoré, *see* A.M. Honore, *Ownership* [in] ANTHONY GORDON GUEST, OXFORD ESSAYS IN JURISPRUDENCE FIRST SERIES 107 (Oxford University Press 1961). Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 279, 280-82 (2011) (discussing the "exclusion strategy" as part of an alternative approach to property theory); BEN MCFARLANE, THE STRUCTURE OF PROPERTY LAW (Hart Publishing 2008).

[52] Dagan highlighted two additional voices in debates about the normative underpinnings of property: the neo-Kantian 'property for independence' approach, and the neo-Aristotelian school of 'property for interdependence.' HANNOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (Oxford University Press 2011).

[53] *See, e.g.,* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL LAW QUARTERLY 8–30 (1927); Eyal Benvenisti, *Sovereignty and the Politics of Property*, 18 THEORETICAL INQUIRIES IN L. 447 (2017); Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust,* 18 THEORETICAL INQUIRIES IN L. 329 (2017); Sergio Dellavalle, *The Dialectics of Sovereignty and Property*, 18 THEORETICAL INQUIRIES IN L. 269 (2017); Larissa Katz, *Property's Sovereignty,* 18 THEORETICAL INQUIRIES IN L. 299 (2017).

Great Recession. Indeed, this need has only become more pressing as we face into the economic impacts of the Covid-19 pandemic. At the same time, property norms and narratives have come under renewed scrutiny in the context of neoliberalism, which simultaneously advances "strong" property rights and a (putatively) "small" state in aspects of social and economic life that are deemed to be 'private'; and strong state interventions (for example deploying the techniques of criminal sanction) in aspects of life that are 'moralized' and/or deemed 'public' (for example, law-and-order, immigration, international trade law).

A. Resilient Property Theory: A New Way Forward

Applying Fox O'Mahony and Roark's Resilient Property Theory offers a new approach for understanding the dynamics and challenges of property apologies and the resiliency gaps they respond to. This new approach and methodology investigate property law's import on state and social relationships, bringing into view the background principles on which property claims are based.[54] Resilient property recognizes that the nature of the state or government responses to property problems is not fixed but fluid; that the institutions of "the state" – and their relationships with citizens, society, markets, the institution of private property, and so on are not mono-linear but polycentric, multimodal and multi-scalar.[55] This new framework sets out to better understand state responses to complex property problems, such as homelessness and housing precarity. These challenges are central to the current crises of access to land, affordable housing, sustainable development and economic crises and recovery that governments must grapple with in the wake of the epidemic.

Importantly, a resilient property approach reveals resiliency gaps that emerge when states make choices about property allocations and preferences. The state's involvement with private property is legion – from the regulation of uses through zoning requirements, to the settlement of disputes between owners and others, to the taxation of property to support public programs. A Resilient property approach in relation to state property problems urges a caution towards narrowing frames that provide only partial accounts and belie the

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[54] *See generally* MARK ROARK AND LORNA FOX O'MAHONY, SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS (Cambridge University Press 2022).

[55] *Id*.

magnitude of the problems we face.[56] Depending on the frame, the problems faced in the Savannah West area can be seen as a local control versus national planning problem (scale and territoriality); a housing allocation problem; a community identity problem; a land use and historic preservation problem, or not a problem at all.[57] Unpacking the entire topography of the problem space requires taking account of:

individual interests such as owners and users to consider how rural-land entrepreneurs deploy property;

collective interests, such as neighbors, communities, as expressed through markets or political action; and

state interests, including the claims by local politicians and actors, planning officials, and national level actors.

The frame of analysis determines how responsibility for causation, intervention, resolution, and prevention are attributed to individuals, institutions, and the state, and what solutions or goals are intended to result from state action or forbearance. The use of frames to narrow our perspectives on what are broad, complex property problems create an impression that "solutions" can be found through the application of the narrowing, selective lens. Inevitably, the choice of frame – or explanation – determines the nature of the proposed resolution. Reductionist frames elide the complexities of problems, in ways that translate and make visible the "official," "relevant" or legible aspects of the problem, while concealing aspects of the problem that sit outside the official, dominant paradigm or grand narrative.

Importantly, private property itself provides one such reductionist frame, scaling down conflicts from multi-variable problems (like West Savannah) to isolated problems that are binary. The scaling down of problems into binary ones frame out other issues and complexities that are relevant to understanding how property should be allocated.[58] As well as raising justice concerns, the effects of framing can practically hinder attempts to resolve complex problems. Resilient Property Theory recognizes as a core concept how property interacts on different scales depending on how a problem is framed. Hierarchical scale describes how individuals and interest actors (including the state) interact in different echelons of authority

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[56] *Id*.

[57] *Id*.

[58] *Id.; see also* Mark L. Roark and Lorna Fox O'Mahony, *Comparative Property and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crises*, 82 LA. L. REV. 789 (2022).

within the dispute.[59] Rhetorical (sometimes called semiotic or discursive) scale describes the resources that validate claims to property as recognized by actors and the state. And distributive scale describes how resources and property may be distributed differently and the justifications that validate those distributions. Land reform interacts within all three levels of scale often creating conflicts between different levels of scale. For example, the state's authority to carry out land reform may be challenged by owners who assert pre-political or moral claims to rely on property rights that are seeking to be reformed. Simultaneously, states may look to rhetorical claims or distributive imbalance claims to justify the need for land reform actions. Importantly, the way that states interact within these scales suggests something about the resilience the state itself seeks in undertaking land reform.

State responses to property problems enable us to better understand how complex, multi-level state actions shore up both individual and aggregated interests, and the resilience of the state itself. This approach resists the narrowing effects of normative frames, seeking instead to identify and delineate the whole problem. Working across the problem space, resilient property approaches follow iterative steps or phases – cycles of analysis and synthesis – to develop an "inference model" that allows stakeholders to better understand the problem space and the possible consequences of alternative decisions or actions. Resilient property problem solving methods require that we "remain in the mess" – keeping options open long enough to explore as many relationships in the problem topology as possible, before synthesizing our understanding and starting to formulate solutions.

Resilient property marks a clear departure from property theorizing that is framed by the classic dichotomies – for example, state/individual, sovereignty/property, exclusion/inclusion – and shaped by *ab initio* normative commitments. These approaches are not well equipped to tackle large-scale questions relating to complex property problems. Property theory has recently centered around two key *loci*: the structure of property (how property works); and the normative underpinnings of property law (why we have property, and how the law of property should evolve).[60] Contemporary property scholarship has, to date, given relatively little direct consideration to

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[59] *See* ROARK AND O'MAHONY, SQUATTING AND THE STATE, *supra note* 54.

[60] *Id.*

the nature of the imagined "state." "The state" lurks in the background of the property/sovereignty debate, which contrasts the "private" sovereignty of property rights with the "public" sovereignty of state action. In addition, property theories tend to frame property problems through ideological frames that aim to justify property's power. As such, property theories themselves are typically geared around, either justifying the institution of private property, or narrowing the frame to focus on transactional "private" relationships.

Resilient property advances a distinctive break from these theories to better understand state responses that pertain to complex property problems[61] It focuses on state action, recognizing states or governments as self-interested actors responding to large-scale property problems, and its role and relationships with competing stakeholders in property conflicts. It is focused on understanding the state-backed institution of property law in relation to the state's own stake in multidimensional property problems: the state's own vulnerability, and its capacity to foster resilience for others. Resilient property draws three key insights from Fineman's "vulnerability theory":[62] her general approach to vulnerability and resilience; her insights concerning institutional vulnerability, including the vulnerability of the state; and finally, building on Fineman's framework to develop a third insight that provides a central anchor for our analyses of state responses to property problems, namely that a necessary implication of recognizing that the state itself is a vulnerable institution is that we recognize the need for states (and governments) to act in ways that build their own resilience, to shore up their authority and legitimacy in the face of the epidemic.[63]

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[61] *Id.*

[62] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State,* 60 EMORY L. J. 252, 255 (2010); Martha Albertson Fineman, *Women, Marriage and Motherhood in the United States: Allocating Responsibility in a Changing World*, 2011 SINGAPORE JOURNAL OF LEGAL STUDIES 1, 16 (2011); Martha Albertson Fineman & Robert W. Woodruff, *Afterword: Vulnerability and Resilience*, 36 RETFÆRD ÅRGANG 84 (2013); Martha A. Fineman & Anna Grear, *Introduction, Vulnerability as a Heuristic: An Invitation to Future Exploration* [in] MARTHA A. FINEMAN & ANNA GREAR (EDS), VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 21 (Routledge 2013); Martha A. Fineman, *Vulnerability and the Institution of Marriage Paper Symposium: Polygamous Unions- Charting the Contours of Marriage Law's Frontier*, 64 EMORY L. J. 2089, 2091 (2015); Martha A. Fineman & George Shephard, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 61 (2016-2017).

[63] Roark & O'Mahony, *Comparative Property and the Pandemic*, *supra* note 58, at 805 (citing Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 63).

States are not neutral arbiters in relation to competing claims to land, instead doling out resilience in ways that shore up the state's own self-serving needs for legitimacy.[64] Fineman's work reveals the realities of state action in response to complex property problems: that states are required to negotiate their "other-regarding" responsibilities – adjudicating and allocating resilience to individuals and institutions – against the backdrop of their own "self-regarding" need for resilience.[65] Whether and how individuals are able to access these stores of resilience is often dictated through limited analysis, rather than through understanding of the entire problem space. This enables us to develop a realistic, contextualized, conceptualization of state action with regard to complex property problems.

Fineman deploys the concept of "resilience" to articulate the means through which universal vulnerability is mitigated and managed: by accumulation, access to or acquisition of resources – specifically housing for purposes of this project – to enable us to adapt to, ameliorate, compensate for or contain our inherent vulnerability.[66] Forms of vulnerability are aggravated during times of crisis, drawing our attention to state responses in allocating resources for the sake of resilience.[67] Individual experiences of vulnerability are structured through the person's social embeddedness in the institutional structures and relationships that provide resilience.[68] Resilience is produced through the institutions that create, enable, provide, and protect the "assets" of resilience – the physical and material, social and relational, environmental and existential capabilities to weather misfortune and disaster, and to avail ourselves of opportunities. Vulnerability is mediated through the quality and quantity of resources – resilience – that we inherit, accumulate or are capable of accessing; resilience is generated over time and within state-created institutions and relationships.[69]"The state" is central in creating and sustaining the economic (e.g., the market), social (e.g., the family), legal (e.g., constitutions) and political (government) institutions that produce and allocate resilience.[70] These institutions of resilience are created,

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[64] *Id.*

[65] *Id.*

[66] FINEMAN, REFLECTIONS ON A NEW ETHICAL FOUNDATION, *supra* note 62.

[67] ROARK & FOX- O'MAHONY, SQUATTING AND THE STATE, *supra* note 59.

[68] Fineman, *Vulnerability and the Institution of Marriage*, *supra* note 63, at 2090.

[69] Fineman & Grear, *Vulnerability as a Heuristic*, *supra* note 62.

[70] Fineman, *Women, Marriage, and Motherhood in the United States*, *supra* note 62, at 16.

maintained, regulated and backed-up through law; and through this relationship, law confers legitimacy on their operation and their power over individuals. Nevertheless, the societal institutions we create to mitigate our vulnerabilities: the market, the family, the welfare system, the institution of private property, the state: "…are also vulnerable to things like decay, manipulation, corruption, and decline."[71]

Resilient Property offers an alternative conception of 'stability,' rooted in the normative desirability of avoiding tipping points: maintaining legal, political, social, and economic equilibrium. Property theory and property law are embedded in changing national, local, and transnational contexts, and competing individual and institutional demands for resilience. Maintaining equilibrium in a dynamic context, through challenges and crises, requires adaptation, flexibility and innovation, and 'context-appropriate design'—sensitive to the nuances of the property *nomos* in each jurisdiction.[72] Legal resilience has been described as: "…the ability of an Institutional Environment to absorb, by legal mechanisms of resistance and recovery, unlawful practices, and also to adapt its legal space rules to accommodate and retain, or to improve its legal functionality vis-a-vis a new desired practice."[73] The resilience of legal systems depends on being able to adapt, to flex and to innovate in the face of unprecedented and unexpected challenges and change. Arnold and Gunderson argued that, when legal systems favor monocentric and unimodal methods and linear processes they are maladaptive and ill-suited to resolving emerging challenges.[74] Their approach—which they term 'adaptive law'—focuses on how structure emerges out of nested cycles of adaptation and change.[75] Resilient property as a method and an

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[71] Fineman & Woodruff, *Afterword*, *supra* note 62, at 88.

[72] Timothy Sisk has argued that: "Democratic institutions can be designed for resilience, but there are no simple solutions and designs must be adapted to local realities. With context-appropriate design, it may be possible to craft institutions that are more resilient when they are tested by political, economic, or social strains and pressures." TIMOTHY SISK, DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT (Princeton University Press 2017).

[73] Michiel A. Heldeweg, *Normative Alignment, Institutional Resilience and Shifts in Legal Governance of the Energy Transition*, 9 SUSTAINABILITY 1, 4 (2017).

[74] Craig Anthony (Tony) Arnold & Lance Gunderson, *Adaptive Law and Resilience*, 43 ENVTL. L. REPORTER 10426 (2013).

[75] Echoing the methods of wicked problem theory, they proposed that legal frameworks should be developed in ways that mimic the resilience and adaptive capabilities of ecological and social systems: (1) adaptive goals that aim for multiple forms of resilience; (2) an adaptive system structure that is polycentric, multimodal and multi-scalar; (3) methods of

approach to large scale property challenges provides the means for identifying gaps that emerge when different stakeholders stake rights and powers over land allocation.

B. Scaling Memory and Resilience in Property Problems

One challenge in addressing large scale social challenges through property is reconciling the existing legal relationships that property regimes reinforce. Property has a memory that preserves the social claims to space even after social values change.[76] Peñalver notes that "changes that human beings make to the land have a tendency to remain in place until they are affirmatively removed," which can require a process of confronting the past while looking to the future.[77] I have previously suggested that changing property regimes isn't enough if the goal is shaping the property environment around our social constructive expectations – that we must do more than just allocate space, but rather must allocate power.[78] Too often, property rises above our power – in our stories, in our memories, and in our laws.[79]

In resilient property theory we spend a great deal of time dealing with different versions of scale because property itself is often scaled across three dimensions. Indeed, scale exists in hierarchical relationships, such as where governments allocate powers between different levels or branches of government; in resources where different individuals, groups, or governments have access to different levels of resources to carry out their agendas (like land use regimes); and in discursive or semiotic relationships where the rhetoric around

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adaptation and context-regarding flexibility; and (4) iterative processes with feedback loops and accountability mechanisms. *Id.* at 10428.

[76] Mark Roark, *Slavery, Property, and Marshall in the Positivist Legal Tradition*, 2 SAVANNAH L. REV. 45 (2015); *see also* Eduardo M. Peñalver, *Land Virtues*, *supra* note 38.

[77] Peñalver, *supra* note 38, at 830.

[78] Roark, *supra* note 76, at 56.

[79] Stephen Thompson, *Song Premiere: Blind Pilot, 'Umpqua Rushing'*, NPR (June 2016), https://www.npr.org/sections/allsongs/2016/06/01/479498392/song-premiere-blind-pilot-umpqua-rushing (quoting from an email sent by Blind Pilot songwriter Israel Nebeker, who noted that, "The past isn't finished with us yet. Love can be like that, too. I think of this album as a conversation about different kinds of loss and the courage we find when we face loss honestly, cracked open and unsure of what we will become, which is the only real way to face it. In this song, I write about the Umpqua Forest in Oregon and the lost coast of Northern California. It amazes me how places reveal themselves as significant to us by the stories we live in them. They echo memories back to us when we visit or when we listen from afar. I like that, and it reminds me how the past isn't finished with us.")

uses are valued differently depending on the interest challenged. Dealing with memory in land then has come to mean dealing with different versions of memory. Indeed, recent moves to eliminate so-called critical race theory curriculums from state-backed education systems suggests on a certain level that memory, like other forms of power, can be scaled through hierarchical forms of power and control.[80] When memory is used to frame access to resources (like property) or claims to power (like the allocation of resources by the state) all three forms of scale converge to complicate the interests and values on the ground.

This impulse to allocate access to property based on the scaling of powers, resources or rhetoric gives too much power to land and land interests in large scale social problems. The abstracting of property into rights gives power to few individuals who have access to the power to shape those rights over time. Instead, we argue that property should be understood in a more modest light - serving in a "sweeping up function" rather than front and center in an allocation role. As Andre Van der Walt wrote "the process of promoting and protecting fundamental civic, political, and social rights is just too contextual and the property debris left in its wake too messy."[81] What Van der Walt and others have come to realize is the view that democracy and access to democratic institutions are the things to be valued. I would take one step further and suggest that while democratic institutions are things to be valued, the values of community, home, and personhood stand side by side with democratic values that should be front and center in our minds when we ask what impact allocating property has on the ground.

To do so, we must pay attention to the resiliency gaps that remain unattended when states allocate rights or claims such as property. Paying attention to places like West Savannah, where neighbors have struggled to create economically stable communities over the years due to state-imposed policies of segregation, land policy, fractionation of communities, and warehousing of the poor requires that we look beyond just rights in land that would distract us from seeing the totality of the wicked space in front of us.

Thus, applying a resilient property theory method to the West Savannah land challenge would ask two crucial questions. What

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[80] Where state legislatures impose on local school boards limits on what can be taught, there is a hierarchical scaled version of memory.

[81] Van der Walt, PROPERTY IN THE MARGINS, *supra* note 41 at 105.

advantages does the state obtain when it allocates land in particular ways? What resilience gaps emerge when property is so allocated?

i. The State Resilience Question

What advantage does the state seek out when it allocates land to the dedicated homeless shelter in West Savannah. Those advantages are often framed by the city's own resilience gaps. Sometimes those resilience gaps emerge around budget questions and the political power to allocate resources to city problems. Other resilience gaps can emerge from large-scale social challenges, like homelessness, for which there is no single one-sized fits all solution. All of these things shape the way cities attempt to define themselves to outsiders as a way of attracting new forms of consumption in the modern city. The initial reliance on Federal resources to shape American cities in the early 20th century and their subsequent retrenchment in the late 20th century has shaped the way cities marshal resources to deal with large scale problems like housing challenges.

Indeed, each of these resilience gaps are visible in West Savannah. For example, the crumbling state of public housing resources and the high cost to bring them up to standards resulted in the demolition of the property that the Salvation Army proposed to use as a homeless shelter. The draw down on resources in housing has produced fewer affordable housing options in the city, contributing to the rising homelessness crisis the city faces. And as city budgets are constrained, homeless services are often relegated to private actors who operate on land that the city formerly owned to provide needed services, while not allocating money out of budget for those items. Warehousing the poor in economically depressed areas of the city allows the city to both channel policing resources in certain communities (exclusionary practices in the high value downtown district) and broad toleration in lower income communities. It also does not expose the city government to further challenges that would arise if a homeless shelter were proposed near a high-value housing district.

State institutions and actors at different levels exist in recursive relationships, where action by one can trigger a response from another. Jason Hackworth observed that in the neoliberal era, increased local autonomy to address problems has removed some of the barriers that state competencies (or divisions of power) had imposed on city

decision making. Yet, he adds, the broadening of local decision-making powers (competencies) has not necessarily translated to increased capabilities:

> "To the contrary. . .the policy imagination in the current regulatory context has narrowed considerably as neoliberalism has risen to hegemonic status. The "opening" of power has been a lopsided affair because it has taken place within a context that heavily favors the aforementioned global institutions at the expense of cities, towns, PHAs, and so on. Moreover, the power propelled "downward" to localities often amounts to little more than increased responsibility for social reproduction and economic risk, while that propelled "upward" enables greater capital mobility. Many localities are left with little practical choice other than to pursue an "entrepreneurial" path of their own."[82]

The emergence of entrepreneurial cities can be understood as the latest step in the evolution of local-level state interaction with property problems, partners, and the multi-layered institutions of the state. Fainstein and Fainstein's typology of local government in the post-war U.S. identified three distinct periods between 1950 and 1984: (1) the 'directive period' from 1950-1964, when local decision making and access to federal funding was constrained by federal requirements; (2) the 'concessionary period' from 1965-1974, triggered by political and financial crises that forced decision makers at the local level to make concessions to lower income and minority constituents; and (3) the 'conserving period', from 1974-1984, when federal resources dried up, forcing municipal governments to enter modes of retrenchment.[83] Building on Fainstein and Fainstein's initial typology, Hackworth

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[82] JASON HACKWORTH, THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM 43 (Cornell University Press 2014).

[83] Norman I. Fainstein & Susan S. Fainstein, *Regime Strategies, Communal Resistance, and Economic Forces,* in SUSAN S. FAINSTEIN, ET. AL. (eds.), RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT (LONGMAN PUBLISHING GROUP 1983); Norman I. Fainstein & Susan S. Fainstein, *Is State Planning Necessary for Capital?: The U.S. Case*, 9 INTERNATIONAL J. OF URBAN AND REGIONAL RESEARCH 485 (1985); *see also* HACKWORTH, *supra* note 82, at 61.

constructed a fourth model to reflect how local-level governments engage with new financial partners in the 'entrepreneurial period'.[84]

In the entrepreneurial period, cities facing local problems including homelessness and the lack of affordable housing, policing and public order, turned to public and private partners to finance public functions.[85] Public participants (city hall, development authorities, and housing authorities) work with private counterparts (wealthy individuals, finance firms, and influential corporations) to secure investment or delay disinvestment.[86] This new entrepreneurial city has emerged across the U.S., Europe, Asia, and in the developing world, fueling two key changes in relationships between the city and private property, particularly land. As a result, financialization has emerged as an important tool for development at the city or local level; and secondly, public-private partnerships have taken on a key role to fill service gaps, enabling cities to tap into additional resources to "position themselves to be globally competitive in a more mobile world." Entrepreneurial cities have leveraged the opportunities of globalized capital and finance to tackle localized problems that the national-level state either did not see or could not solve.

But they have also rendered other spaces in the city as "wastelands" in service to the economic prosperity of the rest. In Savannah, West Savannah is located just a few miles from the downtown district where tourism is supported by active investment. This leads to the second question – what gaps remain for individuals when state's back certain property owners over others.

ii. The Individual Resilience Gap Question

While states themselves often respond to their own self-serving need for resilience (such as by creating stronger tax bases or creating entrepreneurial hubs to attract outsiders), these responses can create

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[84] HACKWORTH, supra note 82, at 61.

[85] *Id.* at 43, 44 ("Though the boundaries for acceptable policy action have narrowed, localities have been thrust into the position of determining exactly how to address, contest, or embrace larger shifts in the global economy."). Hackworth notes the impact of this shift: "One consequence in the United States, the United Kingdom, and other countries that have pursued neoliberal paths is an acceleration of uneven development within and across localities. Local variation in the qualty, quantity, and maintenance of public housing, for example, has increased significantly in recent years, less because of differences in federal funding or landscape features conducive to investment than because of the kaleidoscope unleashed by the rescaling of regulation." *Id.*

[86] *Id*. at 46.

resilience gaps between different city communities. One of the great challenges of our communities is to find a means for cities to actively take account of those disparities that arise when the city acts. In an earlier article, I argued that cities and local communities should take account of these gaps by requiring human impact statements when development is proposed. These should include economic impacts on communities, housing affordability concerns, and educational concerns of youth.

To that end, when cities favor the highest best use theory of property allocation, they are specifically targeting communities to serve as warehousing spaces for the poor. As cities and states do so for their own resilience, I argue that cities have a greater responsibility to account for the gaps created by those actions. By focusing on state resilience needs, resilient property theory highlights the moral obligation states have to fill in resiliency gaps that are created by the state's own action.

IV. CONCLUSION: PROPERTY IN SERVICE OF DEMOCRACY AND PROPERTY'S MEMORY

Applying a resilient property theory lens to the challenges of land allocation reveals gaps in resiliency among different stake holders to large systemic problems. In Part One, I discussed how challenges to reparations and land reform movements are often framed to limit the impact on existing private property interests by focusing on the role of markets and the distributional effects of property. Those efforts are often built on assumptions that private property is a necessary conduit for maintaining a distribution stream of interests that will trickle down to new participants; that property is an ordering mechanism necessary to prevent chaos in a changing social dynamic; or that property is irrelevant to the greater need to distribute access to previously excluded people. A realist account of property and of reparations reveals that private property facilitates and continues resiliency gaps that exist between prior owners and recipients of rights under reparations or land reform. Thomas Mitchell's work on the loss of black ownership since the 20th century suggests that access to land markets on equal terms have not facilitated greater land distribution for black Americans. Likewise, Dorothy Brown's work has highlighted that even where black ownership has been achieved, the distributional wealth effects have remained allusive for most black Americans. And

Jessica Shoemaker's work has highlighted recently the resistance imbedded in the property system to market correction through longevity interests built into the common law property system. When weighing the impact of private property regimes, it is difficult to turn away from seeing the system of private property as fostering gaps in market access, market distribution, and market correction rather than being the means for correction.

When thinking through these challenges in West Savannah, we can see the resilience gaps that emerged between the rhetorical need for apology, land reform, and city action. What the residents and those interested in West Savannah asked for was an apology – a recognition that the dignity harms that happened years ago are still ongoing. What West Savannah needed was Land Reform – that in the form of apology took decisive action to preserve and protect the value in land for communities and sought to correct past injustices. What West Savannah got was neither.